No. 47183-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

LEO LAVERN RUBEDEW,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 13-1-01876-6
The Honorable Garold Johnson, Judge

OPENING BRIEF OF APPELLANT

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2. Did jeopardy terminate when the jury found Leo Rubedew not guilty of the attempted murder charge but did not reach a verdict on the assault charge, where attempted murder and assault are the same offense in fact and law? (Assignments of Error 1 & 2)

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III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Leo Lavern Rubedew by Amended Information with one count of attempted first degree murder (RCW

9A.32.030) and one count of first degree assault (RCW 9A.36.011). (CP 5-6) Both charges were based on the allegation that Rubedew pointed a firearm at his ex-wife and tried unsuccessfully to pull the trigger. (CP 3-4, 5-6) The State also alleged that Rubedew was armed with a firearm and that the offenses were domestic violence incidents. (CP 5-6)

Rubedew's first trial ended in a mistrial after Rubedew was hospitalized and his ill health prevented him from attending court proceedings. (1TRP3 310, 361-63, 369)[1] His second trial also ended in a mistrial, after the jury returned a not-guilty verdict on the murder charge but deadlocked on the assault charge. (2RP3 304-06; CP 43)

Rubedew moved to dismiss the assault charge, arguing that both double jeopardy and collateral estoppel principles protect him from subsequent prosecutions for the same offense. (3TRP1 15-24; CP 52-66, 81-85) The trial court disagreed, and allowed the State to retry Rubedew on the first degree assault charge. (3TRP1 35, 40, 41-42)

The third jury found Rubedew guilty of assault, and found that

[1] The transcripts from the different trials will be referred to by the trial number (#T) followed by the volume number (RP#) for that trial. The transcript from the sentencing hearing will be referred to as "SRP."

he was armed with a firearm and the offense was a domestic violence incident. (3TRP3 391; CP 108-10) Rubedew requested an exceptional sentence below the standard range based on, among other things, his advanced age, his poor health, and his lack of any criminal history. (CP 111-20; SRP 401-03) Rubedew also asked the court not to impose any discretionary legal financial obligations due to the fact that he would likely never be able to repay them. (SRP 403)

Finding that an exceptional sentence was not warranted, the trial court imposed the low end of the standard range and a mandatory firearm enhancement, for a total term of confinement of 153 months. (SRP 407-08; CP 130, 133) The court also imposed mandatory LFOs and $500 in discretionary defense cost reimbursement. (SRP 408; CP 131) This appeal timely follows. (CP 141)

B. SUBSTANTIVE FACTS

Charlaine Bramlett and Leo Rubedew were married in 1988 and divorced in 2009. (3TRP2 151) According to Bramlett, the marriage fell apart due to Rubedew's drinking problem. (3TRP2 155) After she and Rubedew divorced, Bramlett purchased a house on her own. (3TRP2 156) But after Rubedew attempted suicide, and

because she was having trouble affording the home ownership expenses by herself, Bramlett decided to let Rubedew move in with her. (3TRP2 156-57)

Rubedew slept in the second bedroom and paid rent, and Bramlett paid utilities and food and other expenses. (3TRP2 257) When his health deteriorated and he suffered kidney failure, Bramlett cared for Rubedew and assisted with his daily dialysis treatments. (3TRP2 158, 189-90) Bramlett testified that Rubedew had a gun when he moved into her house, and that she had placed the gun and its bullets in a box on the shelf of her closet. (3TRP2 160)

On May 7, 2013, Rubedew left the house early to go to church, and Bramlett left later in the morning to go shopping with friends. (3TRP2 163-64) When Bramlett returned that afternoon, Rubedew was not home. (3TRP2 163-64) When Rubedew did arrive home a few hours later, Bramlett could tell he had been drinking. (3TRP2 165) She testified Rubedew was very drunk and was having trouble standing up. (3TRP2165196-97)

Bramlett followed Rubedew to his room, and she saw he had the keys to her van. (3TRP2165) Bramlett picked up the keys and told Rubedew he could never drive her van again. (3TRP2165) Bramlett also told Rubedew that she wanted him to move out.

