No. 91193-2

NO. 45126-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOHNNY FULLER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Jerry T. Costello, Judge
The Honorable Stanley J. Rambaugh, Judge

BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENT OF ERROR

The trial court erred when it denied a defense motion to dismiss appellant's assault charge on double jeopardy grounds.

Issue Pertaining to Assignment of Error

Appellant was charged with Assault in the Second Degree for striking the alleged victim in the arm with a baseball bat, thereby recklessly inflicting substantial bodily harm. A jury acquitted appellant of that offense. In light of that acquittal, is the State now precluded from trying appellant for Assault in the Second Degree, based on the same hit to the alleged victim's arm, on the alternative theory appellant assaulted the alleged victim with a deadly weapon?

B. STATEMENT OF THE CASE

On September 10, 2012, Vincent Nix realized his seven-year-old son's bike was missing. RP 128, 130, 133. The bike, which had training wheels and a Harley Davidson logo, had been sitting on a landing just outside the home's front door for about a week. RP 130-132. The tires were flat and in need of new inner tubes. RP 132. Nix asked some of the neighborhood kids if they had seen the bike, and, on September 11, 2012, one child provided

him with information leading him three blocks away to Johnny Fuller's home. RP 134-137.

Fuller had been fixing up old bicycles since he was nine years old. RP 390. He would find bikes (or portions of bikes) that had been abandoned, thrown away, or sold at thrift stores, restore them to a useable condition, and sell them from his home at a bargain price. RP 390-392. He takes care to ensure the bikes are no longer wanted before he takes them. RP 391. He also enlists the help of an acquaintance, who collects metal in the neighborhood to sell as scrap and keeps an eye out for discarded bicycles. RP 372-388. On September 11, Fuller had a large row of bicycles underneath a tarp in his front yard. RP 138.

Nix believed Fuller might have his son's bike and decided to employ a ruse, telling Fuller he was in the market for a bike, his son was partial to "motorcycle bikes," and he heard that Fuller might have such a bike. RP 138-139. Fuller confirmed he had a bike matching that description and retrieved a bike that Nix recognized as his son's bike without the training wheels, which Fuller had removed because they were bent. RP 140, 393-394. Nix and Fuller agreed on a price of $10.00, and Nix said he needed to go get the money. RP 141-142. Instead, Nix went and alerted a

neighbor, Robert Scott, to Fuller's inventory of bikes. RP 143. Nix knew Scott also was missing a child's bike. RP 185. Two weeks earlier, Scott's daughter's "princess bike" disappeared from their front porch. RP 181-184.

Nix and Scott drove in Scott's car to Fuller's house, where they parked in front of the home and approached Fuller.[1] Nix and Scott told Fuller that Scott also was looking for a bike – a "princess bike" – and Scott began looking under the tarp at Fuller's collection. RP 144-145, 189-191. Fuller, who was in the process of grilling meat, indicated he was getting ready to eat lunch and could not show Scott any bikes right then. RP 161, 191-192, 246-247, 401. Nix then informed Fuller that he was not going to buy the bike with the Harley logo because he already owned that bike. RP 146. At first, Fuller disputed Nix's claim, but once Nix said the bike originally had training wheels, Fuller believed Nix. He told Nix to take the bike and leave. RP 147-148.

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[1] Several witnesses, including Fuller, testified that a third man arrived at the same time in a separate car and also approached Fuller's residence. RP 234-236, 240-242, 357-358, 394-396. According to Fuller, like Nix and Scott, this man looked angry. RP 399-400.

Rather than take the bike and return home, however, Nix remained and told Fuller he was going to call the police. RP 148-149. Scott also remained so that he could continue looking for his daughter's bike, and he informed Fuller he was not leaving until police arrived. RP 149, 192. Fuller ordered both men to leave, but they refused.[2] RP 149, 175-176, 401-402. Neither Scott nor Nix had called police when Fuller retreated inside his home. RP 149, 192-193.

