69754-4 69754-4

No. 69754-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RAVIS L. DUNN,

Appellant.

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

The Honorable Kimberley Prochnau

BRIEF OF APPELLANT

SARAH M. HROBSKY
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Constitution

Washington Constitution

United States Supreme Court Decisions

Washington Supreme Court Decision

Washington Court of Appeals Decisions

Rules and Statutes

A. ASSIGNMENTS OF ERROR

1. Mr. Dunn's conviction for both assault in the second degree by reckless infliction of substantial bodily harm or by assault with a deadly weapon and robbery in the first degree by the use or threatened use of force or fear of injury or while armed with a deadly weapon or displayed what appeared to be a deadly weapon violated the prohibition against double jeopardy, when the assault elevated the robbery to the first degree and served no independent purpose.

2. Mr. Dunn's right to a fair and impartial jury was violated when the court order the jurors to return the following day and continue deliberations, even though the jury notified the court they were deadlocked.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Fifth Amendment's prohibition against double jeopardy protects a defendant from multiple punishments for the same offense. Where an assault in the second degree elevates an attempted robbery to the first degree and serves no independent purpose, the assault merges into the robbery conviction and cannot be separately punished. When Mr. Dunn was convicted of assault in the second degree by, *inter alia*, assault with a deadly weapon, as well as of robbery in the first degree while armed with

a deadly weapon, did his assault conviction merge into the conviction for attempted robbery, requiring vacation of the assault conviction?

2. The Due Process Clause of the Fourteenth Amendment guarantees the right to trial by a fair and impartial jury, including the right to have each juror reach a verdict uninfluenced by judicial coercion. When, in response to the jury's note that it was deadlocked, the court ordered the jurors to return the following day to continue deliberations, did the court impermissibly coerce the jurors into returning a guilty verdict within twelve minutes of resuming deliberations?

C. STATEMENT OF THE CASE

In the afternoon of July 16, 2011, Shanon[1] Cassidy was shot during a robbery. Mr. Cassidy's accounts of the incident vary. In an interview with the investigating detective when he was at the hospital recovering from his injuries, Mr. Cassidy stated he arrived from Las Vegas the previous evening and he was staying at the home of Nicole Parke and Rebekah Gonzales MacMaster. Ex. 32 at 2-3. Several people, including Ravis Dunn and a young woman, later identified as Rachelle Lawson, were at the house drinking and socializing. Ex. 32 at 3-4. The following afternoon, Mr. Dunn and Ms. Lawson returned to the house and Mr. Dunn offered to sell Mr. Cassidy a Tim Tebow sports jersey. Ex. 32 at 6. Mr.

[1] In a pre-trial interview, Mr. Cassidy spelled his name "Shanon." Ex. 32 at 1-2. At trial, he spelled his name as "Shannan." 8/6/12 RP 34.

Cassidy followed Mr. Dunn and Ms. Lawson to a car parked on the street when Mr. Dunn put a black gun to Mr. Cassidy's temple, said "nigger you know what this is," told him to empty his pockets, grabbed the corner of his shirt, and tried to hit him in the head with the weapon. Ex. 32 at 7. Mr. Dunn somehow obtained Mr. Cassidy's wallet, which Mr. Cassidy described as black, and was reaching into Mr. Cassidy's front pockets where he had additional cash when Mr. Cassidy tried to grab the gun, there was a "tussle" during which Mr. Cassidy was shot in the hip. Ex. 32 at 7-8, 9. Mr. Cassidy said, "I got shot and I ran away." Ex. 32 at 12.

In a pre-trial interview with the defense team, however, Mr. Cassidy stated he first met Mr. Dunn on the afternoon of the robbery when Mr. Dunn and Ms. Lawson came over to Ms. Parke's house and Mr. Dunn offered to sell him a Mariner's sports jersey. Ex. 33 at 2-3, 4. He further stated that they walked to a parked car, Mr. Dunn pulled out a grey gun and said, "look you know that this [sic] about nigger," put the gun to Mr. Cassidy's head, grabbed his Louis Vuitton wallet from his rear pocket, and tried to grab his check book, Mr. Cassidy swatted the gun away, they "tussled," Mr. Dunn took a step back and shot Mr. Cassidy. Ex. 33 at 4.

