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NO. 52627-1-II

IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON,

DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

AARON WALLACE TROTTER,

Appellant.

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RESPONSE TO PERSONAL RESTRAINT PETITION

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TABLE OF CONTENTS

|   | PAGE |
|---|------|
| I. ANSWER TO PETITION .....   | 1    |
| II. AUTHORITY FOR RESTRAINT OF PETITIONER.....  | 1    |
| III. PROCEDURAL BACKGROUND.....   | 1    |
| IV. STATEMENT OF THE CASE .....   | 2    |
| V. ARGUMENT.....  | 6    |
| 1. DEFENDANT’S CONVICTION FOR ASSAULT IN<br>THE SECOND DEGREE BASED UPON USE OF A<br>DEADLY WEAPON (COUNT II), UPON RETRIAL<br>AFTER A MISTRIAL BECAUSE OF A HUNG<br>JURY ON COUNT II DOES NOT VIOLATE<br>DOUBLE JEOPARDY. ....                       | 6    |
| A. COUNT I-SECOND DEGREE ASSAULT<br>BASED UPON STRANGULATION, WAS<br>FACTUALLY DISTINCT FROM COUNT II-<br>SECOND DEGREE ASSAULT BASED UPON<br>USE OF A DEADLY WEAPON. AS SUCH, IT<br>WAS NOT THE “SAME OFFENSE” FOR<br>DOUBLE JEOPARDY PURPOSES. .... | 7    |
| B. EVEN IF COUNTS I AND II ARE DEEMED TO<br>BE THE SAME OFFENSE, DOUBLE<br>JEOPARDY DOES NOT BAR A RETRIAL<br>AFTER AN ACQUITTAL OF COUNT 1 AND A<br>DEADLOCKED JURY ON COUNT II. ....  | 7    |

|     |   |    |
|-----|---|----|
| 2.  | TROTTER WAS NOT IMPLIEDLY ACQUITTED<br>OF COUNT II BECAUSE THE JURY WAS<br>DEADLOCKED. .... | 16 |
| 3.  | THE DOCTRINE OF COLLATERAL ESTOPPEL<br>DOES NOT BAR THE STATE FROM RETRYING<br>TROTTER..... | 26 |
| VI. | CONCLUSION.....   | 1  |

## TABLE OF AUTHORITIES

|   | Page   |
|---|--------|
| <b>Cases</b>  |        |
| <i>Cox v. Charles Wright Acad., Inc.</i> , 70 Wash.2d 173, 179–80, 422 P.2d 515 (1967) .....  | 25     |
| <i>Ashe v. Swenson</i> , 397 U.S. 436, 443, 90 S. Ct. 1189, 1194, 25 L. Ed. 2d 469 (1970) .....   | 27     |
| <i>Breckenridge v. Valley Gen. Hosp.</i> , 150 Wash.2d 197, 204, 75 P.3d 944 (2003) .....   | 25     |
| <i>Green v. United States</i> , 355 U.S. 184, 188, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957) .....   | 22, 24 |
| <i>In re Moi</i> , 184 Wash.2d at 579, 360 P.3d 811 .....   | 26, 27 |
| <i>State v. Daniels</i> , 160 Wash. 2d 256, 264, 156 P.3d 905, 910 (2007), opinion adhered to on reconsideration, 165 Wash. 2d 627, 200 P.3d 711 (2009) ..... | 21     |
| <i>Price v. Georgia</i> , 398 U.S. 323, 328–29, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970) .....  | 25     |
| <i>Arizona v. Washington</i> , 434 U.S. 497, 505, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978) .....   | 8      |
| <i>State v. Adel</i> , 136 Wash. 2d 629, 641, 965 P.2d 1072, 1077–78 (1998) ..  | 10     |
| <i>State v. Ahluwalia</i> , 143 Wash. 2d 527, 538, 22 P.3d 1254, 1259 (2001) ...  | 8      |
| <i>State v. Carson</i> , 128 Wash. 2d 805, 821–22, 912 P.2d 1016, 1024–25 (1996) .....  | 8      |
| <i>State v. Crowell</i> , 92 Wash.2d 143, 146, 594 P.2d 905 (1979).....   | 25     |
| <i>State v. Davis</i> , 190 Wash. 164, 67 P.2d 894 (1937) .....   | 22     |
| <i>State v. Fuller</i> , 185 Wash. 2d 30, 33–34, 367 P.3d 1057, 1059 (2016).....  | 8      |

|  |        |
|--|--------|
| <i>State v. Fuller</i> , 185 Wash. 2d 30, 367 P.3d 1057 (2016).....  | 13     |
| <i>State v. George</i> , 160 Wn.2d 727, 741, 158 P.3d 1169 (2007).....   | 8      |
| <i>State v. Jackman</i> , 156 Wn.2d 736, 746, 132 P.3d 136 (2006).....   | 8      |
| <i>State v. Linton</i> , 156 Wash. 2d 777, 785–86, 132 P.3d 127, 132 (2006) .....  | 22, 23 |
| <i>State v. Linton</i> , 156 Wash.2d 777, 783, 132 P.3d 127 (2006) .....   | 8      |
| <i>State v. Ng</i> , 110 Wash.2d 32, 43, 750 P.2d 632 (1988) .....   | 25     |
| <i>State v. Rubedew</i> , 193 Wash. App. 1050 (2016) .....   | 30     |
| <i>State v. Russell</i> , 101 Wash. 2d 349, 351, 678 P.2d 332, 335 (1984) .....  | 8      |
| <i>State v. Smith</i> , 159 Wn.2d 778, 154 P.3d 873 (2007).....  | 16     |
| <i>State v. Villanueva-Gonzalez</i> , 180 Wash. 2d 975, 985, 329 P.3d 78, 82<br>(2014).....  | 9      |
| <b>Statutes</b>  |        |
| RCW 9A.36.021.....   | 16     |
| RCW 9A.36.021(1)(a)–(g).....   | 16     |
| <i>State v. Daniels</i> , 160 Wash. 2d 256, 156 P.3d 905 (2007), opinion adhered<br>to on reconsideration, 165 Wash. 2d 627, 200 P.3d 711 (2009) ..... | 17     |
| <i>State v. Ervin</i> , 158 Wash. 2d 746, 753–54, 147 P.3d 567, 570 (2006).....  | 18     |
| <b>Rules</b>   |        |
| GR 14.1 .....  | 30     |
| <b>Constitutional Provisions</b>   |        |
| Fifth Amendment.....   | 8, 26  |

|                               |   |
|-------------------------------|---|
| U.S. Const. amend. V.....     | 7 |
| Wash. Const. art. I, § 9..... | 7 |

**I. ANSWER TO PETITION**

The restraint of the petitioner Aaron Trotter is lawful.

