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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

FAULOLUA FAAGATA, JR., APPELLANT

Petition for Review from the Court of Appeals
Cause No. 36325-9

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. When the defendant was found guilty of both murder in the first degree and second degree felony murder, is the trial court required to vacate the second degree felony murder matter on double jeopardy grounds when the judgment and sentence is silent as to that finding?

B. STATEMENT OF THE CASE¹.

On August 16, 2006, Faulolua Faagata, Jr., hereinafter “defendant,” was charged by amended information with murder in the first degree and murder in the second degree. CP 5-6. On March 21, 2007, both parties appeared for trial. RP² 16. A CrR 3.5 hearing was held and the court ruled that the defendant’s statements were admissible. RP 52, 138-139.

On April 2, 2007, the defendant was found guilty of murder in the first degree and murder in the second degree. CP 78, 80. The jury also found that the defendant was armed with a firearm during the commission

¹ The State’s brief filed below contained a statement of the underlying facts of the case. Because this court has accepted review as to the double jeopardy issue only, the State does not repeat the substantive facts here, but incorporates them by reference.

² All volumes of the verbatim report of proceedings are numbered consecutively, except for the volume containing the report of the sentencing, which occurred on May 4, 2007. In the State’s brief, all volumes will be referred to by page number, and the verbatim report of proceedings from May 4, 2007, will be referred to by date and page number.

of the murder, and that his conduct manifested deliberate cruelty to the victim. CP 81-84.

On May 4, 2007, the court imposed an exceptional sentence of 450 months on the murder in the first degree conviction. CP 107-118. The court's sentence included 90 months for an exceptional sentence and 60 months for a firearm enhancement. (5/4/07) RP 72. At sentencing, even though the jury found the defendant guilty of both first degree murder and second degree, the trial court entered judgment and sentence on first degree murder only. CP 107-118. The trial court orally dismissed the second degree felony murder conviction, stating as follows:

Well, I'm going to dismiss Count II, but I'm going to do it conditionally. I'm going to follow Womac. And Mr. Sepe makes a good point, that that's kind of new law, but it does make a certain amount of sense to me procedurally to do that. We have a jury that entered a conviction, and I don't think that the jury's finding should be a nullity. I think it's entitled to some weight. So I'm going to dismiss it conditionally with the understanding that should Count I be reversed or something with that, collateral attack, it can be reinstated, and, of course, if that were to ever happen, then there would be entirely a new set of appeal rights starting at that time.

(5/4/07) RP 24.

The court's oral ruling conditionally dismissing count II was never reduced to writing, and the judgment and sentence does not reference count II.

The defendant filed an appeal, and the trial court was affirmed on October 21, 2008. This court accepted review as to the defendant's double jeopardy claim only.

C. ARGUMENT.

1. THE DEFENDANT WAS FOUND GUILTY OF BOTH FIRST DEGREE MURDER AND SECOND DEGREE FELONY MURDER, BUT THE JUDGMENT AND SENTENCE IS SILENT AS TO SECOND DEGREE FELONY MURDER, AND THEREFORE, THERE IS NO DOUBLE JEOPARDY VIOLATION AND THE COURT IS NOT REQUIRED TO VACATE THAT FINDING.

The double jeopardy clause guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The double jeopardy clause applies to the states through the due process clause of the Fourteenth Amendment, and is coextensive with article I, § 9 of the Washington State Constitution. *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995) (citing *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)). Washington's double jeopardy clause offers the same scope of protection as the federal double jeopardy clause. *State v. Adel*, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998) (citing *State v. Gocken*, 127 Wn.2d at 107). The double jeopardy clause encompasses three separate constitutional 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 crime.

Gocken, 127 Wn.2d at 100.

With respect to cumulative sentences imposed in a single trial, the double jeopardy clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.

Missouri v. Hunter, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1982). The standard of review on questions of law is *de novo*. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996). There is no double jeopardy violation when a jury convicts a defendant of multiple charges for a single act if only one conviction is reduced to judgment. *See State v. Ward*, 125 Wn. App. 138, 104 P.3d 61 (2005), *State v. Trujillo*, 112 Wn. App. 390, 49 P.3d 935 (2002), *rev. denied*, 149 Wn.2d 1002 (2002), and *State v. Turner*, 144 Wn. App. 279, 182 P.3d 478 (2008), *rev. granted*, 165 Wn.2d 1002 (2008).