At trial, Mr. Cassidy testified similarly to his interview with the defense team, except he described his wallet as a brown and yellow Louis Vuitton, he stated he gave the wallet to Mr. Dunn, and then Mr. Dunn

patted his rear pockets for his check book, they wrestled for the gun, Mr. Dunn took a step back and shot Mr. Cassidy in the hip. 8/6/12 RP 36, 42, 45-51, 75, 90.

Three neighbors observed the incident. James Mahoney was driving home when he noticed two men "play fighting" in front of Ms. Parke's house and he heard a "pop" that sounded like a gunshot. 8/2/12 RP 217-17, 220, 221. Devon Simonsen was at home across the street from Ms. Parke's house when he also noticed two men "slap box" each other, but the exchange did not to seem serious until he heard a gunshot. 8/6/12 RP 105, 107. Todd Novak was in his front yard across the street from Ms. Parke's house when he noticed two men "wrestling a little bit," "pushing back and forth," and then one man pulled out a gun and immediately shot the other man. 8/6/12 125-26. None of the neighbors observed either Mr. Dunn or Mr. Cassidy step back from the altercation before the gun was fired.

Mr. Dunn was charged with robbery in the first degree by use or threatened use of force, violence and fear of injury to the person, during which he displayed a handgun, in violation of RCW 9A.56.200(1)(a)(ii) and 9A.56.190; assault in the second degree with a handgun, thereby recklessly inflicting substantial bodily harm, in violation of RCW 9A.36.021(1)(a), (c); and unlawful possession of a firearm in the first

degree, having previously been convicted of a serious offense, in violation of RCW 9.41.040(1). CP 15-16. He was also charged with the aggravating circumstance of committing the robbery and the assault while armed with a firearm, in violation of RCW 9.94A.533(3). CP 15, 16. The matter was tried before a jury and involved two and one-half days of testimony. CP __ (Supp. CP 44A at 5-12, Jury Trial Clerk's Minutes).

The jury deliberated more than eight hours over two days when it sent a note to the court stating, "We have reviewed the evidence no one feels the need to review further, we are unable to reach a unanimouse [sic] verdict on any count." CP 69. The court called the jurors into the courtroom and, when asked whether they could not reach a verdict in a reasonable time, one juror disagreed. 8/8/12 RP 10. The court then informed them they must resume deliberations the following morning and that they could send a note to the court if they were deadlocked, even though they had done just that. 8/8/12 RP 11. The next morning, one of the jurors was ill. 8/9/12 RP 13-14. Rather than calling in the alternate juror, the court excused the remaining jurors until the afternoon. CP __ (Supp. CP 44A at 15, Jury Trial Clerk's Minutes). At 1:08 pm, the entire panel, including the ill juror, resumed deliberations and twelve minutes later, at 1:20 pm, they informed the bailiff they had reached a verdict. CP __ (Supp. CP at 15, Jury Trial Clerk's Minutes). The court polled the

jurors and each one responded that the verdicts represented the verdicts of the jury and his or her individual verdicts. 8/9/12 RP 15-18.

D. ARGUMENT

1. Mr. Dunn's conviction for assault in the second degree violated the prohibition against double jeopardy, when the assault merged into the attempted robbery conviction.

a. The prohibition against double jeopardy prohibits multiple punishments for the same criminal act.

The double jeopardy clauses of the Fifth Amendment to the United States Constitution and of Article I, section 9 of the Washington Constitution protect a criminal defendant from multiple punishments for the same offense. *Whalen v. United States*, 445 U.S. 684, 688-89, 100 S. Ct. 1432, 63 L.Ed.2d 715 (1980); *State v. Kier*, 164 Wn.2d 798, 803, 194 P.3d 212 (2008). The Fifth Amendment double jeopardy clause applies to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 787, 89 S. Ct. 2056, 23 L.Ed.2d 707 (1969). The state double jeopardy clause provides the same scope of protection as does the federal double jeopardy clause. *State v. Bobic*, 140 Wn.2d 250, 260, 996 P.2d 610 (2000).