**II. AUTHORITY FOR RESTRAINT OF PETITIONER**

Petitioner is being restrained pursuant to the Judgment and Sentence entered on May 3, 2016, in Cowlitz County Superior Court Cause No. 15-1-00616-6. In this case he was sentenced to a total of 39 months, upon conviction of assault in the second degree, domestic violence with a firearm enhancement.

**III. PROCEDURAL BACKGROUND**

By information filed on June 9, 2015, defendant was charged in Count I with assault in the second degree, domestic violence, and in Count II with assault in the second degree, domestic violence with a firearm enhancement. (Information attached as exhibit B.) Count I alleged that defendant, on or about May 31, 2015, did intentionally assault Shantell Zimmerman, a family or household member, by strangulation. Count II alleged that defendant, on or about May 31, 2015, at a time separate and distinct from Count I, did intentionally assault Shantell Zimmerman, a family or household member, with a firearm, to-wit: an AR 15 rifle.

A jury trial was held, beginning August 13, 2015. The jury returned a verdict of not guilty as to Count I, but was unable to reach a unanimous verdict as to Count II. A mistrial was declared. A second jury trial was held

on January 5, 2016, on Count II of the original Information - assault in the second degree, domestic violence with a firearm enhancement. This trial also resulted in a mistrial, not as a result of a deadlocked jury. The third and last jury trial was held on March 30, 2016. The defendant was found guilty of the single count of assault in the second degree, domestic violence with a firearm enhancement -- Count II of the original Information.

#### **IV. STATEMENT OF THE CASE**

The following summarizes the testimony of the first trial held on August 13-15 before Judge Marilyn Haan. Shantell Zimmerman had been in a dating relationship with the Trotter for about two years RP 45. On Sunday May 31, 2015, Zimmerman and Trotter planned to have a barbeque together at the defendant's house. Zimmerman arrived at the Trotter's house with groceries and vodka around 1 or 2 o'clock in the afternoon. RP 49, 50. After they had eaten, they were getting along fine until about 7 or 8 o'clock in the evening. RP 51. That's when Trotter started calling Zimmerman names RP 51. Things escalated from there. Trotter began punching Zimmerman while she was in the defendant's kitchen. When Trotter wouldn't stop, Zimmerman ran into his bedroom but he followed after her. RP 52. In the bedroom Trotter started punching Zimmerman some more all over her body. RP 53. This went on for about five minutes. When Zimmerman tried to get up from the bed, Trotter grabbed her from behind

and put her in a choke hold. Zimmerman thought she would pass out. She struggled to get his arm from around her neck and free her head when he just let go. RP 54. Zimmerman then fell down on the bed. At this point Trotter grabbed his gun from behind his door and put it to Zimmerman's head, then turned the gun around and bashed Zimmerman in the back of her head and on her back a couple of the times. RP 55. Zimmerman described the gun as an assault rifle. She identified a photograph of two AR 15 rifles which the police found in Trotter's room. RP 80. Zimmerman could tell from the sensation of being hit that it was the butt of the gun. The blows from the gun were a lot harder and more painful than the punching. RP 56. Zimmerman realized she was bleeding from being hit in the back of the head so she ran to the bathroom in order to get away from Trotter. Zimmerman took a picture of herself in the bathroom. RP 57. She changed her shirt because the one she had on was covered in blood. RP 58. Zimmerman also identified a photograph of a gash in her head taken the next day. RP 59.

After all of this Zimmerman told Trotter to just let her go to bed. At that point Trotter left Zimmerman alone and she went to sleep. When Zimmerman went to work the next morning coworker Terry Goodwin noticed Zimmerman's injuries RP 60. On Tuesday, Zimmerman contacted the police who took numerous photographs of her showing bruises

throughout her body and the bloodied clothes that she wore that night. RP 62.

Cowlitz County Sheriff's office deputy Brady Spalding received the report from Ms. Zimmerman on June 2, 2015. When he contacted her he observed numerous injuries on her body. RP 97, 98. He characterized a number of bruises around her hand and the blade of her forearm as "defensive wounds." RP 99. The bruises he noticed were consistent with what Zimmerman told him of the incident. RP 100. He obtained a search warrant and searched Trotter's house on June 5, 2015.

Trotter testified as follows: he was in a dating relationship with Ms. Zimmerman for about two years. On the day of the incident he and Zimmerman made plans for her to come over for a barbeque. She arrived around 3 or 4 o'clock in the afternoon. RP 150, 151, 178. They both drank vodka and she became intoxicated within an hour or two. RP 152. Trotter left for brief period of time and when he returned Zimmerman and her vehicle were gone. RP 154. He then went for a walk down to a nearby river and encountered Zimmerman and Jeremy. Zimmerman was crying and seemed upset. RP 155. Zimmerman suggested that she and Trotter go back to his house, but when she got to her vehicle she sped off. RP 156, 157. Trotter continued walking to his house and when he arrived Zimmerman was there inside the house drinking shots of vodka. Trotter had a few shots