(3TRP2166) According to Bramlett, this made Rubedew very angry, and he started screaming at her. (3TRP2166)

Bramlett went to the living room and sat down. (3TRP2 166) Rubedew continued to yell at Bramlett as he walked back and forth between the bedrooms and the living room.[2] (3TRP2166) Bramlett testified that Rubedew then walked in the living room and stood with one hand behind his back. (3TRP2167) Rubedew told Bramlett to come outside, but she refused. (3TRP2 167) Then Rubedew turned slightly, and Bramlett could see that he had a gun in his hand. (3TRP2167)

Bramlett was concerned that Rubedew might be planning another suicide attempt, so she immediately reached for her phone and called 911. (3TRP2 169, 170) Bramlett informed the 911 operator that she told Rubedew to move out and "now he does not want to live anymore." (3TRP2 242; Exh. P1)

As she talked with the 911 operator, Rubedew walked out to the side yard and Bramlett followed him. (3TRP2 171) As Bramlett stood in the doorway watching Rubedew, her dogs ran excitedly into the yard. (3TRP2 171-72) Rubedew sat down in a patio chair about

[2] Bramlett's and Rubedew's bedrooms are next to each other, and Bramlett did not see whether Rubedew walked into her bedroom or his own when he left the living room. (3TRP2 168)

two feet away from Bramlett and yelled that she had ruined his life. (3TRP2 172-73, 174, 203) Then, according to Bramlett, Rubedew pointed the gun towards her head and said, "Get off the damn phone or I'm going to shoot you." (3TRP2 174, 203) Bramlett testified that she heard a click, which she believed sounded like the trigger being pulled. (3TRP2 174, 175-76)

The gun did not fire, however, and Bramlett testified that Rubedew fiddled with the gun, then put it into his mouth and tried to pull the trigger again. (3TRP2 176) Concerned for her safety, and for the safety of her dogs, Bramlett went back into the house and then out to the street to wait for the police to arrive. (3TRP2 177) She eventually saw Rubedew walk outside and lay down on the grass in front of the house, which is how the police found him when they arrived a short time later. (3TRP 1 84; 3TRP2 218-19)

Responding officers approached Rubedew with their guns drawn and ordered him to roll onto his stomach and to keep his hands visible. (3TRP1 84, 85) Rubedew complied, and when asked he told the officers that the gun was inside the house on the kitchen table. (3TRP1 86, 87) The officers found a .45 caliber semi-automatic gun on the table. (3TRP1 89) There was a bullet in the chamber but it was facing backwards. (3TRP1 90, 92; 3TRP3 287-

88, 293) When the officers removed the magazine from the gun, they noted that the bullets inside the magazine had also been loaded backwards.[3] (3TRP1 90, 92)

The responding officers noted that Rubedew seemed intoxicated, but was compliant and cooperative. (3TRP1 86; 3TRP2 135-36; 3TRP3 284) Rubedew told the officers that he was not trying to hurt Bramlett, that he was "not a bad guy," and that he only wanted to hurt himself. (3TRP1 88, 109; 3TRP2 134, 136) Bramlett gave a statement to a responding officer as well, and said that Rubedew pointed the gun at her and she heard a click. (3TRP3 263, 264) When the gun did not fire, she saw Rubedew pulling on the slide in an effort to get a bullet in the chamber, then he put the gun into his mouth and pulled the trigger. (3TRP3 265, 272-73)

Firearms expert Kay Sweeney testified that she tried to mimic the condition that the gun was in when it was found by the officers. She loaded the bullets into the magazine backwards and loaded the magazine into the gun. (3TRP3 317, 330-31) With some manipulation, she was able to force a bullet into the chamber, but the gun would not fire. (3TRP3 318, 319) It did, however, make a

[3] Bramlett also testified that she later found bullets scattered on her bed. (3TRP2 178-79)

clicking sound when she pulled the trigger. 3TRP3 325-26, 336) This process left markings on the chambered bullet similar to those found on the bullet taken from the chamber after police collected it at Bramlett's house. (3TRP 324-25)

IV. ARGUMENT & AUTHORITIES

The State charged Rubedew with attempted first degree murder and first degree assault. (CP 5-6) A person commits first degree assault if he, "with intent to inflict great bodily harm . . . [a]ssaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death." RCW 9A.36.011(1)(a). A person commits first degree murder if, "[w]ith premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person." RCW 9A.32.030(1)(a). A person attempts to commit a crime if, "with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1).

