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No. 52627-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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IN RE THE PERSONAL RESTRAINT PETITION OF  
AARON WALLACE TROTTER,  
Petitioner

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SUPPLEMENTAL BRIEF OF PETITIONER

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MAUREEN M. CYR  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 610  
Seattle, Washington 98101  
(206) 587-2711

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A. ISSUE PRESENTED

The State charged Aaron Trotter with two counts of second degree assault arising from a single, continuous assault. The jury acquitted him of one of the counts and was silent as to the other count. The State retried him for the latter charge and Trotter was convicted.

Where a crime is defined as a course of conduct for double jeopardy purposes, acquittal on any portion of the course of conduct bars prosecution on the remainder. Assault is considered a course of conduct crime. Did the second prosecution violate Trotter's constitutional right to be free from double jeopardy, where a jury already acquitted him of a portion of the crime?

B. STATEMENT OF THE CASE

In June 2015, the State charged Aaron Trotter with two counts of second degree assault, domestic violence. CP 4. The charges arose from an incident involving Trotter's girlfriend, Shantell Zimmerman. CP 4. Count I alleged Trotter "did intentionally assault" Zimmerman "by strangulation" under RCW 9A.36.021(1)(g). CP 4. Count II alleged Trotter "did intentionally assault" Zimmerman "with a firearm" under RCW 9A.36.021(1)(c). CP 4. Count II carried a firearm enhancement allegation. CP 4.

At trial, Zimmerman testified that on the afternoon of May 31, 2015, she went over to Trotter's house for a barbecue. 8/13/15RP 48-49. She said the two got along well at first but at some point Trotter began calling her names. 8/13/15RP 51. Then he "started punching [her] all over" while they stood in the kitchen. 8/13/15RP 52. She ran into the bedroom but Trotter followed her and "started punching [her] some more" as she lay on the bed. 8/13/15RP 52-53. He punched her "over and over and everywhere," from "head to toe." 8/13/15RP 53-54. This went on for about five minutes. 8/13/15RP 54.

Zimmerman said she tried to get up but Trotter grabbed her and put her in a "headlock." 8/13/15RP 54. She thought she was going to pass out but he let her go. 8/13/15RP 54. She fell down on the bed. 8/13/15RP 55. Trotter then grabbed an assault rifle that was leaning against the wall and hit her with the butt of the gun. 8/13/15RP 55-56. He hit her a couple of times in the back and one time in the back of the head. 8/13/15RP 56-57. Her head began to bleed and she ran into the bathroom. 8/13/15RP 57. Later, she came out and went to sleep on the bed. 8/13/15RP 60.

Trotter testified that Zimmerman drank more vodka than he did and became intoxicated. 8/14/15RP 148-50. The two began to argue

and he asked her to leave but she refused. 8/14/15RP 150. He went into his bedroom and closed and locked the door but she broke down the door by slamming her body against it. 8/14/15RP 151-52. He grabbed his shotgun from behind the the door in order to defend himself. 8/14/15RP 152. He pushed her out of the room with the butt of the gun, hitting her on the back. 8/14/15RP 155-57. He put his arm around her as he tried unsuccessfully to drag her out of the house and his arm went around her neck. 8/14/15RP 158, 180-81. She went into the bathroom and then came out and passed out on the bed. 8/14/15RP 161.

The jury was instructed, “A person commits the crime of assault in the second degree when he assaults another with a deadly weapon or assaults another by strangulation.” CP 18. The jury was instructed on a single common law definition of assault: “An assault is an intentional touching or striking of another person, with unlawful force that is harmful or offensive regardless of whether any physical injury is done to the person.” CP 19. The to-convict instruction for count I stated the State must prove beyond a reasonable doubt that Trotter “assaulted Shantell Zimmerman by strangulation.”<sup>1</sup> CP 21. The to-convict

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<sup>1</sup> The jury was instructed, “‘Strangulation’ means to compress a person’s neck, thereby obstructing the person’s blood flow or ability to breathe, or doing so with the intent to obstruct the person’s blood flow or ability to breathe.” CP 22.

instruction for count II stated the State must prove that Trotter “assaulted Shantell Zimmerman with a deadly weapon.”<sup>2</sup> CP 27.