with Zimmerman. RP 158. Zimmerman was intoxicated, becoming argumentative and angry. Trotter then asked her to leave. RP 159. Trotter then went outside to the barbeque to let her cool off and calm down. Zimmerman continued to nag and pick on him. RP 161. Trotter continued to ask her to leave, and Zimmerman did. Trotter locked his doors after she left. A few minutes later Zimmerman returned. RP 162. Trotter was in his living room and she reentered his residence. Trotter retreated to his bedroom and locked the door because Zimmerman was intoxicated and Trotter did not want a confrontation. RP 165. Zimmerman then began pounding on his bedroom door screaming at him. Zimmerman then rammed the door about three or four times, breaking it down. RP 166. After Zimmerman busted the door open, Trotter was scared and testified “the only thing I could think of was to grab a gun behind the back of the door and try to stand my ground, tried to defend myself.” RP 167. Trotter grabbed the shotgun to get Zimmerman out of the residence. Trotter testified that he tried to put his arm around Zimmerman and was trying to “tow her outside” but she kept fighting him. Trotter was unsuccessful in forcing Zimmerman to leave the house. Trotter did, however, manage to move Zimmerman about 4 feet away from his door into the hallway. RP 170.

During this process Zimmerman “swatted the shotgun out of my hand, and to keep her away from the shotgun I pulled her closer to me and

pushed her towards the door and told her to leave till I could grab the shotgun again.” When Trotter pushed her, Zimmerman hit the wall and fell to the ground crying. RP 171. Trotter denied striking Zimmerman in the face but testified he did strike her in the back with the shotgun. RP 172,187. He agreed that he hit Zimmerman with the butt stock of some kind of rifle hard enough to leave an imprint that was visible several days later. RP 188. He claimed he did so because he was in fear of his life. Once things settled down, he went and watched a movie while Zimmerman went to his bed and passed out. The next morning she got ready and left to go to work. RP 173, 174. When the police contacted Trotter several days later asking him how Zimmerman got all the bruises, he told the officer that she may have fallen because she was intoxicated. He did not tell the officer that he struck Zimmerman in self-defense after she broke down his bedroom door. RP 189.

The jury was instructed on self-defense. The defense argued that he did assault Ms. Zimmerman but it was in self-defense. RP 238.

## **V. ARGUMENT**

- 1. DEFENDANT’S CONVICTION FOR ASSAULT IN THE SECOND DEGREE BASED UPON USE OF A DEADLY WEAPON (COUNT II), UPON RETRIAL AFTER A MISTRIAL BECAUSE OF A HUNG JURY ON COUNT II DOES NOT VIOLATE DOUBLE JEOPARDY.**

**A. COUNT I-SECOND DEGREE ASSAULT BASED UPON STRANGULATION, WAS FACTUALLY DISTINCT FROM COUNT II-SECOND DEGREE ASSAULT BASED UPON USE OF A DEADLY WEAPON. AS SUCH, IT WAS NOT THE “SAME OFFENSE” FOR DOUBLE JEOPARDY PURPOSES.**

**B. EVEN IF COUNTS I AND II ARE DEEMED TO BE THE SAME OFFENSE, DOUBLE JEOPARDY DOES NOT BAR A RETRIAL AFTER AN ACQUITTAL OF COUNT I AND A DEADLOCKED JURY ON COUNT II.**

#### *LEGAL PRINCIPLES*

The United States Constitution and the Washington State Constitution protect individuals from being twice put in jeopardy for the same offense. U.S. Const. amend. V (“nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb”); Wash. Const. art. I, § 9 (“No person shall ... be twice put in jeopardy for the same offense.”). “The double jeopardy doctrine protects a criminal defendant from being (1) prosecuted a second time for the same offense after acquittal, (2) prosecuted a second time for the same offense after conviction, and (3) punished multiple times for the same offense.” “The prohibition against double jeopardy applies when (1) jeopardy previously attached, (2) jeopardy was terminated, and (3) the defendant is again prosecuted for the same offense.” Double jeopardy claims are reviewed de novo. *State v. Fuller*, 185 Wash. 2d 30, 33–34, 367 P.3d 1057, 1059 (2016), citing *State*

v. *Linton*, 156 Wash.2d 777, 783, 132 P.3d 127 (2006), *State v. George*, 160 Wn.2d 727, 741, 158 P.3d 1169 (2007), *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2006).

The constitutional double jeopardy provisions do not bar retrial following a mistrial granted because a jury was unable to reach a verdict. *State v. Ahluwalia*, 143 Wash. 2d 527, 538, 22 P.3d 1254, 1259 (2001), citing *See Arizona v. Washington*, 434 U.S. 497, 505, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978) (“retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused.”); *State v. Carson*, 128 Wash. 2d 805, 821–22, 912 P.2d 1016, 1024–25 (1996) (“when a jury is discharged because it is unable to reach a verdict on a criminal charge, ... that event does not bar retrial on the charge under double jeopardy clauses.”); *State v. Russell*, 101 Wash. 2d 349, 351, 678 P.2d 332, 335 (1984) (“neither this court nor the United States Supreme Court has ever held that a hung jury bars retrial under the double jeopardy clauses of either the Fifth Amendment or Const. art. 1, § 9. (Citations omitted).

#### ANALYSIS

Trotter argues that his retrial after he was acquitted of Count I, second degree assault by strangulation, and where the jury was deadlocked as to Count II, second degree assault with a deadly weapon, violated double

jeopardy, because both counts alleged a single crime. As such, Trotter reasons that since he was acquitted of the single crime of second degree assault, double jeopardy precluded him from being retried for this same crime. The underlying premise of his argument is that Counts I and II were the same offense for double jeopardy purposes, relying primarily on *State v. Villanueva-Gonzalez*, 180 Wash. 2d 975, 985, 329 P.3d 78, 82 (2014). The State's argument is twofold. Under the particular facts of this case Counts I and II were not the same offense for double jeopardy purposes. However, even if they are deemed to be the same offense, retrying him for Count II did not violate double jeopardy. The State addresses these two aspects of his double jeopardy claim separately.