Fuller emerged from his home with an aluminum baseball bat in hand in what Nix called a "defensive stance," i.e., much like a baseball player would hold a bat but with the bat more elevated. RP 150-152. Fuller walked toward Nix, who retreated in response. Fuller did not strike him. RP 150-152. Fuller then turned toward Scott and tried the same tactic. RP 152, 193-194. Scott, however, did not retreat. Instead, Scott said he was not going to move and

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[2] At trial, Nix conceded Fuller told him and Scott to leave "[b]ecause he wanted no trouble." RP 148-149, 175-176. Scott, however, testified that Fuller never asked them to leave and, "If he did, I didn't hear it." RP 206. Scott was impeached by a police officer, who interviewed him immediately after the event. According to that officer, Scott admitted that Fuller had asked him to leave and he had refused. RP 349-350.

told Fuller, "hit me." RP 153, 176. Fuller complied, striking the side of Scott's upper left arm. RP 153, 194-196.

The blow hurt and Scott became enraged. He placed Fuller in a bear hug, which caused both men to fall to the ground and Scott to injure his right shoulder. RP 154-155, 167-171, 197-200, 217-218. Nix and Scott denied ever hitting Fuller. RP 157, 196, 222. According to Fuller, however, right before he swung the bat, Scott was advancing on him and looked like he was about to punch him. RP 406-407. Moreover, Fuller claimed that after he was tackled to the ground, he was repeatedly punched and kicked, which left marks on his body. RP 409-412. One uninvolved bystander confirmed that Nix and Scott hit Fuller several times once Fuller was on the ground. RP 233, 236-240. Nix took the bat away from Fuller, and the fray ended. Police arrived in response to 911 calls by several individuals, including Nix and Fuller. RP 155-156, 170, 341.

Scott suffered a dislocated right shoulder when he fell to the ground after tackling Fuller. He also had a rotator cuff injury, although surgery revealed a probable pre-existing injury to that shoulder. RP 291-295. Scott complained of numbness in two fingers on his left hand. RP 295-296. Surgery was performed on

Scott's ulnar nerve (the nerve providing sensation to the pinky and part of the ring finger) at his left elbow. RP 297-299. Dr. Spencer Coray, who treated Scott, testified that, although the nerve can be damaged from compression to the arm, the nerve runs on the inside of the arm and a blow to the outer arm (like the one Scott experienced) was "not likely" to cause such an injury. RP 301-302, 305. Moreover, simply working all day at a computer and resting one's arms on a desk can injure the nerve. RP 305. Scott had worked in computer Information Technology (IT). RP 179.

The Pierce County Prosecutor's Office charged Fuller with four offenses: (count 1) Assault in the Second Degree, (count 2) Assault in the Second Degree, (count 3) Trafficking in Stolen Property in the First Degree, and (count 4) Possession of Stolen Property in the Third Degree. CP 51-53. Count 1 charged assault with a deadly weapon and alleged Scott as the victim. CP 51. Count 2 charged assault recklessly inflicting substantial bodily harm and also alleged Scott as the victim.[3] CP 52. As the prosecutor's

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[3] The alleged "substantial bodily harm" was damage to Scott's ulnar nerve in his left arm. See RP 617-620. Jurors were specifically instructed the State was not relying on the injury to Scott's right shoulder that occurred when he grabbed Fuller and the two men fell to the ground. RP 689-693; CP 68.

closing argument confirmed, both assault charges were based on the identical act – Fuller striking Scott in the upper arm with the bat. See RP 601-602, 614-620. Counts 3 and 4 were based on Fuller's possession of, and attempt to sell, the bike belonging to Nix's son. See RP 602, 604-614. Fuller claimed self-defense and defense of property on the assault charges. RP 644-656; CP 90-94. On the property charges, he denied any knowledge the bicycle belonging to Nix's son was stolen. RP 392, 635-638.

Jurors acquitted Fuller on counts 2, 3 (including a lesser-degree alternative of Trafficking in Stolen Property in the Second Degree), and 4. CP 116, 118-120. Jurors deadlocked on the assault charge in count 1, and the Honorable Jerry T. Costello declared a mistrial on that charge. CP 72; RP 703. In doing so, Judge Costello noted that any attempted retrial on count 1 would raise a double jeopardy issue. RP 703.

Fuller moved to dismiss the charge in count 1 with prejudice, arguing it was the same offense jurors acquitted him on in count 2 and, therefore, a subsequent prosecution would violate double jeopardy. CP 124-130. Judge Costello apparently was not available to hear the motion. The Honorable Stanley Rumbaugh

heard and denied the motion. RP (7/11/13) 2-38; CP 131. Fuller timely filed his Notice of Appeal. CP 132-134.