The jury was instructed, “Because this is a criminal case, each of you must agree for you to return a verdict or special verdict.” CP 33. The jury was told, “You must fill in the blank provided in the verdict forms the words ‘not guilty’ or the word ‘guilty,’ according to the decision you reach.” CP 32. But although the jury was instructed to leave the *special* verdict forms<sup>3</sup> blank if they could not unanimously agree on an answer, the jury was not instructed to leave the *general* verdict forms blank if they could not reach a unanimous verdict. See CP 33.

After deliberating for a few hours, the jurors indicated to the bailiff they had reached a verdict on count I but were “hung” on count II. 8/14/15RP 299. The court called the jury into the courtroom and asked the foreperson, “I understand that you have reached a verdict on Count I; is that correct?” 8/14/15RP 301. The juror said, “That’s right.” 8/14/15RP 301. The court then asked, “Is there a reasonable probability

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<sup>2</sup> The jury was instructed, “A firearm, whether loaded or unloaded, is a deadly weapon.” CP 28.

<sup>3</sup> The special verdict forms A and B pertained to the domestic violation allegation, that Zimmerman and Trotter were family or household members, and special verdict from C pertained to the deadly weapon enhancement allegation. CP 33.

of the jury reaching a verdict within a reasonable time as to Count II?”

8/14/15RP 301. The juror said “No.” 8/14/15RP 301.

The clerk then read the verdict, “not guilty of the crime of assault in the second degree as charged in Count I.” 8/14/15RP 302.

The court stated, “As to Count II, based on the indication of the jury not being able to reach a verdict, I do declare a mistrial as to Count II.” 8/14/15RP 302.

On the verdict form for count I, the jury wrote “not guilty.” CP 34. The jury left the verdict form for count II blank. CP 35.

The State prosecuted Trotter again for count II. As before, Zimmerman testified that Trotter began calling her names and punching her in the kitchen. 3/30/16RP 41. He followed her into the bedroom and punched her as she lay on the bed. 3/30/16RP 42. When she tried to get off the bed, he grabbed her and “put [her] in a chokehold.” 3/30/16RP 42. She felt like she was going to pass out but then he let go. 3/30/16RP 43. She fell back onto the bed and Trotter grabbed an assault rifle from behind the door and hit her with the butt of the gun on the back and the back of her head. 3/30/16RP 43. This all happened “pretty fast at this point in time.” 3/30/16RP 43. Zimmerman then ran into the bathroom and closed the door. 3/30/16RP 44.

Again, Trotter testified that Zimmerman became intoxicated and belligerent and he asked her to leave but she refused. 3/31/16RP 159-61. He went into his bedroom and locked the door but she pounded on the door and rammed it open with her body. 3/31/16RP 166-67. He was afraid and grabbed his shotgun from behind the door. 3/31/16RP 168-69. He hit in in the back with the butt of the shotgun in order to defend himself. 3/31/16RP 173. He put his arm around her and tried to drag her out of the house but she resisted and fell to the floor. 3/31/16RP 169-71. Finally she passed out on the bed. 3/31/16RP 173-74.

Once again, the jury was instructed on the battery common law definition of assault. CP 46. The jury was instructed that “[a] person commits the crime of assault in the second degree when he assaults another with a deadly weapon,” and “[a] firearm, whether loaded or unloaded, is a deadly weapon.” CP 48-49. The to-convict instruction stated the jury must find that Trotter “assaulted Shantell Zimmerman with a deadly weapon.” CP 51.

The jury found Trotter “guilty” of second degree assault. CP 61. In a special verdict, the jury found he was armed with a firearm at the time of the offense. CP 63. A judgment and sentence was entered

convicting Trotter of one count of second degree assault under RCW 9A.36.021(1)(c), with a firearm enhancement. CP 64-75.

Trotter filed a direct appeal, raising a single jury instruction issue. This Court affirmed. The appeal became final on January 26, 2018.

On July 11, 2018, Trotter, *pro se*, filed a CrR 7.8 motion in the trial court to vacate the judgment and sentence. CP 78-85. He argued he was twice put in jeopardy for the same offense when the State retried him for second degree assault after the jury had acquitted him in the first trial. He argued assault by strangulation and assault with a deadly weapon were the “same offense” for double jeopardy purposes under the facts of this case.

The trial court transferred the motion to this Court for consideration as a personal restraint petition. CP 86. This Court entered an order referring the petition to a panel of judges and appointing counsel to represent Trotter.