At the second trial, Bramlett testified that Rubedew heard her talking on the phone, then he pointed the gun at her head and she heard a click, so she assumed that he pulled the trigger. (2TRP2 118) The defense took the position that Bramlett was wrong or

mistaken about hearing a click, and that markings on the nose of the bullet were created when Rubedew manipulated the slide before putting it into his own mouth and pulling the trigger. (2TRP2 137-38; 3TRP3 266-67, 270, 273-74)

During closing arguments, the prosecutor explained the ultimate issue to the jury:

> Now, I'm going to boil all this down to you. The entire decision that you're going to have to make, the entire point in contention in this case is does the evidence support Charlaine Bramlett's version of events? That's it.
>
> Because if you believe Charlaine, if you believe that they got into a fight. If you believe he was drunk and he came out with a gun, *if you believe that at some point during that call [Rubedew] pointed that gun at [her] and [he] pulled the trigger*, *if you believe that, then he's guilty of both counts I and II*.
>
> If you have a reasonable doubt about that that [sic] actually happened, then he's not guilty.

(2VRP3 255, emphasis added) The jury found Rubedew not guilty of the attempted murder charge, but did not reach a verdict on the first degree assault charge. (2RP3 304-06; CP 43)

At the third trial, Bramlett similarly testified that Rubedew saw her talking on the telephone, then pointed the gun at her and she heard a click which she assumed meant he pulled the trigger. (3TRP2 174, 175-76) The defense took the same position as was taken in the second trial. (3TRP3 238, 241, 372-73, 375, 376-77)

During closing arguments, the prosecutor again explained the ultimate issue to the jury:

> What does this entire case boil down to? All three of those elements, *the question is did the defendant try to shoot Charlaine on May 7th, 2013*. That's it. Because if you believe that beyond a reasonable doubt, that he did, then that satisfies all three elements.
>
> *If you believe he pointed the gun at her and pulled the trigger, then he assaulted her* with a firearm with intent to inflict great bodily injury.

(3TRP3 361, emphasis added)

Rubedew argued that his acquittal on the attempted murder charge at the second trial barred any subsequent prosecutions for charges relating to whether he pointed the gun at Bramlett and pulled the trigger, both on double jeopardy and collateral estoppel principles. (3VRP1 15-24; CP 52-66, 81-85) The trial court disagreed, and found no double jeopardy or collateral estoppel concerns with a third trial and additional prosecution of Rubedew for first degree assault. (3TRP1 35, 40, 41-42)

A. RUBEDEW'S ASSAULT CONVICTION SHOULD BE REVERSED ON DOUBLE JEOPARDY GROUNDS BECAUSE HE HAD ALREADY BEEN ACQUITTED OF THE SAME OFFENSE.

The United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amd. V. The Washington State Constitution

further provides that "[n]o person shall . . . be twice put in jeopardy for the same offense." Wash. Const. Art. 1, § 9. The Double Jeopardy Clause embodies three 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).

Thus, "courts may not impose more than one punishment for the same offense and *prosecutors ordinarily may not attempt to secure that punishment in more than one trial*." Brown v. Ohio, 432 U.S. 161, 165, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977) (emphasis added).[4] "The primary goal of barring reprosecution after acquittal is to prevent the State from mounting successive prosecutions and thereby wearing down the defendant." Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 307, 104 S. Ct. 1805, 80 L. Ed. 2d 311 (1984).