In *Villanueva-Gonzalez*, the court ultimately held that assault should be treated as a course of conduct crime. But not every situation of multiple assaults will be deemed a single crime. As the court explained, "there is no bright-line rule for when multiple assaultive acts constitute one course of conduct" and any analysis of this issue is highly dependent on the facts. The court noted other jurisdictions generally considered various factors: the length of time over which the assaultive acts took place; whether the assaultive acts took place in the same location; the defendant's intent or motivation for the different assaultive acts; whether the acts were uninterrupted or whether there were any intervening acts or events; and

whether there was an opportunity for the defendant to reconsider his or her actions. Though the court found these factors useful for determining whether multiple assaultive acts constitute one course of conduct, it noted that “no one factor is dispositive, and the ultimate determination should depend on the totality of the circumstances, not a mechanical balancing of the various factors.” *Villanueva-Gonzalez*, at 985. Other courts have also noted the importance of a case-by-case analysis. (We must be sensitive to different factual patterns in utilizing the unit of prosecution approach to determine if there is multiple punishment for purposes of the double jeopardy clause.) *State v. Adel*, 136 Wash. 2d 629, 641, 965 P.2d 1072, 1077–78 (1998). The concurrence in *Adel* emphasized the unit of prosecution approach to double jeopardy is necessarily one that must develop on a case-by-case basis. *Id.*, at 640.

*Villanueva-Gonzalez* was charged with two counts of second degree assault, one by strangulation and the other by recklessly inflicting substantial bodily harm. The facts were that he hit his girlfriend’s head with his forehead breaking her nose and then grabbing her by the neck making it hard for her to breathe. For count one (based on grabbing the victim's neck), the jury convicted him of the lesser included charge of fourth degree assault. For count two (based on the head butt), the jury convicted him of second degree assault. *Villanueva-Gonzalez*, at 979. After applying the factors

noted above to the facts of that case, the court concluded defendant's actions were a single course of conduct and his two convictions thus violated double jeopardy.

The facts in this case are distinguishable from those in *Villanueva-Gonzalez*. Here, although both the acts of strangulation and bludgeoning the victim with the butt of a rifle occurred at the same residence near in time, Trotter asserted self-defense, a key issue in the trial, and the strength of the evidence was different as to each count. Trotter did not dispute striking Zimmerman with the butt of a rifle, but described the alleged strangulation as putting his arm around her trying to tow her outside while she kept fighting him. Unlike *Villanueva-Gonzalez* the factual background here included a claim of self-defense. This in turn required the jury to determine, separately as to each count, whether the state had proven the strangulation and the assault with a deadly weapon in the first instance, and then whether as to each count, the defendant acted in self-defense. A key part of this self-defense analysis was whether it was "necessary" for defendant to act as he did, and whether his use of force was reasonable or excessive.

This two-part analysis of (1) the strength of the State's evidence and (2) self-defense would necessarily have been different as applied separately to Counts I and II. This is so because the evidence of assault by strangulation

was qualitatively different from the evidence of assault with a deadly weapon.

First, the evidence of assault with a deadly weapon was stronger. For example, Zimmerman testified that Trotter hit her in the back with the butt of the rifle. Trotter explicitly admitted doing that. Photographs showed an imprint on Zimmerman's back matching the butt of rifles found in defendant's bedroom. Second, because defendant asserted self-defense the jury would have had to determine whether Trotter's act of bashing Zimmerman with the butt of a rifle was necessary, reasonable or excessive.

The analysis of self-defense with the concepts of reasonableness, necessity, and excessive force, as well as the quantum of proof would necessarily have been different as applied to the two separate counts. The jury could have concluded that there was insufficient evidence of strangulation to begin with (Zimmerman testified she felt like she was going to pass out and Trotter did not explicitly admit choking her), or that Trotter used necessary and reasonable force fending Zimmerman off. On the other hand, on Count II, Trotter admitted assaulting Zimmerman with the rifle, and the jury could have seen that greater amount of force as unnecessary and unreasonable.

Thus, there were differences in both the strength of the evidence and how self-defense would apply as to each separate assaultive act. This is

factually distinguishable from *Villanueva-Gonzalez*. Because here the jury would necessarily have had to assess the two assaultive acts separately in light of self-defense and levels of proof, the two counts should not be deemed one and the same. Thus they should be considered distinct units of prosecution, not a single crime.

*Villanueva-Gonzalez* addressed double jeopardy in the context of multiple punishments for the same offense, not the specific double jeopardy claim here -- being prosecuted a second time for the same offense after acquittal. Two years after *Villanueva-Gonzalez*, the state Supreme Court in *State v. Fuller*, 185 Wash. 2d 30, 367 P.3d 1057 (2016), addressed the double jeopardy claim of being prosecuted a second time after acquittal on facts virtually the same as in the case at bar. The *Fuller* court held that retrial on second degree assault charge, after the jury acquitted defendant on one means of committing second degree assault and deadlocked on an alternative means of committing second degree assault, resulting in a mistrial on that count, was not barred by double jeopardy; jeopardy never terminated as to the count on which the jury deadlocked, even though it terminated with respect to the count on which the jury acquitted. *Fuller*, at 32.

Fuller, like Trotter, was charged with two counts of assault in the second degree, each count presenting an alternative means of committing

the offense. As with Trotter, the jury acquitted Fuller of one count and deadlocked on the other. The trial court declared a mistrial on that count, and the State sought to retry Fuller. Fuller moved to dismiss, arguing that retrial would subject him to re prosecution for the same offense after an acquittal, in violation of double jeopardy. The superior court denied Fuller's motion, and the Court of Appeals affirmed. The State Supreme Court held that jeopardy never terminated as to the count the State sought to retry, and that the jury's acquittal on the other count was of no consequence. *Fuller*, at 32.

Here, as in Fuller, the trial court instructed the jury that a separate crime was charged in each count, and that its verdict on one count did not control the verdict on any other count. Instruction 5, CP 18. Like Fuller, the jury was instructed that a person commits the crime of assault in the second degree when he assaults another with a deadly weapon or assaults another by strangulation. Instruction 6, CP 18. Like Fuller, the jury was also given separate instructions for counts I and II, which specifically listed the elements the State had to prove to convict on each of those counts. Instructions 9, 11, CP 18. The instructions for counts I and II clearly explained that to convict, the jury must find the evidence proved each element beyond a reasonable doubt. *Fuller*, at, 32–33.