### C. ARGUMENT

#### **1. Prosecuting and convicting Trotter of second degree assault after a jury already acquitted him of the crime violated the Double Jeopardy Clause.**

A jury acquitted Trotter of second degree assault at his first trial.

Assault is considered a course of conduct crime for double jeopardy purposes. A jury acquittal on any portion of a single assault bars a subsequent prosecution on any other portion of the same assault. The charge at Trotter's second trial arose from the same assault as the first trial. The jury's verdict of acquittal barred the State from prosecuting Trotter again for the same assault. The second prosecution violated the Double Jeopardy Clause and the conviction must be vacated.

- a. When a statute defines a crime as a course of conduct, it is a continuous offense and any acquittal based on a portion of that course of conduct bars prosecution on the remainder.

The Double Jeopardy Clause provides three essential protections. It "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969) (footnotes omitted);

State v. Womac, 160 Wn.2d 643, 650-51, 160 P.3d 40 (2007); U.S. Const. amend. V; Const. art. I, § 9.

The constitutional prohibition against double jeopardy is not simply “against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial.” United States v. Ball, 163 U.S. 662, 669, 16 S. Ct. 1192, 41 L. Ed. 300 (1896). As the United States Supreme Court explained in Green v. United States,

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957).

The Double Jeopardy Clause bars a second prosecution if three elements are met: (a) jeopardy previously attached, (b) jeopardy previously terminated, and (c) the defendant is again in jeopardy “for the same offense.” State v. Corrado, 81 Wn. App. 640, 646, 915 P.2d 1121 (1996).

A verdict of acquittal is final, ending a defendant's jeopardy, and is a bar to a subsequent prosecution for the same offense. United States v. Ball, 163 U.S. 662, 671, 16 S. Ct. 1192, 41 L. Ed. 300 (1896); Corrado, 81 Wn. App. at 648 (jeopardy terminates with verdict of acquittal). An acquittal is accorded "special weight" under the Double Jeopardy Clause. United States v. DiFrancesco, 449 U.S. 117, 129, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980). "That a person may not be retried for the same offense following an acquittal is 'the most fundamental rule in the history of double jeopardy jurisprudence.'" State v. Wright, 165 Wn.2d 783, 791-92, 203 P.3d 1027 (2009) (quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 571, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977)). "An acquittal is a resolution, correct or not, of some or all of the factual elements of the offense charged." Wright, 165 Wn.2d at 797.

The purpose of the constitutional bar against multiple prosecutions for the "same offense" is to protect defendants "against prosecution oppression." Womac, 160 Wn.2d at 650. "The same offense element arises from the idea that a defendant should not have to run the same 'gauntlet' more than once." Corrado, 81 Wn. App. at 646. "At the heart of this policy is the concern that permitting the sovereign

freely to subject the citizen to a second trial for the same offense would arm Government with a potent instrument of oppression and, correspondingly, that the State should not have more than one opportunity to convict a defendant for the same crime.” Id. (quotation marks and citations omitted).

Determining whether a second prosecution following an acquittal is for the “same offense” depends upon the “unit of prosecution” for the crime. Sanabria v. United States, 437 U.S. 54, 69-70, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978); State v. McReynolds, 117 Wn. App. 309, 339, 71 P.3d 663 (2003). The “unit of prosecution” is the punishable act the Legislature intended under the criminal statute. Sanabria, 437 U.S. at 69-70; State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). “[O]nce the [Legislature] has defined a statutory offense by its prescription of the allowable unit of prosecution, that prescription determines the scope of protection afforded by a prior conviction or acquittal.” Sanabria, 437 U.S. at 69-70 (quotation marks and citation omitted).

The unit of prosecution may be a single, discrete act, such as rape. See State v. Tili, 139 Wn.2d 107, 116-17, 985 P.2d 365 (1999). Or it may be a course of conduct, such as a continuous possession of a

controlled substance, Adel, 136 Wn.2d at 635-37, or a continuous possession of stolen property, McReynolds, 117 Wn. App. at 339-40. Assault is considered a course of conduct crime for double jeopardy purposes. State v. Villanueva-Gonzalez, 180 Wn.2d 975, 984-85, 329 P.3d 78 (2014).