It is well settled in Washington that punishment for both assault and murder (or attempted murder), based on the same act

[4] Issues of double jeopardy are questions of law reviewed de novo. State v. Womac, 160 Wn.2d 643, 649, 160 P.3d 40 (2007).

committed against the same victim, violates double jeopardy because they are the same offense. See In re Orange, 152 Wn. 2d 795, 100 P.3d 291 (2004); State v. Gohl, 109 Wn. App. 817, 37 P.3d 293 (2001); State v. Valentine, 108 Wn. App. 24, 29 P.3d 42 (2001). It must follow then, that a prosecution for assault, when the defendant has previously been found not guilty of murder or attempted murder, also violates double jeopardy because it represents a subsequent prosecution for the same offense.

For a defendant's double jeopardy right to be violated by a subsequent prosecution, three elements must be met: (a) jeopardy must have previously attached, (b) jeopardy must have previously terminated, and (c) the defendant is again being put in jeopardy for the same offense. State v. Corrado, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996) (and cases cited therein); State v. McPhee, 156 Wn. App. 44, 56, 230 P.3d 284 (2010). All three requirements were met in this case.

1. *Jeopardy attached when the jury was sworn for the second trial and terminated upon the jury's verdict of acquittal for attempted murder.*

First, jeopardy attaches in a jury trial when the jury is impaneled and sworn in. See State v. Ridgley, 70 Wn.2d 555, 557, 424 P.2d 632 (1967); Illinois v. Somerville, 410 U.S. 458, 467, 93 S.

Ct. 1066, 35 L. Ed. 2d 425 (1973). A jury was sworn in at the start of Rubedew's second trial. (1VRP1 90)

Second, jeopardy terminates with a verdict of acquittal. Corrado, 81 Wn. App. at 646; McPhee, 156 Wn. App. at 56. The jury returned a verdict of acquittal on the attempted murder charge at the conclusion of Rubedew's second trial. (2RP3 RP 305; CP 43) Jeopardy therefore terminated for this offense.

The State argued below that acquittal for the attempted murder charge did not bar retrial on the assault charge because the jury hung on the assault count and jeopardy does not terminate when the jury cannot reach a verdict. (CP 67-80; 3TRP1 25-30) The State is correct that retrial is generally allowed when a jury cannot reach a verdict.[5] It is also true that where a jury returns an acquittal on a greater offense and cannot reach a verdict on the lesser included offense, the State is not barred from retrying a defendant on the lesser offense.[6] But those rules do not apply in this case because there was an acquittal on the same offense, and because first degree assault is not a lesser included offense of attempted murder.[7]

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[5] See Corrado, 81 Wn. App. at 648; Richardson v. United States, 468 U.S. 317, 324, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984).
[6] See State v. Ahluwalia, 143 Wn.2d 527, 540-41, 22 P.3d 1254 (2001); State v. Russell, 101 Wn.2d 349, 351, 678 P.2d 332 (1984).
[7] See State v. Harris, 121 Wn.2d 317, 321, 849 P.2d 1216 (1993).

The State charged assault as a separate count for which Rubedew faced conviction, in addition to the charge of attempted murder, based on the same act. (CP 5-6) By charging one count of attempted murder and one count of first degree assault, the State was attempting to obtain two convictions based on the same act. But when the jury acquitted Rubedew of one of the two charges, jeopardy terminated for that offense and any others that are the same offense. Corrado, 81 Wn. App. at 645; McPhee, 156 Wn. App. at 56.

2. *Rubedew's charges of attempted murder and first degree assault are the same offense.*

"Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense. Orange, 152 Wn. 2d at 815-16; State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995) (citing Whalen v. United States, 445 U.S. 684, 688, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980); Brown, 432 U.S. at 165). Where "the relevant statutes do not expressly disclose legislative intent, Washington courts apply a rule of statutory construction that has been variously termed the 'same elements' test, the 'same evidence' test, and the Blockburger test." Orange, 152 Wn. 2d at 816; Calle, 125 Wn.2d at 777; Blockburger v.