Fuller, like Trotter, argued that Counts I and II were a single assault, and that he was acquitted of committing that assault. The court disagreed, writing “Although Fuller is correct that the State may not re prosecute count II—the count on which he was acquitted—he is incorrect regarding re prosecution of the other charged means. Jeopardy did not terminate on count I specifically or on the overall offense of second degree assault. *Fuller*, at, 32–33.

It makes no difference that Trotter was charged with assault in the second degree in two separate counts rather than one count with two specific alternative means. The Fuller court specifically held that the double jeopardy analysis is the same whether someone is charged with two separate counts based on alternative means or a single count with two alternative means. “The second degree assault statute, RCW 9A.36.021, articulates a single criminal offense and currently provides seven separate subsections defining how the offense may be committed. *State v. Smith*, 159 Wn.2d 778, 784, 154 P.3d 873 (2007); *see also* RCW 9A.36.021(1)(a)–(g). Although Fuller was charged with two separate counts, whether a case involves separate counts based on alternative means or a single count with two alternative means does not change the double jeopardy analysis.” *Fuller*, at 34–35.

“Fuller was charged with alternative means of committing assault in the second degree, each means presented in a different count. The jury acquitted him of one means and was declared hung on the other. Jeopardy thus terminated as to only one means of committing the offense; it did not terminate as to the offense overall or as to the means on which the jury could not agree. Because jeopardy never terminated as to the offense as a whole, retrying Fuller on the means on which the jury deadlocked does not implicate double jeopardy.” *Fuller*, at 41–42.

Here, like Fuller, Trotter was charged with two separate counts of the same crime—assault in the second degree, one by strangulation, and one by the use of a deadly weapon. Just as in Fuller, where Trotter was acquitted of one count and the jury was deadlocked on the other, jeopardy was only terminated as to Count I, not as to the offense overall or as to Count II, which the jury could not agree upon. Since jeopardy never terminated as to the offense as a whole, double jeopardy did not preclude retrying Trotter for Count II.

**2. TROTTER WAS NOT IMPLIEDLY ACQUITTED OF  
COUNT II BECAUSE THE JURY WAS  
DEADLOCKED.**

Trotter argues the jury impliedly acquitted him of Count II, asserting the jury was “necessarily silent” because they did not fill out the verdict

form for that count. He further asserts that when the jury foreperson told the judge the jury was deadlocked on Count II, the judge improperly “inquired into the jury’s thinking about that count.” He contends this “improper inquiry” and a blank verdict form amount to silence, which in turn equates to implicit acquittal. The State disagrees with his analysis.

The law is well-settled: While jury silence can be construed as an acquittal and can therefore act to terminate jeopardy, **such is not the case when a jury fails to agree and such disagreement is evident from the record.** (Emphasis added) *State v. Daniels*, 160 Wash. 2d 256, 156 P.3d 905 (2007), opinion adhered to on reconsideration, 165 Wash. 2d 627, 200 P.3d 711 (2009). Here, the record is clear. The foreperson articulated that they had reached a verdict as to Count I, but were deadlocked as to Count II. The court then declared a mistrial. Trotter raised no objection. The court did not inquire into the jury’s thinking. The fact that the jury left the verdict form for Count II blank is further evidence in the record of their disagreement. Trotter cites a number of cases in his discussion of this claim. These cases are distinguishable and do not support his arguments.

In *State v. Ervin*, 158 Wash. 2d 746, 753–54, 147 P.3d 567, 570 (2006), the defendant was charged with aggravated first degree murder (count I), attempted first degree murder (count II), and second degree murder (count III). The trial court instructed the jury that it was to first

consider the crime of first degree murder and, if it unanimously agreed on a verdict, complete verdict form A. “If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A,” the trial court instructed the jury. *Ervin*, at 749. The trial court then gave the following instruction:

If you find the defendant not guilty of the crime of [first degree murder], or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the alternative crime of [attempted first degree murder]. *Ervin*, at 749–50. The instructions went on to direct the jury to follow the same procedures for counts II and III and verdict forms B and C, respectively. *Ervin*, 158 Wash.2d at 750, 147 P.3d 567.

After lengthy deliberations the jury announced that it was unable to reach a unanimous verdict. The jury found Ervin guilty of second degree murder. *Ervin*, at 750. The jury did not fill in the blanks to indicate “guilty” or “not guilty” on Ervin's verdict forms A and B for counts I and II. Rather, someone put a slash mark through the forms and wrote “not used.”

Ervin successfully vacated that conviction on the basis that it could not be predicated on assault. The State subsequently sought to retry Ervin for aggravated first degree murder and attempted first degree murder. Ervin asked that the charges be dismissed on double jeopardy principles. *Ervin*, at 750–51. The Supreme Court granted discretionary review to answer the following question: whether jeopardy had terminated on the charges of aggravated first degree murder and attempted first degree murder, thereby barring the State from retrying Ervin on these charges. *Ervin*, at 752.

The court first noted that it has held that if 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. *Ervin*, at 753. The court then went on to state, however, that juries are presumed to follow the instructions provided:

“Here ... the jury was instructed to leave the verdict forms blank if it was unable to agree on a verdict for each particular charge. The jury did just that on verdict forms A and B. Thus, we may logically conclude that the jury could not agree on a verdict for the crimes of aggravated [first degree murder] or attempted [first degree murder]. The instructions and verdict forms are a part of the record. Both the United States Supreme Court and this court have found that “where a jury ha[s] not been silent as to a particular count, but where, on the contrary, a disagreement is formally entered on the record,” the implied acquittal doctrine does not apply.” *Ervin*, at 756–57.

Therefore, the court explained, even without any inquiry by the trial court, **the blank forms indicate on their face that the jury was unable to agree.** (Emphasis added) It then held that because the jurors were unable to agree, it could not consider them to have acquitted Ervin of the greater charges; therefore, Ervin had no acquittal operating to terminate jeopardy. *Ervin*, at 757.