C. ARGUMENT

FULLER'S ACQUITTAL ON ASSAULT PROHIBITS ANY RETRIAL FOR THAT OFFENSE.

The double jeopardy clauses of the Fifth Amendment[4] and article I, section 9 of the Washington Constitution[5] prohibit "'being (1) prosecuted a second time for the same offense after acquittal, (2) prosecuted for a second time for the same offense after conviction, and (3) punished multiple times for the same offense.'" State v. Turner, 169 Wn.2d 448, 454, 238 P.3d 461 (2010) (quoting State v. Linton, 156 Wn.2d 777, 783, 132 P.3d 127 (2006)). Fuller's claim falls under number (1) above. The assault charges in counts 1 and 2 are the same offense for double jeopardy purposes, and his acquittal on count 2 precludes any future prosecution on

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[4] The Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life and limb."

[5] Article 1, § 9 provides, "[n]o person shall be . . . twice put in jeopardy for the same offense." It provides the same degree of protection as its federal counterpart. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

count 1. This Court's review is de novo. Turner, 169 Wn.2d at 454.

Where the government charges multiple violations of the same statute, double jeopardy analysis focuses on the "unit of prosecution." In re Davis, 142 Wn.2d 165, 172, 12 P.3d 603 (2000). This Court applies a multistep approach to determine the unit of prosecution:

> [T]he first step is to analyze the statute in question. Next, we review the statute's history. Finally, we perform a factual analysis as to the unit of prosecution because even where the legislature has expressed its view on the unit of prosecution, the facts in a particular case may reveal more than one "unit of prosecution" is present.

State v. Hall, 168 Wn.2d 726, 730, 230 P.3d 1048 (2010) (quoting State v. Varnell, 162 Wn.2d 165, 168, 170 P.3d 24 (2007)). Notably, "[u]nless the legislature clearly and unambiguously intends to turn a single transaction into multiple offenses, the rule of lenity requires a court to resolve ambiguity in favor of one offense." State v. Jensen, 164 Wn.2d 943, 949, 195 P.3d 512 (2008) (citing State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998)).

1. Analyzing the Statute

The statute in question is RCW 9A.36.021, which provides:

> (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
>
> (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
> (b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or
> (c) Assaults another with a deadly weapon; or
> (d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or
> (e) With intent to commit a felony, assaults another; or
> (f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or
> (g) Assaults another by strangulation or suffocation.

Absent sexual motivation, an assault in the second degree is a class B felony. RCW 9A.36.021(2). Fuller was charged in count 1 under subsection (1)(c) (assault with a deadly weapon) and in count 2 under subsection (1)(a) (assault recklessly inflicting substantial bodily harm).

"[L]egislatures frequently enumerate alternative means of committing a crime without intending to define . . . separate crimes." Schad v. Arizona, 501 U.S. 624, 636, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991). "Alternative means statutes identify a single crime and provide more than one means of committing that crime." State v. Williams, 136 Wn. App. 486, 497, 150 P.3d 111 (2007) (citing In re Detention of Halgren, 156 Wn.2d 795, 809, 132 P.3d 714 (2006); State v. Arndt, 87 Wn.2d 374, 376-77, 553 P.2d 1328 (1976)). There can be no doubt that RCW 9A.36.012 is just such a statute. The Washington Supreme Court has already said so.

In State v. Smith, 159 Wn.2d 778, 780-781, 154 P.3d 873 (2007), the Washington Supreme Court examined whether the three common law definitions of assault (i.e., an intentional touching that is harmful or offensive, an unsuccessful attempt to inflict bodily injury, and an act creating reasonable apprehension of bodily injury) were alternative means for committing the crime of assault, thereby requiring the prosecution to produce substantial supporting evidence for each definition jurors were asked to consider. In deciding they were not, the Court contrasted these

definitions with the multiple alternative statutory means by which an assault may be committed:

> Alternative means crimes are ones that provide that the proscribed criminal conduct may be proved in a variety of ways. As a general rule, such crimes are set forth in a statute stating a single offense, under which are set forth more than one means by which the offense may be committed. *See* State v. Arndt, 87 Wash.2d 374, 384, 553 P.2d 1328 (1976). Criminal assault is just such a crime.
>
> The legislature has codified four degrees of criminal assault. Between the crimes of first, second, and third degree assault, the legislature has delineated a total of 17 alternative means of commission. *See* RCW 9A.36.011-.031. As promulgated by the legislature, the second degree criminal assault statute articulates a single criminal offense and then provides six separate subsections by which the offense may be committed. RCW 9A.36.021(1)(a)-(f). Each of these six subsections represents an alternative means of committing the crime of second degree assault. . . .