Double jeopardy jurisprudence recognizes "[w]ithin constitutional constraints, the legislative branch has the power to define criminal

conduct and assign punishment." *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). However, even though the State may charge multiple offenses arising from the same criminal incident, double jeopardy prohibits a court from entering multiple convictions and punishments for the same offense. *Ball v. United States*, 470 U.S. 856, 860, 105 S. Ct. 1668, 84 L.Ed.2d 740 (1985); *Albernaz v. United States*, 450 U.S. 333, 344, 101 S. Ct. 1137, 67 L.Ed.2d 275 (1981); *State v. Michielli*, 132 Wn.2d 229, 238-39, 937 P.2d 789 (1997). A reviewing court is to determine what punishments the Legislature has authorized and whether those punishments exceed the Legislature's authority by imposing multiple punishments for the same offense. *State v. Vladovic*, 99 Wn.2d 413, 422-23, 622 P.2d 853 (1983); *accord State v. Louis*, 155 Wn.2d 563, 569, 120 P.3d 936 (2005) (a reviewing court is to determine whether the Legislature intended multiple punishments for conduct that violates multiple criminal statutes).

Washington courts have developed a three-part test to determine whether the charged crimes constitute the same offense. *Kier*, 164 Wn.2d at 804. First, the court analyzes the relevant statutes for any express of implicit expression of legislative intent. *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005). Second, if it is not clear whether multiple punishments are authorized by statute, courts utilize the "*Blockburger*

test" or "same elements" test to determine whether multiple convictions violate double jeopardy, that is, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932); *accord United States v. Dixon*, 509 U.S. 688, 697, 113 S. Ct. 2849, 125 L.Ed.2d 556 (1993); *State v. Gocken*, 127 Wn.2d 95, 101-02, 896 P.2d 1267 (1995).

Third, legislative intent may be clarified by the "merger doctrine," where, if the degree of one offense is elevated by conduct separately criminalized, courts presume the Legislature intended to punish only the elevated offense. *Freeman*, 153 Wn.2d at 772-73. Merger is "a doctrine of statutory interpretation used to determine whether the Legislature intended to impose multiple punishments for a single act which violates several statutory provisions." *Vladovic*, 99 Wn.2d. at 419 n.2. Offenses merge when proof of one offense is necessary to prove an element or a degree of another offense, and if one offense does not involve an injury that is separate and distinct from the other. *Id.* at 419-21. The doctrine applies:

> where the Legislature has clearly indicated that in order to prove a particular degree of crime (e.g., first degree rape) the State must prove not only that a defendant committed that crime (e.g., rape) but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes (e.g., assault or kidnapping).

Id. at 421.

A double jeopardy challenge is reviewed *de novo*. *Bobic*, 140 Wn.2d at 257; *Freeman*, 153 Wn.2d at 770. When there is doubt as to the legislative intent for multiple punishments, the rule of lenity requires the interpretation most favorable to the defendant. *Whalen*, 445 U.S. at 694; *Bell v. United States*, 349 U.S. 81, 84, 75 S.Ct. 620, 99 L.Ed.2d 905 (1955).

b. As charged and proven, Mr. Dunn's 's conviction for assault in the second degree merged into his conviction for robbery in the first degree, because the assault did not have an independent purpose or intent.

Whether assault in the second degree merges with robbery in the first degree is determined on a case-by-case basis. *Freeman*, 153 Wn.2d at 780. However, the *Freeman* Court concluded there was "no evidence that the legislature intended to punish second degree assault separately from first degree robbery when the assault facilitates the robbery," and "these two crimes will merge unless they have an independent purpose or effect." *Id.* at 776, 780; *accord State v. Chesnokov*, No. 67924-4-I, 2013