United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

Our State Supreme Court's decision in Orange is instructive here. In that case, the defendant was convicted of both attempted first degree premediated murder and first degree assault for a single shot fired at a single victim. 152 Wn. 2d at 814-15. Orange argued on appeal that these two convictions violated double jeopardy, and the Supreme Court agreed. 152 Wn. 2d at 815, 820.

The Court noted that the relevant statutes did not disclose any legislative intent that the two crimes should be punished separately, and so the Court moved on to the "same elements" test. Orange, 152 Wn. 2d at 816. Under this test, two statutory offenses are the same offense for double jeopardy purposes if they are identical both *in fact* and *in law*. Orange, 152 Wn. 2d at 816; State v. Baldwin, 150 Wn.2d 448, 454, 78 P.3d 1005 (2003). The question is whether each offense includes an element not included in the other, and whether proof of one would necessarily prove the other. Orange, 152 Wn. 2d at 816; Baldwin, 150 Wn.2d at 454; Blockburger, 284 U.S. at 304.

The Orange court applied this test to the charges and facts of the case presented, and held that "the crimes of first degree attempted murder (by taking the 'substantial step' of shooting at [the victim]) and first degree assault (committed with a firearm) were the

same in fact and in law. The two crimes were based on the same shot directed at the same victim, and the evidence required to support the conviction for first degree attempted murder was sufficient to convict Orange of first degree assault." Orange, 152 Wn.2d at 820.

Similarly, in Valentine, the court was asked to determine whether "[i]t is a double jeopardy violation to punish a stabbing separately as an assault when it is also the substantial step used to prove attempted murder." 108 Wn. App. at 26. The Valentine court concluded that convictions for attempted murder and assault based on the same act violates double jeopardy. 108 Wn. App. at 27. And in Gohl, Division One held convictions for both assault and attempted murder violated double jeopardy because attempted first degree murder and first degree assault convictions are the "same in law and in fact." 109 Wn. App. at 822.

Rubedew was charged with first degree assault and attempted murder. There is no question that the attempted murder and assault charges are the same *in fact* because they are based on the same act (pointing the gun and pulling the trigger), directed at the same victim (Bramlett). (CP 3-4, 5-6; 2TRP2 118; 2TRP3 255; 3TRP2 174; 3TRP3 361) There is no allegation that Rubedew tried

to shoot the gun more than once, or that he engaged in any other act alleged to be an assault on or an attempted murder of Bramlett. Both charges are based on the single attempted shot directed at Bramlett, and the evidence used in an effort to obtain convictions for both is identical. This is precisely the fact pattern the Supreme Court addressed in Orange when it held that punishing a single shot as both an attempted premeditated murder and an assault violates double jeopardy. 152 Wn.2d at 817.

The two charges are also the same *in law.* Under the "same evidence" or "same elements" test, the offenses are the same *in law* if proof of one offense would necessarily also prove the other. State v. Read, 100 Wn. App. 776, 791, 998 P.2d 897 (2000); Orange, 152 Wn. 2d at 816, 818, 819.

Obviously, proof of first degree assault does not necessarily prove murder, because a person may assault another person without actually causing death. See Read, 100 Wn. App. at 791. However, "proof of attempted murder committed by assault will always prove an assault." Valentine, 108 Wn. App. at 29; see also Read, 100 Wn. App. at 791. As the Read court stated when comparing first degree assault with second degree intentional murder: "A person who intends to cause death also must intend to inflict great bodily harm;

and a person who (with intent) causes a person's death also assaults that person by a means likely to produce death. . . . Therefore, proof of second degree intentional murder necessarily also proves first degree assault." 100 Wn. App. at 791-92. Similarly here, because the evidence used to prove attempted murder also proves first degree assault, the two crimes are also the same *in law*.

It is clear from established case law, and from the application of that law to Rubedew's case, that the attempted murder charge and the assault charge were the same offense. Rubedew was tried to completion and acquitted of the attempted murder charge. The subsequent prosecution for the "same offense" of first degree assault violated double jeopardy. Rubedew was twice put in jeopardy for the same offense. The trial court therefore erred when it refused to dismiss the assault charge after the second trial, and when it allowed the State to prosecute Rubedew in a subsequent third trial. Accordingly, Rubedew's assault conviction must be reversed and dismissed.