*Ervin* is factually distinguishable and unhelpful to Trotter. The “multiple charges” involved in *Ervin* were such that the jury was instructed that if they could not agree on the greater charge they were then to consider the lesser or alternative charge, leaving the verdict form on the greater

charge blank. This was not the situation here. Trotter, unlike Ervin, was not charged with a “multiple charges” scheme whereby the jury was instructed to leave a “greater charge” blank if undecided and then proceed to the alternative or lesser charge. This scenario in Ervin which raised the very question of whether a blank verdict form equated with silence, simply does not apply to the facts here.

Trotter argues that a blank verdict form indicates silence. To the contrary Ervin reasoned, “the blank verdict forms indicate on their face that the jury was unable to agree. Because the jurors were unable to agree, we cannot consider them to have acquitted Ervin of the greater charges. As in *Ervin*, the fact that the verdict form here was left blank shows on its face that the jury was unable to agree.

In *State v. Daniels*, 160 Wash. 2d 256, 264, 156 P.3d 905, 910 (2007), opinion adhered to on reconsideration, 165 Wash. 2d 627, 200 P.3d 711 (2009) the state Supreme Court considered the same issue it considered in *Ervin*. In *Daniels*, the defendant was charged with homicide by abuse and second degree murder, predicated on either assault or criminal mistreatment. *Daniels*, at 259. Like the trial court in *Ervin*, the trial court instructed the jury to fill in verdict form A if it unanimously agreed on a verdict as to the homicide by abuse charge; otherwise, it was to leave it blank. *Daniels*, at 260. If the jury either found Daniels not guilty of

homicide by abuse or could not agree as to that charge, the jury was instructed to consider the second degree murder charge. The jury left verdict form A blank but found Daniels guilty of second degree murder. *Daniels*, at 260. Daniels's murder conviction was reversed because it was predicated on assault. Our Supreme Court was asked to decide whether the State could retry Daniels without violating double jeopardy.

Noting that the issue before it in *Daniels* was “nearly identical” to the issue it considered in *Ervin*, the court held that there was no implied acquittal and jeopardy did not terminate on Daniels's homicide by abuse charge and that she could be retried. *Daniels*, 160 Wash.2d at 264–65, 156 P.3d 905. “Jury silence can be construed as an acquittal and can therefore act to terminate jeopardy. *Green v. United States*, 355 U.S. 184, 188, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957) (stating jury's silence acted as implied acquittal). But such is not the case when a jury fails to agree **and such disagreement is evident from the record.**” (Emphasis added) *Daniels*, at 262, citing *Ervin*.

Trotter proclaims “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,” citing *State v. Davis*, 190 Wash. 164, 67 P.2d 894 (1937). Appellant’s brief, page 22, 23. *Davis* does not support any such proposition. The *Davis* court reasoned ‘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.’ (Emphasis added). *State v. Linton*, 156 Wash. 2d 777, 785–86, 132 P.3d 127, 132 (2006),” citing *State v. Davis*, 190 Wash. 164, 67 P.2d 894 (1937), *Daniels*, 124 Wash.App. at 843, 103 P.3d 249. (“[T]he *Davis* court also noted that, had something in the record explained why the court discharged the jury, the explanation might allow the State to retry Davis on both counts.”)

In the case at bar, the record very clearly shows why the court discharged the jury – the foreperson articulated that they were deadlocked. No cases cited by Trotter stand for the proposition that the *only way* a jury’s disagreement is formally entered on the record is where they so indicate *through a verdict form*. All that is required is that the disagreement be formally entered on the record. Trotter’s argument that the blank verdict form coupled with a deadlocked jury amounts to silence and thus an implicit acquittal runs contrary to any cases Trotter cites as well as common sense and logic.

Trotter also claims the trial court “erred by inquiring into the jury’s thinking about that count.” Appellant’s brief, page 24. He cites *State v.*

*Linton*, 156 Wash. 2d 777, 786–87, 132 P.3d 127, 132 (2006), in support of his argument. *Linton* is distinguishable.

*Linton*, like *Ervin* and *Daniels*, involved lesser included offenses. *Linton* was charged with first degree assault. A jury convicted him of second degree assault based on an instruction directing it to consider the lesser included offense of second degree assault if it acquitted *Linton* of first degree assault or if it was unable to agree on that charge. The judge directed the clerk to ask each juror whether the verdict she read constituted his or her verdict in order to assure the court that the verdict was unanimous. Each juror responded that the statement represented his or her verdict, and the judge accepted and filed the verdict. The State then requested the trial judge to ask each juror whether they were able to reach a verdict on first degree assault and whether they would be able to given more time. The judge, over defendant's objection, asked the presiding juror, based on the comments and question the jury sent out, whether the jury would be able to arrive at a unanimous verdict on first degree assault if given more time. The presiding juror responded that they believed that based on the evidence, the jury would not be able to come to a unanimous verdict with additional time. The State sought to retry the defendant for first degree assault, but the trial court denied the State's motion on double jeopardy grounds.

The issue on appeal was if there was an implied acquittal barring retrial on first degree assault on double jeopardy grounds. The appellate court affirmed the trial court's denial of the state's motion, reasoning that because the defendant was convicted of second degree assault, he was implicitly acquitted of first degree assault. *State v. Linton*, at 779–80. The state Supreme Court affirmed the Court of Appeals, but on different grounds. The court reiterated the well-settled law, stating, “The United States Supreme Court has held that where a jury considers multiple offenses and renders a guilty verdict as to some but is silent on others, **and the record does not show the reason for the discharge of the jury** nor that the defendant consented to its discharge, the verdict is the equivalent of an acquittal for those offenses on which the jury was silent. *Green v. United States*, 355 U.S. 184, 191, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957); *see also Price v. Georgia*, 398 U.S. 323, 328–29, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970). (Emphasis added) *Linton*, at 784. The court stated, “We do not believe that there was an implied acquittal based on silence here because the court inquired and the jury articulated that it was unable to agree on the first degree assault charge and the judge then declared the jury hopelessly deadlocked. But given the unable to agree jury instruction and the verdict on second degree assault, the trial judge erred by inquiring into the jury's thinking about the first degree assault charge.” *Linton*, at 787.