WL 4321905, *2-3 (Wash.App.Div. I July 8, 2013). Thus, in the *Freeman* companion case of Mr. Zumalt, the Court found Mr. Zumalt's convictions for both first degree robbery and second degree assault violated double jeopardy where Mr. Zumalt and his accomplices offered to sell drugs to a women and met her in a parking lot to conduct the transaction, where Mr. Zumalt punched the woman in the face, knocked her to the ground causing serious injuries, then robbed her of cash and casino chips. *Id.* at 770. The Court concluded that the assault and robbery of the women did not have an independent purpose or effect, even though the force used was excessive in relation to the crime charged. *Id.* at 779; *see also In re Personal Restraint of Francis*, 170 Wn.2d 517, 523-25, 242 P.3d 866 (2010) (conviction for second degree assault merged into conviction for attempted robbery in the first degree where State charged defendant with assault with a deadly weapon and the assault elevated the attempted robbery to the first degree); *State v. S.S.Y.*, 170 Wn.2d 322, 329-30, 241 P.3d 781 (2010) ("Washington courts have found legislative intent to impose only one punishment when first degree robbery and second degree assault are charged because the greater offense typically carries a penalty that incorporates punishment for the lesser includes offense." (Internal quotations omitted)); *State v. Lindsay*, 171 Wn. App. 808, 288 P.3d 641 (2012) (convictions for second degree kidnapping and second degree

assault merged into conviction for first degree robbery where the kidnapping was incidental to the robbery and the assault was committed with intent to commit robbery).

Here, the jury was instructed that robbery in the first degree involves the use of force to obtain property or to overcome resistance while armed with a deadly weapon. The instructions provided in relevant part:

> A person commits robbery when he or she unlawfully and with intent to commit theft thereof takes personal property from the person of another against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person. The force or fear must be used to obtain possession of the property or to prevent or overcome resistance to the taking, in either of which cases the degree of force is immaterial.

CP 38 (Instruction No. 7).

> A person commits the crime of robbery in the first degree when in the commission of a robbery he or she is armed with a deadly weapon or displays what appears to be a firearm or other deadly weapon.

CP 39 (Instruction No. 8).

> To convict the defendant of the crime of robbery in the first degree, ... each of the following six elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about the 16th of July 2011, the defendant unlawfully took personal property from the person of another;
> (2) That the defendant intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person;
(4) That force or fear of force was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
(5) (a) That in the commission of these acts the defendant was armed with a deadly weapon or (b) That in the commission of these acts the defendant displayed what appeared to be a firearm or other deadly weapon or [sic]; and
(6) That any of these acts occurred in the State of Washington.

CP 36 (Instruction No. 6).

The jury was instructed that assault in the second degree involves the use of force and either the infliction of substantial bodily harm or a harmful or offensive touching with a deadly weapon. The instructions provided in relevant part:

> An assault is an intentional touching or striking or shooting of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking or shooting is offensive if the touching or striking or shooting would offend an ordinary person who is not unduly sensitive.

CP 49 (Instruction No. 17)

> A person commits the crime of assault in the second degree when he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm or assaults another with a deadly weapon.

CP 50 (Instruction No. 18).

> 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 the 16th of July 2011, the defendant:
> (a) intentionally assaulted Shanon Cassidy and thereby recklessly inflicted substantial bodily harm; or
> (b) assaulted Shanon Cassidy with a deadly weapon; ....

CP 47 (Instruction No. 16).

The evidence at trial established that the assault on Mr. Cassidy had no purpose other than to further the robbery. According to Mr. Cassidy, Mr. Dunn displayed the gun to induce him to give Mr. Dunn his wallet. 8/6/12 RP 45, 46. Then, while still displaying the weapon, Mr. Dunn reached for Mr. Cassidy's back pocket to take his check book, Mr. Cassidy resisted, and Mr. Dunn fired his gun, either while they were wrestling for the gun or immediately when they separated. 8/6/12 RP 48-51; Ex. 32 at 7-8, 9; Ex. 33 at 4. This was corroborated by the three neighbors, all of whom testified the weapon fired during the struggle for the gun. The assaultive conduct occurred in the midst of the robbery and had no purpose other than to induce Mr. Cassidy to relinquish his property and to overcome his resistance. As such, the assault merged into the attempted robbery.

