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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

2. Mr. Dunn's conviction for assault in the second degree merged into his conviction for robbery in the first degree.

Mr. Dunn's conviction for assault in the second degree by unlawful use of force and infliction of bodily injury or use of deadly weapon must merge into his conviction for robbery in the first degree[1] by use of force and while armed with a firearm, to avoid violation of the Double Jeopardy Clause of the federal and state constitutions. U.S. Const. amend. V, XIV; Const. art. I, § 9. Assault in the second degree merges into robbery in the first degree where the assault has no independent purpose or effect other than to facilitate the robbery. *State v. Freeman*, 153 Wn.2d 765, 776, 780, 108 P.3d 753 (2005); *accord State v. Chesnokov*, 175 Wn. App. 345, 350, 305 P.3d 1103 (2013) ("[T]he [Washington] Supreme Court has repeatedly determined that second degree assault merges into first degree robbery when there is no independent purpose for each crime.").

The trial court erroneously conflated the *Blockburger*[2] test with the merger doctrine. 10/19/12 RP 28-29. The merger doctrine does not

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[1] Mr. Dunn was convicted of robbery in the first degree, not attempted robbery. The Brief of Appellant made several erroneous references to attempted robbery. Counsel regrets the error and any resulting confusion.

[2] *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932).

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 and which serves no independent purpose other than to further the one crime. *See Freeman*, 153 Wn.2d at 772-73.

Here, 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 his wallet to Mr. Dunn. 8/6/12 RP 45, 46. While still displaying the weapon, Mr. Dunn then reached for Mr. Cassidy's rear pocket to take his check book. 8/6/12 RP 8-49. 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 State argues the jury could convict Mr. Dunn of robbery in the first degree only if it found he was armed with or displayed a deadly weapon in the course of the robbery. Br. of Resp. at 10. This argument

ignores other elements of the crime of robbery, specifically, the use of force or the fear of injury to "obtain possession of the property or to prevent or overcome resistance to the taking." CP 38 (Instruction No. 7). As Mr. Cassidy testified, and as corroborated by neighbors, the shooting occurred when Mr. Dunn attempted to take Mr. Cassidy's checkbook from his rear pocket and Mr. Cassidy tried to wrestle the gun away from Mr. Dunn to prevent the taking.

The State further argues the robbery was complete when Mr. Dunn displayed the gun and took Mr. Cassidy's wallet. Br. of Resp. at 12. This argument is contrary to Mr. Cassidy's testimony that the robbery was on-going after Mr. Dunn took his wallet, when Mr. Dunn then tried to take his checkbook. The unit of prosecution for robbery is each taking of personal property from a person, regardless of the number of items taken. *State v. Tvedt*, 153 Wn.2d 705, 707, 107 P.3d 728 (2005). "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 State also argues the definitional instruction for assault "limited the jury's consideration of assault to the act of Dunn's shooting of

Cassidy." Br. of Resp. at 11. This is incorrect. The definitional instruction of assault refers to "unlawful force," just as the definitional instruction of robbery refers to "the use or threatened use of immediate force, violence, or fear."

The present case involves assault in the second degree and a completed robbery, whereas *State v. Esparza*, 135 Wn. App. 54, 143 P.3d 612 (2006), involved assault in the second degree and attempted robbery in the first degree. The State's reliance on *Esparza* is accordingly misplaced. Br. of Resp. at 13-14.

Here, because the assault had no independent purpose, but simply furthered the robbery, Mr. Dunn's conviction for assault in the second degree must merge into his conviction for robbery in the first degree.

2. The trial court coerced a verdict when it ordered the deadlocked jury to continue deliberations.

The constitutional 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. *State v. Goldberg*, 149 Wn.2d 888, 892, 72 P.3d 1083 (2003); *State v. Boogaard*, 90 Wn.2d 733, 736, 585 P.2d 789 (1978); U.S. Const. amend. VI, XIV; Const. art. I, §§ 3, 21, 22. Thus, although a court has limited authority to require a deadlocked jury to continue deliberations, the court may 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 continue deliberations. CrR 6.15(f)(2), 6.16(a)(3).

The court's conduct here 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. Supp. CP __ (Sub no. 44A at 13-15, Jury Trial Clerk's Minutes); CP 69. Second, without any explanation, the court told the jury that it could inform the court if it was deadlocked. 8/8/12 RP 11. 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. Supp. CP __ (Sub no. 44A at 15, Jury Trial Clerk's Minutes). The jury reached a only twelve minutes after it resumed deliberations. 8/9/12 RP 14; Supp. CP __ (Sub no. 44A at 15, Jury Trial Clerk's Minutes).

The State alleges the jury deliberated either for only "one day" or "about one court day." Br. of Resp. at 15, 20. This is unsupported by the record. As discussed, the record establishes that the jury deliberated for more than eight hours over a two day period. Supp. CP __ (Sub no. 44A at 13-15, Jury Trial Clerk's Minutes); CP 69.

The State argues the trial court did not violate CrR 6.15(f)(2) because its questions to the jury were neutral. Br. of Resp. at 19-20. This argument ignores the court's actions after questioning the jury, when it ordered the jury to continue deliberations and to inform the court if it was deadlocked, even though the jury had done that precisely. By ordering the jury to continue deliberations, the court clearly suggested the need for agreement.

The State argues the court waited for the ill juror "immediately" after being informed of the deadlock. Br. of Resp. at 23. This, too, is unsupported by the record. The jury informed the court of the deadlock on August 7, 2012 at 1:33 p.m. 8/9/12 RP 14; Supp. CP __ (Sub no. 44A at 14, Jury Trial Clerk's Minutes). The jury was then dismissed for the day and ordered to return two days later, at 9:00 a.m. on August 9, 2012. Supp. CP __ (Sub no. 44A at 14, Jury trial Clerk's Minutes). ON August 9, 2012, the bailiff informed the court that one juror was ill and the court dismissed the remaining jurors until the afternoon. 8/9/12 RP 14; Supp. CP __ (Sub no. 44A at 15, Jury Trial Clerk's Minutes). That afternoon, the entire panel reconvened and returned a verdict within 12 minutes. 8/9/12 RP 14; Supp. CP __ (Sub no. 44A at 15, Jury Trial Clerk's Minutes).

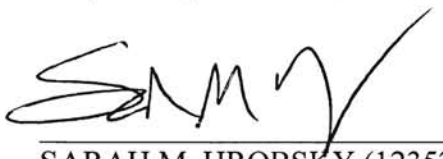
By ordering the jury to continue deliberations and by continuing deliberations until the ill juror recovered, the trial court improperly and inherently coerced a verdict.

B. CONCLUSION

For the foregoing reasons, and the reasons set forth in the Brief of Appellant, Mr. Dunn respectfully requests this Court reverse his convictions for assault in the second degree and robbery in the first degree.

DATED this 6th day of January 2014.

Respectfully submitted,



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Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF JANUARY, 2014, I CAUSED THE ORIGINAL **REPLY 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] ERIN BECKER, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 6TH DAY OF JANUARY, 2014.

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