Smith, 159 Wn.2d at 784 (citations and footnote omitted; emphasis added).

Consistent with the Smith Court's interpretation of RCW 9A.36.021, the pattern instruction for assault in the second degree assumes that, regardless which means is used to commit the crime, it is one crime. In fact, as an example, the pattern instruction uses the very same two alternative means charged in Fuller's case:

WPIC 35.12 Assault – Second Degree (Alternate Means) – Inflict Substantial Bodily Harm or with Deadly Weapon – Elements

To convict the defendant of the crime of assault in the second degree, each of the following two elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about (date) _____, the defendant:
[(a) intentionally assaulted (name of person) _____ and thereby recklessly inflicted substantial bodily harm;] [or]
[(b) assaulted (name of person) _____ with a deadly weapon;] and

(2) That this act occurred in the State of Washington.

Washington Pattern Jury Instructions (Criminal), WPIC 35.12.[6]

2. History of Statute

Looking to the history of RCW 9A.36.021, under the 1909 criminal code:

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[6] Typically, when both alternative means are contained in a single instruction, jurors also are told they need not be unanimous as to which means has been proved. See WPIC 35.12. Because, however, the State charged and tried Fuller in separate counts, juror unanimity was required to find each means satisfied. See CP 88-89 ("to convict instructions" for counts 1 and 2); CP 111 (requiring unanimity on each count). This was the "law of the case." See State v. Hickman, 135 Wn.2d 97, 101-103, 954 P.2d 900 (1998) (State's proof requirements dictated by law as set forth in jury instructions).

> Second degree assault could be committed in any of seven varied ways: (a) by administering poison with intent to injure; (b) by administering a narcotic or anesthetic with intent to commit a crime; (c) by inflicting grievous bodily harm; (d) by assaulting another with a weapon or instrument likely to produce bodily harm; (e) by assaulting another with a whip, while armed with a deadly weapon; (f) by assaulting another with intent to commit a felony, to resist the execution of court process, or to resist arrest or detention, or (g) by shooting a person while hunting.

13A Wash. Prac., Criminal Law § 304 (2013-14 ed.) (citing Laws of 1909, ch. 249, § 162 codified as former RCW 9.65.020); see also former RCW 9.11.020 (replacing former RCW 9.65.020 with statute of similar structure). Over the years, the specific means by which one can commit assault in the second degree have been modified. But the statute has always been structured as it is today – one offense that can be committed by multiple means.

3. Particular Facts

The final consideration is whether the particular facts in a case reveal more than one unit of prosecution. Hall, 168 Wn.2d at 735. For example, in State v. Jensen, the Supreme Court used the particular facts of the case to find that three separate conversations, where the defendant solicited the killing of four people, was properly charged as more than a single count of solicitation to commit murder. Jensen, 164 Wn.2d at 958-959. In

contrast, where the case involves a single, continuous course of conduct, the particular facts do not warrant multiple charges. Hall, 168 Wn.2d at 736. Fuller's case involves one act – striking Scott in the arm with a bat – that resulted in two alternative theories of liability under the assault statute. These particular facts do not reveal more than one unit of prosecution.

4. Same Result Under *State v. Arndt*

Just as the above factors reveal the unit of prosecution in Fuller's case to be a single assault, the result is the same under the somewhat modified approach found in State v. Arndt, cited by the Supreme Court in Smith. In Arndt, the Supreme Court examined RCW 74.08.331 (grand larceny by fraudulent receipt of public assistance), seeking to determine whether the statute "describes a single offense committable in more than one way, or describes multiple offenses." Arndt, 87 Wn.2d at 378. In ultimately determining the statute created a single crime committed in multiple ways, the Arndt Court examined several factors:

> (1) the title of the act; (2) whether there is a readily perceivable connection between the various acts set forth; (3) whether the acts are consistent with and not repugnant to each other; (4) and whether the acts may inhere in the same transaction.

