69754-4

69754-4

NO. 69754-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RAVIS L. DUNN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE KIMBERLEY PROCHNAU

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ERIN H. BECKER
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Washington State:

Constitutional Provisions

Federal:

Washington State:

Statutes

Washington State:

Rules and Regulations

Washington State:

A. ISSUES PRESENTED

1. Two offenses merge for purposes of double jeopardy when proof of one is necessary to the proof of the other and elevates its degree. Here, Dunn was charged with Robbery in the First Degree, predicated on his being armed with or displaying what appeared to be a deadly weapon during the course of a robbery. The State proved that Dunn committed the crime by showing a gun to Cassidy and taking his wallet. Dunn was also charged with Assault in the Second Degree, predicated solely on his shooting Cassidy after he had obtained the wallet. The assault, as charged and proved, was unnecessary to elevate the robbery to first degree robbery. Additionally, the robbery was completed before Dunn shot the victim. Did the trial court correctly decline to merge the two convictions?

2. A trial court may not improperly influence a jury to return a unanimous verdict. Here, when the presiding juror indicated that the jury was deadlocked after deliberating for about one day, the court inquired as to whether there was a reasonable probability of the jury reaching a unanimous verdict within a reasonable amount of time. One juror indicated that there was. Had the court declared a mistrial in the absence of an actual deadlock, double jeopardy would have precluded the State from retrying Dunn. The court thus had the jury continue its deliberations, and it reached a verdict a short time later. Has Dunn failed to show a

substantial possibility that the jury's verdicts were improperly influenced by the court's actions?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On February 22, 2012, the State of Washington charged the defendant, Ravis L. Dunn, with Robbery in the First Degree, Assault in the Second Degree, and Unlawful Possession of a Firearm in the First Degree. CP 1-3. The robbery and assault charges also alleged that Dunn committed the offenses while armed with a firearm. CP 1-2. Rachelle Lawson, a codefendant, was charged with Rendering Criminal Assistance in the First Degree. CP 1-2. Lawson entered a plea of guilty to a reduced charge and agreed to testify against Dunn. 3RP 313, 339-40.[1] The Information was then amended in order to eliminate Lawson's charge from Dunn's charging instrument. CP 15-16; 1RP 3-4.

The matter proceeded to a jury trial before the Honorable Kimberley Prochnau. 1RP. After deliberating for about one court day, the jury sent a note to the court that it was "unable to reach a unanimous verdict on any count." CP 69; 6RP 7. After conferring with counsel, the trial court brought the jury into the courtroom and asked the presiding

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[1] The seven-volume Verbatim Report of Proceedings is referred to herein as follows: 1RP is July 31, 2012; 2RP is August 1, 2012; 3RP is August 2, 2012; 4RP is August 6, 2012; 5RP is August 7, 2012; 6RP is August 8 and 9, October 19, and November 27, 2012; and 7RP is September 14, 2012.

juror, "Is there a reasonable probability of the jury reaching a unanimous verdict within a reasonable time[?]" 6RP 10. The presiding juror responded, "No." 6RP 10. The court then asked, "Is there any member of the jury that disagrees with that statement?" 6RP 10. One of the jurors raised her hand. 6RP 10. The court then released the jurors for the day, instructing them to return the next day to continue deliberations. 6RP 11. The court also instructed the jury that, if they again came to believe that they were unable to continue deliberations, they should advise the court. 6RP 11.

The jury ultimately returned verdicts of guilty as charged on all counts, and concluded that Dunn was armed with a firearm during the commission of the robbery and the assault. CP 63-67. At sentencing, Dunn asked the court to conclude that the convictions for Robbery in the First Degree and Assault in the Second Degree merged, and to vacate the conviction for Assault in the Second Degree. CP 111-12; 6RP 23-27; 7RP 7-12. The trial court denied Dunn's motion, but did find that the two offenses constituted the same criminal conduct for purposes of RCW 9.94A.589(1)(a). 6RP 27-33. The court then imposed a standard range sentence, consistent with those rulings. CP 119-27. This appeal timely followed. CP 138.