B. RUBEDEW'S ASSAULT CONVICTION SHOULD BE REVERSED BECAUSE THE STATE WAS COLLATERALLY ESTOPPED FROM RETRYING RUBEDEW ON THIS CHARGE.

Collateral estoppel means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue

cannot be litigated again between the same parties in any future lawsuit. Ashe v. Swenson, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970); State v. Stein, 140 Wn. App. 43, 61-62, 165 P.3d 16 (2007). Collateral estoppel operates in the criminal context and "is embodied in the Fifth Amendment guarantee against double jeopardy." Ashe, 397 U.S. at 445; State v. Peele, 75 Wn.2d 28, 30, 448 P.2d 923 (1968).

"After a jury determines an issue by its verdict, the State cannot 'constitutionally hale [a defendant] before a new jury to litigate that issue again.'" State v. Eggleston, 129 Wn. App. 418, 428, 118 P.3d 959 (2005) (quoting Ashe, 397 U.S. at 446). Thus, where a jury, in acquitting the defendant, necessarily found that the State failed to prove a fact essential to convict the defendant, the State cannot relitigate the same fact in a later proceeding against the defendant. Eggleston, 129 Wn. App. at 427.

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.'" Ashe, 397 U.S.

at 444 (citation omitted). The burden is on the defendant "to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." Dowling v. United States, 493 U.S. 342, 350, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990). The defendant must show that "the issue decided in the prior adjudication is identical with the one presented in the action in question." State v. Tili, 148 Wn.2d 350, 361, 60 P.3d 1192 (2003); Eggleston, 164 Wn.2d at 71-72.

For example, in Ashe, the defendant was one of four masked men charged with robbing a group of six poker players. 397 U.S. at 437. Ashe was tried first for the robbery of one of the players, Donald Knight, and the issue at trial was the identity of the robbers, and whether Ashe was one of them. 397 U.S. at 438. The jury found Ashe "not guilty due to insufficient evidence." 397 U.S. at 439. The Court found that the jury, in acquitting Ashe, necessarily found that the prosecutor failed to prove he was one of the robbers, so the State could not retry him for robbing a different member of the poker playing group. 397 U.S. at 446-47. The Court noted:

> Once a jury had determined upon conflicting testimony that there was at least a reasonable doubt that [Ashe] was one of the robbers, the State could not present the same or different identification evidence in a second prosecution for the robbery . . . in the hope that a

different jury might find that evidence more convincing.

397 U.S. at 446.

Here, the issue in the second and third trials was identical: whether Rubedew, with the intent to shoot Bramlett, pointed a firearm at her and pulled the trigger. The prosecutor even expressed this to the jury in the second trial, when he said:

> [I]f you believe that at some point during that call [Rubedew] pointed that gun at [Bramlett] and [he] pulled the trigger, if you believe that, then he's guilty of both [attempted murder and assault].
>
> If you have a reasonable doubt about that that [sic] actually happened, then he's not guilty.

(2VRP3 255) The jury clearly had a reasonable doubt, because it found Rubedew not guilty of attempted murder.

As in Ashe, once a jury had determined that there was at least a reasonable doubt that Rubedew intended to shoot Bramlett and attempted to pull the trigger, the State could not present the same evidence in a subsequent prosecution for the same alleged act "in the hope that a different jury might find the evidence more convincing." Ashe, 397 U.S. at 446. The rule of collateral estoppel therefore precluded a subsequent prosecution of Rubedew for assault based on the same act, and Rubedew's conviction must be reversed.