Arndt, 87 Wn.2d at 379 (quoting State v. Kosanke, 23 Wn.2d 211, 213, 160 P.2d 541 (1945)).

First, regarding the title of the act, RCW 9A.36.021 was originally enacted as a new section under the title "Sentencing of Adult Felons." Laws of 1986, ch. 257, sec. 5. It was subsequently amended in 1987,[7] 1988,[8] 1997,[9] 2001,[10] 2003,[11] 2007,[12] and 2011.[13] The original enactment, and the subsequent amendments adding to and modifying the statute, evidence an intent to define

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[7] Laws of 1987, ch. 324, sec. 2 under the title "Second Degree Assault Includes Harm To An Unborn Quick Child."

[8] Laws of 1988, ch. 158, sec. 2 under the title "Assault Revisions"; Laws of 1988, ch. 206, sec. 916 under the general title "Sexually Transmitted Diseases – Aids – Public Health and Education" and subheading "Control of Sexually Transmitted Diseases"; Laws of 1988, ch. 266, sec. 2 under the title "Assault in the Second Degree – Revised."

[9] Laws of 1997, ch. 196, sec. 2 under the title "Aids-Related Crimes."

[10] Laws of 2001, 2nd sp. sess., ch. 12, sec. 355 under the general title "Sex Offenders – Civil Commitment" and subheading "Sentencing Structure."

[11] Laws of 2003, ch. 53, sec. 64 under the title "Criminal Statutes – Technical Reorganization."

[12] Laws of 2007, ch. 79, sec. 2 under the title "Strangulation."

[13] Laws of 2011, ch. 166, sec. 1 under the title "Crimes – Assault By Suffocation – Domestic Violence."

various ways of committing the crime of assault in the second degree.

Second, there is a perceivable connection between the acts described in RCW 9A.36.021. The statute lists 6 methods of committing assault, each legally equivalent and therefore deemed by the Legislature to warrant similar punishment – a class B felony unless accompanied by sexual motivation, in which case it is a class A felony.

Third, the acts are consistent with, and not repugnant to, each other. "The varying ways by which a crime may be committed are not repugnant to each other unless the proof of one will disprove the other." Arndt, 87 Wn.2d at 383. The two means charged in Fuller's case (assault with a deadly weapon and assault recklessly inflicting substantial bodily harm) are not repugnant. Indeed, according to the State, a single swing of the bat violated both alternatives. There is no inconsistency.

Finally, not only *may* the acts inhere in the same transaction, they did so here. They are inseparable.

All of the above considerations weigh in favor of a single offense that may be committed in multiple ways. In finding that the statute in Arndt defined a single offense, that Court also relied on

two general interpretive rules: (1) under the rule of lenity, doubts are generally resolved in favor of lenity and (2) penal statutes are generally construed against the State in favor of the accused. Arndt, 87 Wn.2d at 385-386. These considerations also favor a finding that one assaultive act, violating two alternatives under RCW 9A.36.021, is but a single criminal offense.

In response to the above arguments, the State may seek to rely on State v. Gatlin, 158 Wn. App. 126, 241 P.3d 443 (2010), review denied, 171 Wn.2d 1020, 253 P.3d 393 (2011). Gatlin was convicted of three counts of second degree assault and one count of gang intimidation for his role in the brutal beating and intimidation of a juvenile who refused to join a local gang. Gatlin, 158 Wn. App. at 128-130. The first assault charge, filed under RCW 9A.36.021(1)(a) (reckless infliction of substantial bodily harm), was premised on blows to the victim's head that caused bruising and substantial injury. Id. at 130. The second assault charge, filed under RCW 9A.36.021(1)(a) and (1)(g) (strangulation or suffocation), was premised on strangulation of the victim. Id. The third assault charge, filed under RCW 9A.36.021(1)(e) (with intent to commit a felony), was premised on assault with the intent to commit gang intimidation. Id.

Among his challenges on appeal, Gatlin argued that his convictions for gang intimidation and assault violated double jeopardy. Id. at 133. After a thorough discussion of the issue, and analysis under Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), Division Three disagreed. Id. at 133-135. Relevant to Fuller's appeal, Gatlin also argued that his three assault convictions – all based on conduct during a prolonged beating of the victim – violated double jeopardy. Division Three's entire analysis of this issue is as follows:

> Mr. Gatlin also argues the three assault convictions violate double jeopardy. But, each assault is based on different facts. As discussed above, one assault relates to bodily injury (punching/kicking) and one relates to strangulation. The last assault relates to gang intimidation. Thus, double jeopardy is not implicated.