2. SUBSTANTIVE FACTS

On July 15, 2011, Rachelle "Diamond" Lawson had just had an argument with her boyfriend. 3RP 287, 289-91, 297-98. She was consoling herself alone at a bar when she ran into Dunn, whom she had known for a number of years. 3RP 288-90, 293. Because she did not want to go home to her boyfriend, she left the bar with Dunn in a Ford Bronco. 3RP 291-94.

Dunn took Lawson to a home in West Seattle where some of his friends were. 3RP 294-96. Rebekah Gonzales (now Rebekah MacMaster) and Nicole Parke lived at the West Seattle home. 2RP 163-64; 3RP 233-35; 4RP 4-6. When Lawson and Dunn arrived at the home in the early morning hours of July 16, 2011, Gonzales and Parke were there, along with friends Kim Wilbur and Shannan Cassidy. 2RP 162-64, 168; 3RP 236-41; 4RP 9-13. After talking and drinking for some period of time, Lawson and Dunn left around 4:00 a.m. 2RP 168-70.

Later that morning, Wilbur, Cassidy, Parke, and Gonzales were discussing going to a Mariners game when Dunn and Lawson returned to the house. 2RP 171; 3RP 235-36, 241-42; 4RP 14-16, 41-42. At some point—possibly the night before—Cassidy and Dunn discussed sports jerseys. 2RP 172-73; 3RP 246; 4RP 45. Dunn left the house, leaving Lawson behind. 2RP 171. About thirty minutes later, Lawson received a

call on her cell phone, said that Dunn was back to pick her up, and left the house. 2RP 171; 3RP 199-200. Gonzales then saw Lawson and Dunn together outside the house standing at the Bronco. 3RP 244-45, 265.

A short time later, Lawson came back to the front door. 2RP 171-74; 3RP 192, 267. She told Cassidy that she had sports jerseys in her truck, and that he should come take a look. 2RP 174; 3RP 192, 246, 267, 302-03. Lawson later explained to the jury that she had sports jerseys in the Bronco because she had given them to her boyfriend as gifts and had taken them with her when she left after their argument. 3RP 291, 303. Lawson also testified that a third person was now with them at the Bronco, a man named Quayvis.[2] 3RP 299-303.

Cassidy left the house to look at the jerseys. 2RP 175; 3RP 247, 267; 4RP 45. Outside, Dunn pulled out a pistol and put the gun to Cassidy's head, saying, "You know what this is, nigga." 4RP 45-47. Cassidy thought he was being robbed. 4RP 46-47. He gave Dunn his wallet. 4RP 47, 77. Dunn then started to check Cassidy's pockets. 4RP 48. Cassidy pushed the gun away and started tussling with Dunn.

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[2] Passersby corroborated Lawson's testimony that another man was present but apparently uninvolved with the robbery; they all testified that he was farther down the street, apparently urinating. 3RP 218-20, 225-26; 4RP 102-05, 113-15. None of the occupants of the house, including Cassidy, ever saw Quayvis. 3RP 200-01, 265-66; 4RP 52.

4RP 49-50. Dunn took a step back and shot Cassidy in the hip. 4RP 50-52.

Wilbur was still inside the house when she heard a "pop." 2RP 175. Gonzales heard what she thought was a firecracker. 3RP 251. Parke heard a gunshot. 4RP 15-18. They all heard Cassidy yelling that he had been shot, and saying something like "your friend shot me." 2RP 175; 3RP 251-53; 4RP 18. He was stumbling and bleeding, and had a bullet hole in his hip. 2RP 175-76; 3RP 253; 4RP 18-19, 53.

After he shot Cassidy, Dunn got into the front passenger side of the Bronco, Lawson got in the driver's seat, and Quayvis got into the back seat. 3RP 307. Lawson drove away. 3RP 307.

Dunn had a prior conviction for a serious offense, and his right to possess a firearm had been revoked. 4RP 133.