C. THE RECORD FAILS TO ESTABLISH THAT THE TRIAL COURT ACTUALLY TOOK INTO ACCOUNT RUBEDEW'S FINANCIAL CIRCUMSTANCES BEFORE IMPOSING DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

The trial court ordered Rubedew to pay legal costs in the amount of $1,300.00, which included discretionary costs of $500.00 for appointed counsel and defense costs. (SRP 408; CP 131)

The Judgment and Sentence includes the following boilerplate language:

> 2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

(CP 130) But when Rubedew's counsel asked the court to forego discretionary LFOs because Rubedew would likely never be able to repay them, the court nevertheless ordered LFOs with no discussion of his ability to pay. (SRP 403, 408)

RCW 10.01.160 gives a sentencing court authority to impose legal financial obligations on a convicted offender, and includes the following provision:

> [t]he court *shall not* order a defendant to pay costs

> unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court *shall* take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3) (emphasis added). The word "shall" means the requirement is mandatory. State v. Claypool, 111 Wn. App. 473, 475-76, 45 P.3d 609 (2002). The judge must consider the defendant's individual financial circumstances and make an individualized inquiry into the defendant's current and future ability to pay, and the record must reflect this inquiry. State v. Blazina, 182 Wn.2d 827, 837-38, 344 P.3d 680 (2015). Hence, the trial court was without authority to impose LFOs as a condition of Rubedew's sentence if it did not first take into account his financial resources and the individual burdens of payment.

While formal findings supporting the trial court's decision to impose LFOs under RCW 10.01.160(3) are not required, the record must minimally establish the sentencing judge did in fact consider the defendant's individual financial circumstances and made an individualized determination that he has the ability, or likely future ability, to pay. State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992); State v. Bertrand, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011). If the record does not show this occurred, the trial court's

LFO order is not in compliance with RCW 10.01.160(3) and, thus, exceeds the trial court's authority.

Recently, in Blazina, our State Supreme Court decided to address a challenge to the trial court's imposition of LFOs, notwithstanding the defendant's failure to object below, because of "[n]ational and local cries for reform of broken LFO systems" and the overwhelming evidence that the current LFO system disproportionately and unfairly impacts indigent and poor offenders. 182 Wn.2d at 835. The Blazina court also noted that "if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs." 182 Wn.2d at 839. Here, Rubedew was found indigent for both trial and on appeal. (CP 142-44; 148)

The record does not establish the trial court actually took into account Rubedew's financial resources and the nature of the payment burden or made an individualized determination regarding his ability to pay. And the trial court made no further inquiry into Rubedew's financial resources, debts, or future employability. Because the record fails to establish that the trial court individually assessed Rubedew's financial circumstances before imposing LFOs, the court did not comply with the authorizing statute. In the

event that Rubedew's assault conviction is upheld, this Court should vacate the LFO portion of his Judgment and Sentence.

V. CONCLUSION

"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[.]"[8]

The attempted murder and assault charges are the same offense for double jeopardy purposes, and jeopardy attached and was terminated upon the not guilty verdict at Rubedew's second trial. The third trial on the assault charge violated Rubedew's right to be free from successive prosecutions for the same offense, and violated double jeopardy protections enshrined in both our Federal and State constitutions. Furthermore, when the jury found Rubedew not guilty of attempted murder, it necessarily concluded that the evidence did not prove beyond a reasonable doubt that Rubedew attempted to shoot Bramlett. Therefore, the State could not "constitutionally hale [him] before a new jury to litigate that issue again."[9]

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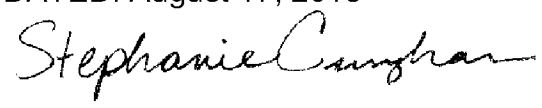
[8] Green v. United States, 355 U.S. 184, 187, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957)
[9] Ashe, 397 U.S. at 446.

Both double jeopardy and collateral estoppel prohibited the State from seeking a conviction for assault in a third trial, and Rubedew's conviction must be vacated and dismissed with prejudice.

DATED: August 17, 2015



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CERTIFICATE OF MAILING

I certify that on 08/17/2015, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Leo L. Rubedew, DOC# 380256, Monroe Correctional Complex, P.O. Box 777, Monroe, WA 98272-0777.

STEPHANIE C. CUNNINGHAM, WSBA #26436

CUNNINGHAM LAW OFFICE

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