The present case is similar to *State v. Kier*, in which Mr. Kier and an accomplice stopped a car, the accomplice grabbed the driver as he got

out of the car, Mr. Kier pointed a gun at the passenger and told him to get out of the car, and they stole the car. 164 Wn.2d at 801. Mr. Kier was convicted of robbery in the first degree and assault in the second degree. On appeal, the Court reversed the assault conviction on the grounds the assault merged into the robbery, and stated, "The merger doctrine is triggered when second degree assault with a deadly weapon elevates robbery to the first degree because being armed with or displaying a firearm or deadly weapon to take property through force or fear is essential to the elevation." *Id.* at 806.

Here, the State clearly intended to circumvent the merger doctrine by dividing the incident into multiple discrete episodes. In closing argument, the prosecutor stated:

> When a deadly weapon is used to shoot someone, that is an assault, and this is separate from the robbery because in the robbery Mr. Dunn, or whoever they're claiming could be the other person, puts the gun up to Mr. Cassidy's head, takes the items from him. Now, the robbery is complete. Now they start fighting over the gun. Mr. Cassidy's trying to protect himself. He indicates he's stepping back and trying to get away from Mr. Dunn. Mr. Dunn is moving towards the car. He takes the gun and he fires it right through the hip. It's a separate act, an assault.

8/7/12 RP 22-23.

This argument was in error. First, the prosecutor misstated the evidence regarding the sequence of events. According to Mr. Cassidy, he

started fighting for the gun when Mr. Dunn tried to take his check book from his pocket. Depending on which of Mr. Cassidy's versions the jury believed, he was shot either during the struggle for the gun or immediately after Mr. Dunn took a step backwards. Under either scenario, the assault occurred as Mr. Cassidy was resisting the on-going robbery.

Second, this argument is contrary to the prohibition against double jeopardy. "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." *Brown v. Ohio*, 432 U.S. 161, 169, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), *quoted with approval in State v. Adel*, 136 Wn.2d 629, 635, 965 P.2d 1072 (1998). The fact that an incident can be parsed into distinct acts and separately described does not make the acts separate and distinct for purposes of the prohibition against double jeopardy. *State v. Potter*, 31 Wn. App. 883, 886, 645 P.2d 60 (1982).

The trial court ruled the offenses did not merge because robbery in the first degree and assault in the second degree have different elements.

> There is no merger. Robbery and second degree assault convictions did not merge, because the legislature has not clearly indicated that to prove robbery in the first degree the State must prove assault in the second degree. Further, the offenses of robbery and assault in the second degree are not the same in law, because they have different elements. Lastly the offenses are not the same. In fact, the assault

> involved facts unnecessary to prove the robbery and vice versa.
>
> To prove second degree assault the State must prove an assault with either a deadly weapon or that recklessly causes substantial bodily harm. Intent to commit an assault is an applied [sic] element of assault. By contrast, to prove robbery in the first degree, the State must prove that Defendant took possession of the victim by force and is either armed with a deadly weapon or displays what appears to be a deadly weapon or inflicts bodily injury.
>
> Unlike assault, robbery does not require that the reasonably – that the victim reasonably perceived that the firearm was about to be used, rather that the item only needs to be displayed or be within the Defendant's possession. Further, the element of taking is not required for an assault, but is necessary for robbery.

10/19/12 RP 28-29.

This analysis erroneously conflates the *Blockburger* test with the merger doctrine. The merger doctrine does not compare the elements of the offenses, unlike the *Blockburger* test, but, rather, looks at whether the degree of punishment for one crime is elevated by conduct that is separately criminalized. *See Freeman*, 153 Wn.2d at 772-73.

c. The proper remedy is to vacate the conviction for assault in the second degree and remand for resentencing.

Where two convictions merge for purposes of double jeopardy, the proper remedy is to vacate the lesser offense. *State v. Womac*, 160 Wn.2d 643, 660, 160 P.3d 40 (2007); *State v. Hughes*, 166 Wn.2d 675, 686, 212 P.3d 558 (2009); *Chesnokov*, 2013 WL 3421905, *2. The lesser offense is

determined primarily by which offense carries the shorter sentence, as well as the seriousness level and the degree of the offense. *Hughes*, 166 Wn.2d at 686 n.13.