C. ARGUMENT

1. DUNN'S TWO CONVICTIONS AND PUNISHMENTS FOR ROBBERY IN THE FIRST DEGREE AND ASSAULT IN THE SECOND DEGREE DO NOT VIOLATE DOUBLE JEOPARDY.

Dunn claims that his convictions for Robbery in the First Degree and Assault in the Second Degree violate double jeopardy. But two offenses do not merge unless the legislature has clearly indicated that in order for the State to prove a higher degree of one crime, it must prove

that that crime was accompanied by another crime. Although in some situations the crime of robbery may be elevated to the first degree by proof of an accompanying assault, in the present case the Robbery in the First Degree was predicated on Dunn being armed with or displaying what appeared to be a deadly weapon. The assault, as charged here, was not required to elevate the robbery. Moreover, the jury could only conclude that Dunn committed Assault in the Second Degree if it found that he shot Cassidy—an act that was not necessary to prove the first-degree robbery. Dunn's two convictions for robbery and assault do not merge.

Both the federal and state constitutions provide a defendant with protection against double jeopardy. U.S. CONST. amend V ("No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb."); WASH. CONST. art. I, § 9 (same). The clauses provide three protections: against a second prosecution for the same offense after an acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense. Albernaz v. United States, 450 U.S. 333, 340-42, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981). Multiple convictions whose sentences are served concurrently may still violate double jeopardy. State v. Calle, 125 Wn.2d 769, 775, 888 P.2d 155 (1995).

Within these constitutional constraints, the legislature has broad power to define crimes and assign punishments. Id. at 776. Where a single act supports conviction under multiple statutes, multiple punishments may be permitted unless, in light of legislative intent, the crimes are the same offense. State v. Kier, 164 Wn.2d 798, 803-04, 194 P.3d 212 (2008). In other words, the question of whether conviction and punishment for multiple crimes arising out of the same conduct violates double jeopardy turns on how the legislature intended to punish the conduct. State v. Louis, 155 Wn.2d 563, 568-69, 120 P.3d 936 (2005); State v. Freeman, 153 Wn.2d 765, 768, 108 P.3d 753 (2005); Calle, 125 Wn.2d at 776. This Court's review of legislative intent is de novo. Freeman, 153 Wn.2d at 770; Kier, 164 Wn.2d at 804.

In determining whether multiple punishments were authorized by the legislature, this Court must use the three-part test articulated by the Supreme Court in Calle. First, this Court looks to the language of the statutes themselves to see if the legislature implicitly or explicitly authorized or prohibited cumulative punishments. Calle, 125 Wn.2d at 776-77; Kier, 164 Wn.2d at 804. Here, the statutes themselves do not address whether separate punishments may be imposed. Compare RCW 9A.56.200 (Robbery in the First Degree) with RCW 9A.36.021 (Assault in the Second Degree); see also Freeman, 153 Wn.2d at 774-76 (holding that

there is no evidence that the legislature intended to punish second degree assault separately from first degree robbery).

Second, when legislative intent is not clear from the statutes, this Court turns to the Blockburger[3] or "same evidence" test. Calle, 125 Wn.2d at 777-78; Freeman, 153 Wn.2d at 776-77. Under that test, if there is an element of each offense that is not included in the other, and proof of one offense would not always prove the other, the two offenses are not the same for constitutional double jeopardy purposes. Calle, 125 Wn.2d at 777-78; Freeman, 153 Wn.2d at 772, 776-77; State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983). Robbery in the First Degree requires proof of an unlawful taking, which Assault in the Second Degree does not. Likewise, Assault in the Second Degree requires an intentional assault, which Robbery in the First Degree does not. Compare RCW 9A.56.190 & .200 with RCW 9A.36.021. Thus, Robbery in the First Degree and Assault in the Second Degree are not the same offense under this analysis, and Dunn does not argue otherwise.