Discussing the subject of an improper inquiry into the jury's thinking, the Linton court, at 787-788, noted,

“Neither parties nor judges may inquire into the internal processes through which the jury reaches its verdict. See *Breckenridge v. Valley Gen. Hosp.*, 150 Wash.2d 197, 204, 75 P.3d 944 (2003).

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 itself. *Cox v. Charles Wright Acad., Inc.*, 70 Wash.2d 173, 179–80, 422 P.2d 515 (1967); see also *State v. Ng*, 110 Wash.2d 32, 43, 750 P.2d 632 (1988) (“The individual or collective thought processes leading to a verdict ‘inhere in the verdict’ and cannot be used to impeach a jury verdict.” (quoting *State v. Crowell*, 92 Wash.2d 143, 146, 594 P.2d 905 (1979))).

*Linton* is not helpful to Trotter. First, it is further authority for the rule that there is no implied acquittal based on “silence” where the jury articulates it was unable to agree on a charge. Second, it illustrates that what Judge Haan did here was a far cry from an “improper inquiry.” The court did not inquire into the internal processes of the jury. Judge Haan did not ask any questions about how many jurors decided one way or the other, what their motives were, how they felt about the evidence, or their intentions and beliefs. The court appropriately asked only if there was a reasonable probability of the jury reaching a verdict within a reasonable time, to which the foreperson answered, “no.”

The jury did not impliedly acquit Trotter of Count II. The fact that the jury left the verdict form for Count II blank and that the jury foreperson announced that they were deadlocked with no reasonable probability of reaching a verdict are matters in the record. The jury failed to agree on Count II and such disagreement is evident from the record. This is not a case where the jury was silent. Under all of the circumstances here Trotter was not impliedly acquitted of count II.

**3. THE DOCTRINE OF COLLATERAL ESTOPPEL DOES NOT BAR THE STATE FROM RETRYING TROTTER.**

The doctrine of collateral estoppel is incorporated within the double jeopardy clause of the Fifth Amendment to the United States Constitution. *In re Moi*, 184 Wash.2d at 579, 360 P.3d 811. Washington has four elements that the party asserting it must establish: (1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea of collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation; and (4) application of the doctrine must not work an injustice.

Trotter argues collateral estoppel precluded the State from prosecuting him again for second degree assault, asserting that the ultimate issue was the same – whether he assaulted his girlfriend. He cites *In re Moi*,

184 Wash.2d at 579, 360 P.3d 811, and *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S. Ct. 1189, 1194, 25 L. Ed. 2d 469 (1970) to support his argument. These cases are distinguishable.

Moi, was charged with murder for shooting and killing McGowan. Shortly before trial he was also charged with unlawfully possessing the firearm he allegedly used to kill McGowan. He moved to sever the two charges, which the State opposed. The court denied the severance motion. The State suggested that Moi waive his right to a jury trial and have the firearm charge tried to the bench at the same time the murder charge was tried to a jury. Ultimately, the parties agreed to do that. *In re Moi*, at 578. The first jury was unable to reach a verdict on the murder charge and the judge declared a mistrial. The judge later acquitted defendant of the unlawful possession of a firearm charge.

Moi was retried again for murder. The second jury returned a guilty verdict. Moi filed a personal restraint petition, arguing that double jeopardy and collateral estoppel did not allow him to be retried for murder in 2007 when the State's theory of the case was that he shot the victim with a gun he was acquitted of possessing in 2006. *In re Moi*, at 578–79.

The State conceded the first three factors of the collateral estoppel analysis, leaving only the question of whether application of the doctrine would work an injustice. *In re Moi*, 580–81. The State argued that applying

collateral estoppel would work an injustice for two reasons – because Moi created the situation by moving to sever the murder and unlawful possession charges in his first trial, and because Moi himself deprived the State of a full and fair opportunity to present its case. The court rejected both arguments, and granted the petition, reasoning “Here, the parties did have a full criminal trial where, at the suggestion of the State, the trial judge decided one of the charges. ... Given this full trial; given the fact that in essence, the State was able to treat its first unsuccessful 2006 prosecution as a “dry run” for its successful 2007 prosecution, contra *Ashe*, 397 U.S. at 447; and given the State's concession that the same issue of ultimate fact was decided in both trials, we find application of collateral estoppel does not work an injustice.” *In re Moi*, 583–84.

Unlike *In re Moi*, the State does not concede the first three elements of the collateral estoppel test. First, the issue of whether Trotter assaulted Zimmerman with a deadly weapon was not decided in the first trial. Second, there was no final judgment on the merits of that charge. *Moi*, on the other hand, was acquitted of a crime which was based upon a particular act -- unlawfully possessing a gun. Under the State's theory that he used that gun to commit a murder, possessing the gun was a necessary fact. Whether he possessed the gun was the issue of ultimate fact which was decided with a

final judgment in the first trial. Here, on the other hand, the act of strangling Zimmerman (which he was acquitted of) was not a part of or necessary to the charge of assaulting her with a deadly weapon. In fact, the alleged act of strangulation was completed prior to the act of striking Zimmerman with a firearm. The two acts did not have the same relationship with one another as did the act of possessing the gun and using it to kill in *In re Moi*. The facts in the case at bar are not analogous to the very unique fact pattern of *In re Moi*,

Likewise, *Ashe v. Swenson* is distinguishable. In this case several masked men had robbed a six-player poker game. *Id.* at 437. Ashe was initially charged with robbing just one of the players. *Id.* at 438. After the jury acquitted Ashe of robbing that player, the State charged him with robbing another, “frankly conceded[ing] that following the petitioner’s acquittal, it treated the first trial as no more than a dry run for the second prosecution.” *Id.* at 439, 447. The Supreme Court concluded that “[t]he single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers,” and held that double jeopardy barred the subsequent prosecution. *Id.* at 445. The issue of ultimate fact in that case was whether Ashe had robbed the poker game, not which player he had robbed. *Id.* at 446 (“[T]he name of the victim, in the circumstances of this case, had no bearing whatever upon the issue of whether the

petitioner was one of the robbers.”). Once acquitted, the State could not “constitutionally hale him before a new jury to litigate that issue again.”