Assault in the second degree is a lesser offense than robbery in the first degree because it carries a shorter sentence and has a lower seriousness level. Assault in the second degree is a Class B offense, with a seriousness level of IV. RCW 9.94A.515, 9A.36.021(2)(a). Robbery in the first degree is a Class A offense with a seriousness level of IX. RCW 9.94A.515, 9A.56.200(b). Therefore, Mr. Dunn's conviction for the lesser offense of assault in the second degree merged into his conviction for robbery in the first degree.

At sentencing, the court found the assault and the robbery constituted the same criminal conduct for purposes of calculation of Mr. Dunn's offender score. CP 84. However, the double jeopardy merger doctrine is distinguishable from "same criminal conduct." Multiple offenses deemed to constitute the "same criminal conduct" are counted as a single current offense for purpose of calculation of an offender score, but the convictions remain intact. RCW 9.94A.589(1)(a).[2] By contrast, where

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[2] RCW 9.94A.589(1)(a) provides in relevant part:

> If the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.

multiple convictions merge into the greater offense, the lesser conviction is vacated. *Womac*, 160 Wn.2d at 660. Because Mr. Dunn's conviction for assault in the second degree merged into the robbery, his conviction for assault in the second degree must be reversed and vacated.

2. The trial court violated Mr. Dunn's right to due process and CrR 6.15 when it required the jury to reconvene the following day, even though the jury declared it was deadlocked.

The federal and state constitutions guarantee a criminal defendant the right to a fair trial before an impartial jury. U.S. Const. Amend. VI, XIV; Const. art. I, sec. 3, 22. The Washington Constitution also requires a jury verdict be based on unanimity that every element was proven beyond a reasonable doubt. Const. art. I, sec. 21, 22; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). The right to a jury trial includes the right to have each juror reach his or her own verdict "uninfluenced by factors outside the evidence, the court's proper instructions, and the arguments of counsel." *State v. Goldberg*, 149 Wn.2d 888, 892, 72 P.3d 1083 (2003) (citing *State v. Boogaard*, 90 Wn.2d 733, 736, 585 P.2d 789 (1978)).

When a jury is deadlocked on a general verdict, the trial court has authority, within limits, to require the jury to continue deliberations. CrR 6.16(a)(3). However, the right to a fair and impartial jury trial demands

that the judge not bring coercive pressure to bear upon the deliberations of a criminal jury. CrR 6.15(f)(2) provides: "After jury deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate." The purpose of the rule is to prevent judicial intervention into the deliberative process and to ensure that the court does not instruct the jury in such a way as to suggest the need for agreement after deliberations have begun. *State v. Watkins*, 99 Wn.2d 166, 175, 660 P.2d 1117 (1983); *Boogaard*, 90 Wn.2d at 736, 738.

When a jury declares it is unable to reach a verdict, the judge may consider the complexity of the case and the length of deliberations relative to the length of the trial, make limited inquires of the jury that do not amount to impermissible coercion, and then determine whether to discharge the jury or order them to resume their deliberations. *State v. Jones*, 97 Wn.2d 159, 165, 641 P.2d 708 (1982); *State v. Barnes*, 85 Wn. App. 638, 656, 932 P.2d 669 (1997). This requires careful weighing by the judge.

> On the one hand, if [the trial judge] discharges the jury when further deliberations may produce a fair verdict, the defendant is deprived of his "valued right to have his trial completed by a particular tribunal." But if he fails to discharge a jury which is unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures

> inherent in the situation rather than the considered judgment of all the jurors.

Jones, 97 Wn.2d at 163-64 (quoting *Arizona v. Washington*, 434 U.S. 497, 509, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978)).

Here, the jury has deliberated more than eight hours over a two-day period of time before informing the court that it was unable to reach a verdict. CP __ (Supp. CP 44A at 13-15, Jury Trial Clerk's Minutes); CP 69. When the court received the note, it discussed its options with the prosecutor and defense counsel, and concluded that the deliberations were not lengthy given the number of witnesses, the number of counts, and the six verdict forms. 8/8/12 RP 8-9. However, Mr. Dunn was charged with only three offenses and the testimony spanned only two and one-half days. Moreover, as defense counsel noted, regardless of the number of charges, the jury was presented with only one real issue, that is, whether Mr. Dunn was the person responsible for the offenses, which were admittedly committed by a single person. 8/8/12 RP 8.