If the Legislature defines the crime as a course of conduct, the Double Jeopardy Clause protects the accused against “overzealous prosecutors seeking multiple convictions based upon spurious distinctions between the charges.” Adel, 136 Wn.2d at 635.

If the unit of prosecution is a course of criminal conduct over a period of time, “then it is a continuous offense and any conviction or acquittal based on a portion of that course of action will bar prosecution on the remainder.” State v. McReynolds, 117 Wn. App. 309, 339, 71 P.3d 663 (2003) (quoting Harrell v. Israel, 478 F. Supp. 752, 755 (E.D. Wis. 1979)).

Applying these principles, this Court has held that where an individual was acquitted in one trial of a crime defined as a course of conduct, the Double Jeopardy Clause precluded the State from prosecuting the individual again for a charge arising from the same course of conduct. See, e.g., State v. Mata, 180 Wn. App. 108, 117-20,

321 P.3d 291 (2014); State v. Green, 156 Wn. App. 96, 98, 230 P.3d 654 (2010).

In Mata, Mata was acquitted in Pierce County of unlawful possession of a firearm. 108 Wn. App. at 113. Later, he was charged and convicted in Yakima County of unlawful possession of a firearm for allegedly possessing the same firearm earlier on the same day. Id. Unlawful possession of a firearm is a course of conduct crime for double jeopardy purposes. Id. at 117-20. The unit of prosecution is each continuous possession of a single firearm. Id. The Court concluded Mata's acquittal of unlawful possession of a handgun barred the subsequent prosecution for possessing the same handgun on the same day because both charges arose from the "same offense." Id. at 120.

Similarly, in Green, Green was required to register as a sex offender every 90 days. 156 Wn. App. at 98. After he failed to report as required one day, the State charged him with one count of failure to register. In a bench trial, the judge acquitted him of the charge. Id. The State then charged Green with another count of failure to register for failing to report on a date one month after the alleged date of the first count. Id. Failure to register as a sex offender is a course of conduct. Id. at 101. The crime is committed when the person violates the statute by

failing to report and continues until the person registers again. Id.  
Failing to register for each 90-day period does not create a separate  
crime. Id. Therefore, once Green was acquitted of failing to register, the  
State could not prosecute him again for the crime until “the continuing  
course of conduct of a prior failure to register ha[d] ended.” Id.

Applying these principles to Trotter’s case, it is apparent that  
once the jury acquitted him of second degree assault in the first trial,  
the State was precluded from prosecuting him again for second degree  
assault arising from the same course of conduct.

This Court reviews a double jeopardy claim *de novo*. State v.  
Fuller, 185 Wn.2d 30, 34, 367 P.3d 1057 (2016).

- b. Because assault is a course of conduct crime,  
Trotter’s acquittal at the first trial precluded the  
State from re-prosecuting him for any other  
portion of the same assault.

As stated, assault is a course of conduct crime for double  
jeopardy purposes. Villanueva-Gonzalez, 180 Wn.2d at 984-85. Thus,  
multiple assaultive acts coalesce into a single assault if they occur  
during a single continuous attack. Id.

In determining whether multiple assaultive acts constitute a  
single course of conduct, the Court considers the totality of the  
circumstances in light of various factors including: (1) the length of

time over which the assaultive acts took place; (2) whether the assaultive acts took place in the same location; (3) the defendant's intent or motivation for the different assaultive acts; (4) whether the acts were uninterrupted or there were any intervening acts or events; and (5) whether there was an opportunity for the defendant to reconsider his or her actions. Id. at 985.

Applying these factors in Villanueva-Gonzalez, the court concluded the defendant's actions constituted one course of conduct. Id. at 985-86. The defendant pulled his girlfriend out of the room, hit her head with his forehead, breaking her nose, and then grabbed her by the neck and held her against some furniture, making it hard for her to breathe. Id. at 978. The jury found him guilty of both second degree assault, for recklessly inflicting substantial bodily harm, and fourth degree assault, as a lesser-included offense of second degree assault by strangulation. Id. at 981. The court noted Villanueva-Gonzalez's actions of head-butting his girlfriend and then holding her neck against some furniture took place in the same location and over a short period of time, with no interruptions or intervening events. Id. No evidence suggested he had a different intention or motivation for any of the acts or an opportunity to reconsider them. Id. Therefore, Villanueva-

Gonzalez's assaultive acts "constituted a single course of conduct" and he could not be convicted of two separate counts of assault. Id.