*State v. Rubedew*, 193 Wash. App. 1050 (2016) (not reported in P. 3d)<sup>1</sup> is instructive on both double jeopardy and collateral estoppel. Rubedew was charged with attempted first degree murder and first degree assault with firearm and domestic violence sentencing enhancements. Rubedew's case proceeded to trial three times. Rubedew's first trial ended in a mistrial due to his health issues. At Rubedew's second trial, the jury returned a verdict finding him not guilty of attempted first degree murder, but it could not reach a verdict on the first degree assault charge. Before the start of Rubedew's third trial, he moved to dismiss the first degree assault charge, raising double jeopardy and collateral estoppel issues. The trial court denied the motion. The jury in Rubedew's third trial found him guilty of first degree assault. He appealed his conviction and sentence, asserting that (1) his conviction violated the constitutional prohibition against double jeopardy, (2) his conviction was barred by principles of collateral estoppel,

Following *Fuller*, the court rejected the double jeopardy claim, writing,

“This argument overlooks that double jeopardy jurisprudence does not bar retrial for a lesser included offense that is considered the “ ‘same

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<sup>1</sup> This is an unpublished opinion. GR 14.1

offense’ “ as the greater offense for which a defendant was acquitted. *Fuller*, citations omitted.

That Rubedew's first degree assault charge was not a lesser included offense to attempted first degree murder is a distinction without a difference. If double jeopardy is not offended by retrial of a defendant for a lesser included offense that is the “same offense” as the greater crime for which the defendant has been acquitted, it follows that double jeopardy is not offended by retrial of a defendant for a non-lesser included offense arising from the same alleged criminal conduct as an offense for which the defendant has been acquitted. Because jeopardy did not terminate on Rubedew's first degree assault charge in light of the jury's inability to reach a verdict on that charge, we hold that the State was permitted to retry him on that charge without offending double jeopardy principles.

The court also rejected his collateral estoppel claim. It began its analysis noting that where “a previous judgment of acquittal was based on a general verdict, courts must ‘examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict on an issue other than that which the defendant seeks to foreclose from consideration.’” (citations omitted) (quoting *Ashe*, 397 U.S. at 444).

Applying this analysis the court contrasted the elements of the greater and lesser offenses, “To convict Rubedew of attempted first degree murder, the jury was required to find that the State proved beyond a reasonable doubt that he (1) took a substantial step toward (2) causing the death of another person, (3) with premeditated intent. In contrast, to convict Rubedew of first degree assault, the jury was required to find that the State

proved beyond a reasonable doubt that (1) with intent to inflict great bodily harm, he (2) assaulted another with a firearm.” Reviewing Rubedew's second trial, the court concluded that a rational jury could have acquitted Rubedew of attempted first degree murder based on issues that would not have foreclosed a subsequent jury from finding him guilty of first degree assault. “The jury at Rubedew's second trial could have acquitted him of attempted first degree murder based on its determination that the State failed to prove beyond a reasonable doubt that Rubedew had *premeditated* intent to kill Bramlett.” Such a finding, said the court, would not foreclose a subsequent jury from finding that Rubedew formed an intent to inflict bodily harm, as required to convict him of first degree assault. “Because the jury at Rubedew's second trial could have grounded its verdict of acquittal on the State's failure to prove premeditated intent, Rubedew cannot meet his burden to show that collateral estoppel barred a subsequent jury from finding him guilty of first degree assault. Accordingly, his collateral estoppel claim fails.”

In Trotter's case, as to Count I (assault by strangulation) the jury had to find he strangled Zimmerman, and that he was not acting in self-defense. The jury was instructed, that strangulation meant “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.” Instruction 10, CP 18. On this charge, Zimmerman testified Trotter grabbed her from behind and put her in a choke hold, and she thought she would pass out. As to Count II (assault with a deadly weapon) the jury had to find Trotter assaulted Zimmerman with a deadly weapon, and that he was not acting in self-defense. Each count was different as to the strength of the evidence and how a jury would likely view self-defense given the different levels of force used. On Count I the jury could have found the evidence of strangulation lacking, or that self-defense was not disproven. On Count II, on the other hand, there was no issue about whether Trotter assaulted Zimmerman with a deadly weapon, and given the self-defense issues of reasonableness, necessity, and excessive force, the jury obviously concluded Trotter did not act in self-defense. Thus, like Rubedew, the jury could have grounded its verdict of acquittal on the State's failure to prove strangulation, or to disprove self-defense. Such findings would not foreclose a subsequent jury from finding that Trotter assaulted Zimmerman with a deadly weapon and reject his claim of self-defense. Thus, his collateral estoppel claim fails.

**VI. CONCLUSION**

Based on the preceding argument, respondent requests the Court deny the petition.

Respectfully submitted this 9 day of January, 2020.

By   
\_\_\_\_\_  
Tom Ladouceur, WSBA #19963  
Chief Criminal Deputy Prosecuting Attorney

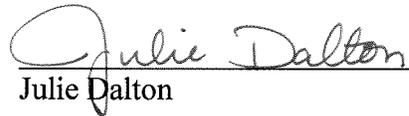
**CERTIFICATE OF SERVICE**

I, Julie Dalton, do hereby certify that opposing counsel listed below was served BRIEF FO RESPONDENT IN RESPONSE TO PERSONAL RESTRAINT PETITION electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on January 9, 2020.

  
\_\_\_\_\_  
Julie Dalton

**COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE**

**January 09, 2020 - 12:02 PM**

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