This result of the same evidence or Blockburger test creates a strong presumption that the legislature intended that the crimes should be punished separately, which can be overcome only by clear evidence of contrary legislative intent. Louis, 155 Wn.2d at 570. Nonetheless, the

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

third part of the Calle test requires this Court to apply the merger doctrine as a tool of statutory construction to determine whether the legislature intended to impose multiple punishments. Id.; Freeman, 153 Wn.2d at 772-73. That doctrine "only 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)." Vladovic, 99 Wn.2d at 421 (emphasis added). Washington courts have held in certain situations that Robbery in the First Degree and Assault in the Second Degree merge under this analysis. E.g., Freeman, 153 Wn.2d at 777-78; Kier, 164 Wn.2d at 805-06. However, that doctrine does not apply here.

The application of the merger doctrine rests on how the crimes were charged and proved to the jury in the individual case. Freeman, 153 Wn.2d at 778; see also id. at 774 ("[N]o per se rule has emerged; instead, courts have continued to give a hard look at each case."). Here, the jury was instructed that it could convict Dunn of Robbery in the First Degree only if it found that he was armed with or displayed a deadly weapon in the course of the robbery. CP 36. That crime was proved by evidence that

Dunn showed a firearm to Cassidy, said, "You know what this is, nigga," and took Cassidy's wallet.

By contrast, the jury was instructed that it could convict Dunn of Assault in the Second Degree only if it found that he intentionally assaulted Cassidy with a deadly weapon or intentionally assaulted Cassidy and recklessly inflicted substantial bodily harm on him. CP 47. In some situations, Dunn's pointing of a gun at Cassidy's head could constitute assault based on the common-law definition of assault as including causing an apprehension of harm. E.g., State v. Elmi, 166 Wn.2d 209, 215, 207 P.3d 439 (2009) (recognizing three definitions of assault, including putting another in apprehension of harm). Here, however, the jury was instructed that the assault charge was predicated only on an actual battery:

> 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. This instruction effectively limited the jury's consideration of assault to the act of Dunn's shooting of Cassidy—an act that was entirely unnecessary to a robbery predicated on being armed with or displaying a deadly weapon. Accordingly, in order to prove Robbery in the First

Degree as charged and proven in this case, the State was not required to prove the shooting that formed the sole basis for the assault charge. The two offenses do not merge.

Examination of other cases where Washington courts have found that robbery and assault merge further underscores why there is no merger in this case. For example, in Zumwalt, the companion case in Freeman, 153 Wn.2d 765, the Supreme Court examined a case in which Zumwalt punched a woman in the face, breaking her eye socket, and robbed her of $300 in cash and casino chips. The court determined that the first degree robbery (based on bodily harm) and the second degree assault (predicated on the injury to the woman) merged, because the assault was committed "in furtherance" of the robbery. Id. at 778. Stated differently, the court concluded that, but for the conduct amounting to the charged assault, the defendant would have been guilty only of second degree robbery. Id. That is not the case here. Whether Dunn shot Cassidy—the only act supporting the assault conviction—was immaterial to his robbery conviction. Rather, the Robbery in the First Degree was committed by Dunn showing Cassidy his gun and taking his wallet.

Similarly, in Kier, 164 Wn.2d 798, the court merged a first degree robbery and a second degree assault committed during the course of a carjacking, where the defendant aimed a gun at the occupants of the car in

order to steal it. But there, both charges required the State to prove "that Kier's conduct created a reasonable apprehension or fear of harm." Id. at 806. Here, however, the jury could not find that the assault was committed merely by Dunn's use of a gun to create a reasonable apprehension of harm; while such fear was necessary to the robbery, the assault required an actual shooting. CP 49. Thus, Dunn's shooting of Cassidy did not "elevate[] robbery to the first degree," and the merger doctrine is not triggered. Id.