Similarly, in In re Personal Restraint of White, 1 Wn. App.2d 788, 790, 407 P.3d 1173 (2017), a single course of assaultive conduct occurred where White pointed a gun at his girlfriend and said he was going to kill her, then threw her to the floor, beat her, repeatedly told her he was going to kill her, and then put his hands around her neck so she could not breathe. Id. at 795. These acts took place over a short period of time in the same location; White's intent and motivation did not change; and the assault was continuous with no interruption or moment of calm providing White an opportunity to reconsider. Id. at 795-98. Therefore, White's two convictions for second degree assault violated the prohibition against double jeopardy. Id. at 798.

Here, applying the factors from Villanueva-Gonzalez, it is apparent that a single continuous assault occurred. The alleged assaultive acts took place in the same location—Trotter's bedroom—over a few minutes' time. 8/13/15RP 52-57. Trotter's intent or motivation for the different acts was the same. The acts were continuous and uninterrupted, with no intervening events. Trotter had little or no opportunity to pause and reconsider his actions.

At the first trial, the jury acquitted Trotter of second degree assault for his actions. CP 34. The jury's verdict of acquittal was final and Trotter could not be prosecuted again for the "same offense." Ball, 163 U.S. at 671; Corrado, 81 Wn. App. at 648. Thus, Trotter could not be prosecuted again for any portion of the same assault. Mata, 180 Wn. App. at 120; Green, 156 Wn. App. at 101; McReynolds, 117 Wn. App. at 339. The second prosecution and the conviction resulting from it violated Trotter's constitutional right to be free from double jeopardy. Green, 355 U.S. at 188.

The remedy for a double jeopardy violation is to vacate the offending conviction. Womac, 160 Wn.2d at 657, 660. Trotter's conviction must be vacated.

**2. The jury's failure to reach a verdict on count II at the first trial amounted to an implied acquittal barring re-prosecution on that charge.**

The State was precluded from re-prosecuting Trotter for count II for the additional reason that the jury impliedly acquitted him of that charge at the first trial.

Jeopardy is not regarded as having terminated so as to bar a second trial where unforeseeable circumstances arise during the trial that make its completion impossible, such as the failure of the jury to

agree on a verdict. Green, 355 U.S. at 189. The constitutional double jeopardy provisions do not bar retrial following a mistrial granted because a jury was unable to return a verdict. State v. Ahluwalia, 143 Wn.2d 527, 538-40, 22 P.3d 1254 (2001). “[F]or over a century the United States Supreme Court has held that when a jury is unable to agree, jeopardy has not terminated.” State v. Daniels, 160 Wn.2d 256, 263, 156 P.3d 905 (2007) (citing Selvester v. United States, 170 U.S. 262, 269, 18 S. Ct. 580, 42 L. Ed. 1029 (1898)).

But a jury’s failure to enter an express verdict does not necessarily mean the jury was unable to agree and the defendant may be prosecuted again for the same offense. “[I]f a jury considering multiple charges renders a verdict as to one of the charges but is *silent* on the other charge, such action constitutes an implied acquittal barring retrial on those charges.” State v. Ervin, 158 Wn.2d 746, 753, 147 P.3d 567 (2006). An acquittal terminates the initial jeopardy, whether the acquittal is express or implied. State v. Hescocock, 98 Wn. App. 600, 604-05, 989 P.2d 1251 (1999).

If the jury had a full opportunity to convict of multiple charges but failed to do so and no extraordinary circumstances prevented it from doing so, “jury silence as to multiple counts bars further

prosecution on those counts.” Hescock, 98 Wn. App. at 611. “It is a general rule supported by the great weight of authority, that, where an indictment or information contains two or more counts and the jury either convicts or acquits upon one and is silent as to the other, and the record does not show the reason for the discharge of the jury, the accused cannot again be put upon trial as to those counts.” State v. Davis, 190 Wash. 164, 166, 67 P.2d 894 (1937).