In *State v. Womac*, 160 Wn.2d 643, 160 P.3d 40 (2007), Womac was convicted of homicide by abuse, felony murder, and first degree assault of a child for the death of his son, Anthony Owens. *Id.* at 647. The trial court entered judgments on each of the three convictions, but only sentenced Womac on the homicide by abuse count. *Id.* In an appendix to the judgment and sentence, the court found the remaining two counts valid, but chose not to sentence Womac on them in an attempt to avoid violating double jeopardy principles. *Id.* at 648. On appeal, the

Court of Appeals directed the trial court to conditionally dismiss the remaining two counts so that if the homicide by abuse conviction is set aside on appeal, then the other two counts could be reinstated. *Id.* at 649. This court reversed the Court of Appeals and remanded to the trial court to vacate Womac's convictions for felony murder and first degree assault. *Id.* at 649.

This court found that Womac was "found to have committed a single offense against a single victim yet three separate convictions remain on his record." *Id.* at 650. In finding that Womac's three convictions violate double jeopardy, this court relied upon cases in which a defendant's multiple convictions for the same crime were reduced to judgment. *See Id.* at 656-58, citing *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995) (double jeopardy may be violated when a defendant's multiple convictions for a single offense are reduced to judgment regardless of whether concurrent sentences are imposed); *State v. Gohl*, 109 Wn. App. 817, 37 P.3d 293 (2001), *rev. denied*, 146 Wn.2d 1012 (2002) (defendant's double jeopardy rights were violated when the court reduced defendant's convictions for attempted murder and first degree assault to judgment even though the court found same criminal conduct and imposed no sentence for the assaults).

The *Womac* court, however, distinguishes *State v. Ward*, 125 Wn. App. 138, 104 P.3d 61 (2005). In *Ward*, the defendant was convicted of second degree felony murder and first degree manslaughter. *Id.* at 141.

At sentencing, Ward moved to vacate the first degree manslaughter conviction. *Id.* at 142. The court denied the motion and sentenced Ward *only* on second degree felony murder. *Id.* The judgment and sentence entered by the court did not mention the jury's finding that Ward was guilty of first degree manslaughter. *Id.* Ward argued that the trial court erred when it refused to vacate the first degree manslaughter conviction even though that conviction was not reduced to judgment. The Court of Appeals rejected Ward's argument, stating:

But Ward was not convicted and sentenced to both second degree felony murder and first degree manslaughter. Instead, the judge entered judgment and sentenced Ward only on the second degree felony murder charge; therefore there was no violation of double jeopardy. Because there was no violation of double jeopardy, the court was not required to vacate the manslaughter charge.

Id. at 144.

The present case is similar to *Ward*. In the case at bar, the defendant was convicted of murder in the first degree and second degree felony murder. CP 78, 80. The State concedes that the defendant cannot be sentenced on both first degree murder and second degree felony murder. The State also concedes that the trial court below improperly relied on the Court of Appeals' decision in *Womac*³ which was ultimately reversed by the Washington Supreme Court. However, because the trial

³ *State v. Womac*, 130 Wn. App. 450, 123 P.3d 528 (2005), reversed by *State v. Womac*, 160 Wn.2d 643, 160 P.3d 40 (2007).

court did not include the second degree murder conviction on the defendant's judgment and sentence, there is no double jeopardy violation. See *Ward*, 125 Wn. App. 138 at 144. The defendant asserts that *Ward* is distinguishable because *Ward* involved convictions that were charged in the alternative. Brief of Petitioner, page, 8. As the Court of Appeals correctly found, however, the practical result of charging separate offenses or charging in the alternative is the same—juries are asked to return verdicts on all counts, and courts either merge convictions or enter judgment as to one conviction. *State v. Faagata*, 147 Wn. App. 236, 248 n.9, 193 P.3d 1132 (2008). The defendant has provided no authority for the assertion that crimes charged separately are treated differently than crimes charged as alternative means for purposes of double jeopardy analysis.

In *State v. Trujillo*, 112 Wn. App. 390, 49 P.3d 935 (2002), *rev. denied*, 149 Wn.2d 1002 (2003), a jury convicted four defendants of first degree assault and, in the alternative, first degree attempted murder. The Court of Appeals rejected Trujillo's double jeopardy claim, stating that "where the jury returns a verdict of guilty on each alternative charge, the court should enter a judgment on the greater offense only and sentence the defendant on that charge without reference to the verdict on the lesser offense." *Id.* at 411. The court noted that if the lesser charge is not reduced to judgment, it "does not subject the appellants to any future jeopardy." *Id.* The court's reasoning was grounded not in the fact that the

defendants were charged in the alternative, but in the fact that the lesser charge was not reduced to judgment.