Gatlin, 158 Wn. App. at 135.

Gatlin is immediately distinguishable because Fuller's assault charges were not "based on different facts." They were based on two theories stemming from a single blow. In any event, given the Gatlin court's failure to mention, much less apply, unit of prosecution analysis or the analysis set forth in Arndt, the decision is of dubious value.

The only remaining issue is the effect of Fuller's acquittal on count 2. "As a general rule, jeopardy terminates with a verdict of acquittal." State v. Corrado, 81 Wn. App. 640, 646, 915 P.2d 1121 (1996). "Thus, 'a verdict of acquittal . . . is a bar to a subsequent prosecution for the same offense.'" Id. (quoting Ball v. United States, 163 U.S. 662, 671, 16 S. Ct. 1192, 41 L. Ed. 300 (1896)). As discussed above, whether an assault in the second degree is committed with a deadly weapon or with the reckless infliction of substantial bodily harm, when based on the same assaultive act, there is but one offense. Thus, when jurors acquitted Fuller on count 2, the State was prohibited from retrying him on count 1, which is the "same offense" for double jeopardy purposes.

In the trial court, the State relied on State v. Ramos, 163 Wn.2d 654, 657-661, 184 P.3d 1256 (2008). CP 144. In Ramos, co-defendants were tried and convicted for second degree murder based on two alternative means – intentional murder and felony murder predicated on assault. Ramos, 163 Wn.2d at 657-658. Unlike Fuller's case, both means were included in one instruction, and jurors were told they need not be unanimous as to the means. Id. at 658. Following In re Personal Restraint of Andress, 147

Wn.2d 602, 56 P.3d 981 (2002), the defendants' murder convictions were vacated. Id. at 658-659.

The issue on appeal was whether double jeopardy prevented the State from retrying the defendants on the lesser included charges of first-degree manslaughter. Ramos, 163 Wn.2d at 659-660. Relying on the fact jurors were told they need not be unanimous regarding the alternative means by which second-degree murder had been committed, the Supreme Court found no prohibition:

> The alternative means principle dictates that when a jury renders a guilty verdict as to a single crime, but one of the alternative means for committing that crime is later held to be invalid on appeal and the record does not establish that the jury was unanimous as to the valid alternative in rendering its verdict, double jeopardy does not bar retrial on the remaining, valid alternative mean. . . .

Id. at 660.

Unlike the defendants in Ramos, Fuller was charged with separate counts in separate instructions. Unlike the defendant in Ramos, his jury was instructed it must be unanimous as to each means. And, unlike the defendants in Ramos, Fuller's jury did not "render a guilty verdict." Rather, the only verdict is a unanimous *acquittal* for assault. While jeopardy had not terminated in Ramos,

it terminated for Fuller upon that unanimous acquittal, thereby precluding any future prosecution. Ramos does not dictate the outcome in Fuller's case.

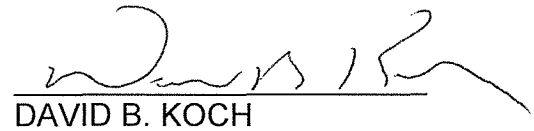
D. CONCLUSION

For the foregoing reasons, Fuller is entitled to dismissal of the charge in count 1 with prejudice.

DATED this 17th day of January, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON	)	
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Respondent,	)	
	)	
v.	)	COA NO. 45126-3-II
	)	
JOHNNY FULLER,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 17TH DAY OF JANUARY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOHNNY FULLER
4365 SALISHAN BOULEVARDE
TACOMA, WA 98404

SIGNED IN SEATTLE WASHINGTON, THIS 17TH DAY OF JANUARY 2014.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

January 17, 2014 - 2:06 PM

Transmittal Letter

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Case Name: Johnny Fuller
Court of Appeals Case Number: 45126-3

Is this a Personal Restraint Petition? Yes ■ No

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Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

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Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

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Sender Name: Patrick P Mayavsky - Email: **mayovskyp@nwattorney.net**

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