In Green, the defendant was charged with one count of arson and one count of first degree murder for causing the death of a woman by the alleged arson. Green, 355 U.S. at 185. For the murder count, the jury was instructed it could find Green guilty of either first degree murder or second degree murder as a lesser-included offense. Id. at 185-86. The jury found Green guilty of arson and guilty of second degree murder but left the verdict form for first degree murder blank. Id. at 186. The Court of Appeals reversed the second degree murder conviction, holding it was not supported by the evidence. Id. The Supreme Court concluded Green could not be re-tried for first degree murder. Id. at 190. The Court explained, “Green was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gantlet once on that charge and the jury

refused to convict him.” Id. The jury’s verdict was an implied acquittal on the charge of first degree murder. Id. His jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense. Id. at 191.

A jury’s inability to agree on a charge must be “formally entered on the record” in order for a second trial on the charge to be allowed. Ervin, 158 Wn.2d at 757. A second prosecution for the same offense does not constitute a second jeopardy “*where a jury have not been silent as to a particular count, but where, on the contrary, a disagreement is formally entered on the record.*” State v. Linton, 156 Wn.2d 777, 784-85, 132 P.3d 127 (2006) (quoting Selvester, 170 U.S. at 269) (emphasis in Linton).

A jury’s inability to agree on a verdict is “formally entered on the record” only if it is apparent from the jury instructions and verdict forms. State v. Ramos, 163 Wn.2d 654, 661, 184 P.3d 1256 (2008); Ervin, 158 Wn.2d at 756-57; State v. Daniels, 160 Wn.2d 256, 264-65, 156 P.3d 905 (2007); In re Pers. Restraint of Candelario, 129 Wn. App. 1, 6-7, 118 P.3d 349 (2005). Neither the trial court nor the parties may inquire into the internal process through which the jury failed to reach a verdict on one charge because the jurors’ thought processes inhere in

any verdict reached on the other charges. Linton, 156 Wn.2d at 787-89; Davis, 190 Wash. at 166.

Juries are presumed to follow the instructions provided. Ervin, 158 Wn.2d at 756. In Ervin, for example, Ervin was charged with aggravated first degree murder, attempted second degree murder, and second degree felony murder based on the predicate crime of assault. Id. at 749. The jury put slash marks through the verdict forms for the first two counts and found Ervin guilty of second degree felony murder. Id. After that conviction was vacated based on In re Personal Restraint of Andress<sup>4</sup>, the supreme court held Ervin could be retried for second degree intentional murder because the jury was not “silent” on the greater charge. Id. at 756-57. The jury was instructed to leave the verdict forms blank if it was unable to agree on a verdict, and that is what the jury did. Id. Therefore, the court could “logically conclude that the jury could not agree on a verdict” for the first two charges and jeopardy did not terminate for those charges. Id.

Likewise, in Ramos, the jury was instructed on second degree murder under the alternative means of intentional murder and felony murder predicated on assault. 163 Wn.2d at 658. The jury found both

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<sup>4</sup> In re Pers. Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002).

defendants guilty of second degree murder. The jury answered special interrogatories stating that it did not unanimously agree intentional murder was proved but unanimously agreed felony murder was proved. 163 Wn.2d at 658. After the convictions were vacated based on Andress, the supreme court held the defendants could be retried for second degree intentional murder because the jurors' response to the special interrogatory indicated they did not unanimously agree on that alternative. Id. at 661; see also Daniels, 160 Wn.2d at 260, 264-65 (holding jury's decision to leave verdict form blank did not constitute implied acquittal where jury was instructed to leave the form blank if they could not agree on verdict); Candelario, 129 Wn. App. at 4-7 (defendant could be retried for intentional murder where jury indicated on special verdict form that it could not reach unanimous agreement as to the charge).

But a jury's failure to agree on a verdict is not "formally entered on the record" if the jury leaves the verdict form blank, the jury is not instructed to leave the verdict form blank if it fails to agree on a verdict, and the only evidence of the jury's thought processes is the jury's response to an inquiry from the trial court. "The fact that the foreman of the jury informed the court that they could not reach a verdict on

those counts does not make a record of the reason why the court so acted.” Davis, 190 Wash. at 166. “Neither parties nor judges may inquire into the internal thought processes through which the jury reaches its verdict.” Linton, 156 Wn.2d at 787-88. The mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors’ intentions and beliefs, are all factors inhering in the jury’s processes in arriving at its verdict, and, therefore, inhere in the verdict. Id. A trial judge’s inquiry into the verdict is limited to polling members of the jury to ensure that the verdict read is the actual verdict of each individual. Id.