Then the judge called the jurors into open court and conducted the following inquiry:

> THE COURT: Members of the jury, you've been called back into the courtroom to discuss the reasonable probability of reaching a unanimous verdict. But please, a word of caution. Because you've already started your deliberations, it is important that you not make any remark that may adversely affect the rights of either party or that

may disclose opinions of members of the jury. So, I will have a question for you, but in answering that questions please do not suggest or comment or in any way, point out any particular member of the jury or members of the jury in answering that question.

I'm going to ask the presiding juror, Mr. Baker, please to stand up, and I'll ask you a question, sir.

A VOICE: Yes.

THE COURT: Mr. Presiding Juror, you're directed to answer either yes or no, and not to say anything else. Please do not disclose any other information or indicate the status of your deliberations.

Is there a reasonable probability of the jury reaching a unanimous verdict in a reasonable time.

A VOICE: No.

THE COURT: Thank you, please be seated.

Is there any member of the jury that disagrees with that statement. If so, please raise your hand. All right so you disagree, ma'am? Okay. Then we will go ahead and recess.

I believe one of the jurors wanted to recess early, or there was an agreement to recess early today for an appointment of some sort. And we'll go ahead and recess today for the afternoon, and then have the jurors come back tomorrow to begin your deliberations. If at some point you believe you're not able to continue deliberations, then you can send out – use one of those forms again, we'll have you come out and we'll discuss it further, okay? All right.

So we'll see you tomorrow morning. Thank you.

8/8/RP 9-11.

The following morning, however, one of the jurors was ill.[3] 8/9/12 RP 13-14; CP __ (Supp. CP 44A at 15, Jury Trial Clerk's Minutes). Yet, rather than call on the alternate juror, the court again dismissed the jury until the afternoon, at which time the ill juror apparently recovered

[3] The record does not indicate the nature of the juror's illness or whether the parties discussed replacing the ill juror with the alternate juror.

sufficiently to participate in deliberations. CP __ (Supp. CP 44A at 15, Jury Trial Clerk's Minutes). The jury resumed deliberations at 1:08 and reached a verdict at 1:20, only twelve minute later. 8/9/12 RP 14; CP __ (Supp. CP 44A at 15, Jury Trial Clerk's Minutes). The jury was polled and each juror indicated the verdict represented the verdict of the jury and his or her individual verdict. 8/9/12 RP 15-18.

Under these circumstances, the court's conduct was inherently coercive. First, the jury deliberated a significant amount of time, more than eight hours over two days, relative to the length of the trial, two and one-half days of testimony. Second, without any explanation, the court told the jury that it could inform the court if it was deadlocked. But that is exactly what the jury did, to no avail. Third, rather than call on the alternate juror, the court waited for the ill juror to recover sufficiently to continue deliberations. This procedure unquestionably pressured both the healthy jurors and the ill juror to reach a verdict as soon as possible to avoid additional recesses and additional fruitless time at the courthouse.

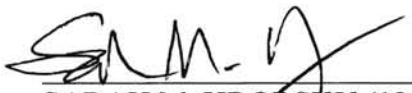
On this record, this Court should conclude that by ordering the jury to continue deliberations without respecting the jury's conclusion that it was deadlocked, and by continuing deliberations until the ill juror recovered, the court improperly coerced a verdict. This matter should be remanded for a new trial. *See Boogaard*, 90 Wn.2d at 738.

E. CONCLUSION

Mr. Dunn's conviction for assault in the second degree merged into his conviction for robbery in the first degree. The trial court improperly coerced a deadlocked jury to continue deliberations and reach a verdict. For the foregoing reasons, Mr. Dunn respectfully requests this Court to vacate his conviction for assault in the second degree and reverse his conviction for robbery in the first degree.

DATED this 17th day of September 2013.

Respectfully submitted,



SARAH M. HROBSKY (12352)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 69754-4-I
v.	)	
	)	
RAVIS DUNN,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF SEPTEMBER, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] RAVIS DUNN 781378 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF SEPTEMBER, 2013.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710