In *State v. Turner*, 144 Wn. App. 279, 182 P.3d 478 (2008), review granted, 165 Wn.2d 1002 (2008), the Court of Appeals found no double jeopardy violation when the jury found Turner guilty of first degree robbery and second degree assault, but the court only reduced the first degree robbery conviction to a judgment. Before the trial court both the State and Turner agreed that the second degree assault merged into the first degree robbery count. *Id.* at 281. The court then signed an order stating that the jury had found Turner guilty of both crimes, that the assault charge merged into the robbery charge, and that the trial court was vacating the assault charge for purposes of sentencing. *Id.* The trial court also indicated in the order that the assault charge was a valid conviction and could be taken to sentencing if there were problems with the robbery conviction. *Id.* The Court of Appeals affirmed the trial court, finding that because the trial court did not reduce the second degree assault conviction to judgment, did not sentence Turner for that conviction, and did not include any information about the second degree assault conviction on the judgment and sentence, that there was no double jeopardy violation. *Id.* at 283. The Court of Appeals declined to vacate the assault conviction.

In the present case, the court did not enter judgment on both first and second degree murder. CP 107-118. Because the judgment and sentence is silent as to the second degree felony murder conviction,

vacation is not necessary on double jeopardy grounds. Under *Ward*, if the judgment and sentence is silent as to the additional count, vacation of that count is not required, and double jeopardy is not violated.⁴ Whether or not the trial court made an oral ruling stated that it was conditionally dismissing the murder in the second degree count is irrelevant because the judgment and sentence is silent. Vacation of murder in the second degree is not required because the defendant was not sentenced on that crime.

While this case is joined with *State v. Turner*, 144 Wn. App. 279, 182 P.3d 478 (2008), it is distinguishable from the case at bar. In *Turner*, the trial court specifically stated in a written order that the assault in the second degree conviction was a valid conviction. *Id.* at 282. In the present case, there was never a formal order entered which declared the defendant to have a valid conviction for murder in the second degree. In this case, the only evidence in the court file that the defendant was found guilty of both murder in the first degree and second degree felony murder is a jury verdict that was not acted upon.

⁴ The court in *Ward* acknowledges that it may be possible for the secondary charge to be “revived” if the charge on which the defendant was sentenced was vacated. *Ward*, 125 Wn. App. 138 at 146-147. The court stated that “Ward would receive a large windfall if we vacated his felony murder conviction *and* ignored the guilty verdict on the charge of manslaughter. Instead, the appellate court may seek to place the defendant ‘in exactly the same position in which he would have been had there been no error in the first instance.’” *Id.* at 146, citing *State v. Silvers*, 90 F.3d 95, 99 (4th Cir. 1996). The issue of whether a conviction previously vacated because of a double jeopardy violation can later be revived has been resolved during this appeal. See *State v. Schwab*, 163 Wn.2d 664, 677-678, 185 P.3d 1151 (2008) (The double jeopardy doctrine does not preclude reinstating Schwab’s manslaughter conviction because it was vacated solely to prevent double punishment for the same crime, not because the jury’s verdict was somehow in error.)

In his petition for review, defendant asserts that the present case is in direct contradiction of this court's decision in *State v. Womac*, 160 Wn.2d 643, 160 P.3d 40 (2007). Brief of Petitioner, page 9. However, the present case is distinguishable from *Womac* on its facts because in the present case, only defendant's first degree murder conviction was reduced to judgment.

Unlike *Womac* and the cases on which it relies, only one of defendant's two convictions was reduced to judgment. Like *Ward*, *Trujillo*, and *Turner*, there is no double jeopardy violation in the present case because the court properly declined to act on the jury verdict finding the defendant guilty of felony murder, and only reduced defendant's first degree murder conviction to judgment.

D. CONCLUSION.

For the reasons stated above, this court should affirm the Court of Appeals.

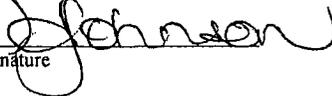
DATED: APRIL 29, 2009.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4/30/09 
Date Signature