In Linton, the jury entered a verdict of “guilty” on second degree assault and failed to enter a verdict on the greater charge of first degree assault. Id. at 781. The jury was instructed it could consider the lesser charge of second degree assault if it either acquitted of first degree assault or failed to agree on that charge. Id. at 780-81. The judge asked the presiding juror if the jury would be able to reach a unanimous verdict on first degree assault if given more time and the juror responded in the negative. Id. at 781. The supreme court held the jury

was necessarily “silent” on the greater offense, notwithstanding the presiding juror’s comments. Id. at 788. The jury’s disposal of that charge inhered in its verdict on second degree assault and was “beyond the realm of inquiry.” Id.

Here, at Trotter’s first trial, the jury entered an express verdict of “not guilty” for count I but left the verdict form for count II blank. CP 34-35. The jury was instructed, “You must fill in the blank provided in the verdict forms the words ‘not guilty’ or the word ‘guilty,’ according to the decision you reach.” CP 32. But the jury was not instructed to leave the verdict form blank if it could not agree on a verdict. The jury *did* receive a failure to agree instruction for the special verdict forms but not for the general verdict. See CP 33. Therefore, the jury was necessarily “silent” as to its verdict for count II. Linton, 156 Wn.2d at 787-89. The judge erred by inquiring into the jury’s thinking about that count. Id. The presiding juror’s responses to the court’s inquiry inhere in the verdict for count I and may not be considered. Id.

Because the jury implicitly acquitted Trotter of count II at the first trial, his second prosecution on that charge violated the Double Jeopardy Clause. Wright, 165 Wn.2d at 792; Ervin, 158 Wn.2d at 753;

Hescock, 98 Wn. App. at 604-05. The conviction must be vacated.

Womac, 160 Wn.2d at 657, 660.

**3. The State was barred by the doctrine of collateral estoppel from prosecuting Trotter again for second degree assault after the jury acquitted him of committing the same assault at the first trial.**

Federal collateral estoppel is applicable to the states as part of the Fifth Amendment. Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1980). Under the doctrine of collateral estoppel, when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Id. at 443. The rule of collateral estoppel in criminal cases “is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality.” Id. at 445. Where a previous judgment of acquittal was based upon a general verdict, the court must “examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.” Id. (internal quotation marks and citation omitted).

In Ashe, Ashe was tried and acquitted of the robbery of one participant in a poker game. Id. at 439. He was brought to trial again for the robbery of another participant in the poker game. Id. This time, after the State introduced stronger evidence of identity, the jury found him guilty. Id. at 440. Applying collateral estoppel, the Supreme Court reversed, holding that Ashe's acquittal in the first trial foreclosed the second trial because the acquittal verdict could have meant only that the jury was unable to conclude beyond a reasonable doubt that Ashe was one of the robbers. Id. at 445. And to convict at the second trial, the jury would have had to reach a conclusion "directly contrary" to the first jury's decision. Dowling v. United States, 493 U.S. 342, 348, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990) (citing Ashe, 397 U.S. at 445).

Similarly, in In re Personal Restraint of Moi, 184 Wn.2d 575, 577-78, 360 P.3d 811 (2015), Moi was charged with one count of murder and one count of unlawful possession of a firearm related to the gun allegedly used to kill the victim of the murder. The murder charge was tried to a jury and the firearm charge to the bench; the jury was unable to reach a verdict on the murder charge but the judge acquitted Moi of the firearm charge. Id. Our supreme court held collateral

estoppel precluded the State from prosecuting Moi again for the murder charge because the ultimate issue was the same. Id. at 583-84.

Similarly, here, a jury acquitted Trotter of assaulting his girlfriend. CP 34. Collateral estoppel precluded the State from prosecuting him again for second degree assault because the ultimate issue was the same—whether Trotter assaulted his girlfriend.

D. CONCLUSION

Trotter was prosecuted twice for the same offense in violation of the Double Jeopardy Clause. His conviction must be vacated.

Respectfully submitted this 30th day of September, 2019.

/s Maureen M. Cyr  
State Bar Number 28724  
Washington Appellate Project – 91052  
1511 Third Avenue, Suite 610  
Seattle, WA 98101  
Phone: (206) 587-2711  
Fax: (206) 587-2710  
Email: maureen@washapp.org



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