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Division II  
State of Washington  
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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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REPLY BRIEF OF PETITIONER

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A. ARGUMENT IN REPLY

**1. Where Trotter was acquitted in one trial of assault, he could not be prosecuted and convicted again for assault arising from the same course of assaultive conduct.**

This Court must reject the State's argument that the two counts of second degree assault arose from two separate crimes. Contrary to the State's argument, the facts of this case cannot be distinguished from State v. Villanueva-Gonzalez, 180 Wn.2d 975, 329 P.3d 78 (2014). In determining whether two separate crimes or one continuous offense occurred, the Court must look at the underlying substantive facts. No authority supports the State's position that the Court may look at differences in the strength of the State's evidence, or the defenses raised, for each charge. Under Villanueva-Gonzalez, the facts of this case establish only a single continuous assault.

Villanueva-Gonzalez instructs the Court to look at the underlying facts of the case when deciding whether the defendant committed a single continuous assault or two separate assaults for purposes of the Double Jeopardy Clause. Id. at 985. The Court considers the totality of the factual 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.

As argued in the opening brief, the totality of the factual circumstances in this case establish only a single continuous assault. The alleged assaultive acts took place in the same location, in a single uninterrupted sequence of events, with little or no opportunity to pause and reflect between acts. The facts establish only one, continuous offense for purposes of the Double Jeopardy Clause.

The State's reliance on State v. Fuller, 185 Wn.2d 30, 367 P.3d 1057 (2016) is misplaced. Fuller does not cite or discuss Villanueva-Gonzalez. In Fuller, the facts established only a single assaultive act—hitting someone with a baseball bat. Id. at 32. The State charged Fuller with two counts of second degree assault under two alternative means—assault with a deadly weapon and intentional assault that recklessly inflicted substantial bodily harm. Id. In that scenario, where the facts established only a single, discrete criminal act, the jury's acquittal on one theory did not bar retrial on another theory on which the jury could not agree. Id. at 38. The situation was akin to the

situation where the jury is instructed on a lesser included offense. Id. at 37-38. If the jury acquits on one theory but is declared hung on the other, retrial on the theory for which the jury was unable to agree is permitted and does not violate double jeopardy. Id.

By contrast, where the facts establish a single *continuous* offense, the jury's acquittal on one portion of the offense bars retrial on the remainder. State v. McReynolds, 117 Wn. App. 309, 339, 71 P.3d 663 (2003); 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). The State does not address McReynolds, Mata, or Green.

Here, the jury acquitted Trotter of one portion of a single, continuous alleged assault when it found him not guilty of count I. Trotter could not be re-prosecuted or convicted of any other portion of that same assault. Therefore, his subsequent conviction for count II violated his constitutional right to be free from double jeopardy and must be vacated.

**2. The jury in the first trial impliedly acquitted Trotter of count II, barring retrial on that count.**

Contrary to the State's argument, the record does not unambiguously demonstrate that the jury in the first trial was deadlocked on count II.

As the Washington Supreme Court has held, 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. State v. Ervin, 158 Wn.2d 746, 756-57, 147 P.3d 567 (2006); see also State v. Linton, 156 Wn.2d 777, 784-85, 132 P.3d 127 (2006). In Ervin, the jury's inability to agree was "formally entered on the record" where the jury was instructed to leave the verdict forms blank if it was unable to agree on a verdict, and that is precisely what the jury did. Ervin, 158 Wn.2d at 756-57; see also Daniels, 160 Wn.2d 256, 260, 264-65, 156 P.3d 905 (2007) (holding jury's decision to leave verdict form blank did not constitute implied acquittal where jury was instructed to leave form blank if they could not agree on verdict); In re Pers. Restraint of Candelario, 129 Wn. App. 1, 4-7, 118 P.3d 349 (2005) (holding 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).

Contrary to the State's argument, the Ervin court expressly refused to rely upon the jury's response to the trial court's inquiry in open court in concluding that the jurors were unable to agree on a verdict. Ervin, 158 Wn.2d at 757. Instead, the court looked only to the

verdict forms and the jury instructions in holding that “the blank verdict forms indicate on their face that the jury was unable to agree.” Id.

As explained in the opening brief, the Court may not rely upon the jurors’ statements made in response to the trial court’s inquiries in deciding whether the jury was deadlocked, as the jurors’ responses inhere in the verdict. “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.” State v. Davis, 190 Wash. 164, 166, 67 P.2d 894 (1937). “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. 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.

Here, any inability of the jurors to agree on a verdict for count II was not formally entered on the record. The jury was not instructed to leave the verdict forms blank if they could not agree on a charge. CP 32-33. The only indication that the jury was unable to agree came from the foreperson’s statement in open court in response to the court’s question whether there was “a reasonable possibility of the jury reaching a verdict within a reasonable time.” 8/14/15RP 299-302.

At best, the verdict form is ambiguous. When analyzing a double jeopardy claim, if the jury's verdict is ambiguous, principles of lenity apply and the verdict must be interpreted in the defendant's favor. State v. Whittaker, 192 Wn. App. 395, 399, 367 P.3d 1092 (2016); State v. DeRyke, 110 Wn. App. 815, 824, 41 P.3d 1225 (2002), aff'd, 149 Wn.2d 906, 73 P.3d 1000 (2003); State v. Taylor, 90 Wn. App. 312, 317, 950 P.2d 526 (1998). Here, given the absence of an instruction informing the jury to leave the verdict form blank if they could not agree on a verdict, the blank verdict form is ambiguous. It must be interpreted in Trotter's favor as an implied acquittal.

This case cannot be distinguished from State v. Hescock, 98 Wn. App. 600, 989 P.2d 1251 (1999). There, Hescoc, a juvenile, cashed a payroll check payable to another person. Id. at 602. He was charged with one count of forgery by two alternative means: falsely making, completing or altering a written instrument or, in the alternative, possessing or putting off as true a written instrument he knew to be forged. Id. at 603. In its oral ruling, the court found him guilty of both means but in its written ruling, the court found him guilty under only the falsely made alternative. Id. On appeal, the Court concluded as a matter of law that the evidence was not sufficient to

prove that alternative. Id. The Court also held that Hescoock could not be retried under the other alternative because the trial court's silence on that alternative was an implied acquittal. Id. at 605. The Court held that "jury silence as to multiple counts bars further prosecution on those counts," regardless of whether the multiple counts consist of greater and lesser offenses or multiple alternative means. Id. at 610. Thus, notwithstanding the court's oral ruling, "there [we]re no written findings or conclusions on alternative (1)(b) that would demonstrate that the trial court was convinced of Hescoock's guilt." Id. at 607.

Similarly, here, the jury's silence on count II was tantamount to an acquittal for double jeopardy purposes. Contrary to the State's argument, it does not matter that the multiple counts consisted of multiple alternative means rather than greater and lesser offenses. Id. at 610. Retrying Trotter for count II violated his constitutional right to be free from double jeopardy. The conviction must be vacated.

B. CONCLUSION

For the reasons provided above and in the opening brief, retrying and convicting Trotter of count II violated his constitutional right to be free from double jeopardy. The conviction must be vacated.

Respectfully submitted this 28th day of February, 2020.

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 28<sup>TH</sup> DAY OF FEBRUARY, 2020, I CAUSED THE ORIGINAL **REPLY BRIEF OF PETITIONER** TO BE FILED IN THE COURT OF APPEALS - DIVISION TWO AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2020.

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# WASHINGTON APPELLATE PROJECT

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