Moreover, in Kier, the Supreme Court approved of the result in State v. Esparza, 135 Wn. App. 54, 143 P.3d 612 (2006). See Kier, 164 Wn.2d at 806-07. In Esparza, this Court declined to merge an Attempted Robbery in the First Degree and an Assault in the Second Degree. Esparza and his co-defendant Beaver tried to rob a jewelry store at gunpoint; Beaver aimed a gun at the jeweler, who shot him, causing Beaver to flee before obtaining any property. Esparza, 135 Wn. App. at 57-58. In concluding that there was no double jeopardy violation, the Esparza court noted that the State had to prove only that Beaver was armed with or displayed a deadly weapon in order to prove the Attempted Robbery in the First Degree. Id. at 66. The Court then held,

> Since it was unnecessary under the facts of this case for the State to prove that Beaver engaged in conduct amounting to second degree assault in order to elevate his robbery

> conviction, and because the State did prove conduct not amounting to second degree assault that elevated Beaver's attempted robbery conviction, the merger doctrine does not prohibit Beaver's conviction for both attempted first degree robbery and second degree assault.

Id. The case at bar is indistinguishable from Esparza. The State had to prove that Dunn was armed with or displayed what appeared to be a deadly weapon in order to prove the first degree robbery. CP 36. The assault—the shooting of Cassidy—was unnecessary to elevate the crime of robbery to Robbery in the First Degree. The offenses do not merge.

Even if this Court concludes that the merger doctrine applies, however, the two offenses may still be punished separately if the defendant's particular conduct demonstrates an independent purpose or effect. Kier, 164 Wn.2d at 804; Vladovic, 99 Wn.2d at 421. Certainly, the assault and robbery statutes are "directed to separate evils." See Albernaz, 450 U.S. at 343. Stealing Cassidy's wallet and shooting him in the hip caused separate and distinct injuries; neither is "merely incidental to the [other] crime." Id. (quoting State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979), overruled on other grounds by State v. Sweet, 138 Wn.2d 466, 980 P.2d 1223 (1999)). And, because the shooting occurred after the first degree robbery was legally completed, "there was a separate injury and intent justifying a separate assault conviction." Freeman, 153

Wn.2d at 779 (citing State v. Prater, 30 Wn. App. 512, 516, 635 P.2d 1104 (1981).

In short, the State proved that Dunn committed Robbery in the First Degree by being armed with or displaying what appeared to be a deadly weapon. That crime was completed when Dunn showed Cassidy his gun and took his wallet. The State proved that Dunn committed Assault in the Second Degree when he shot Cassidy in the hip. Under the facts of the case and the instructions to the jury, no other act could have supported the assault conviction. Thus, the proof of the assault was not necessary to the conviction for Robbery in the First Degree. The two offenses do not merge.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO DECLARE THE JURY DEADLOCKED WHEN A JUROR SAID THAT SHE BELIEVED THE JURY COULD REACH A UNANIMOUS VERDICT IN A REASONABLE AMOUNT OF TIME.

Dunn contends that the trial court improperly coerced the jury into reaching a unanimous verdict. But the trial court merely asked the jury, when it had indicated that it was deadlocked after one day of deliberations, whether there was a reasonable probability of the jury reaching a unanimous verdict within a reasonable time. When one juror responded that there was such a probability, the court directed the jury to continue

deliberating. The question was neutral, and did not suggest to the jury the need to reach agreement, the consequences of failing to agree, or the length of time the jury would be required to continue its deliberations. Further, a mistrial when the jury was not in fact deadlocked would have deprived Dunn of his right to complete his trial before the particular jury chosen to try his case, and thus precluded retrial due to double jeopardy protections. The trial court did not err.

A criminal defendant has a right to a trial before an impartial jury. U.S. CONST. amend. VI; WASH. CONST. art. I, §§ 21, 22. "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, 892-93, 72 P.3d 1083 (2003), overruled on other grounds by State v. Nunez, 174 Wn.2d 707, 285 P.3d 21 (2012). Thus, the trial court may not coerce a jury to reach a verdict. State v. Jones, 97 Wn.2d 159, 163-65, 641 P.2d 708 (1982); State v. Boogaard, 90 Wn.2d 733, 736-37, 585 P.2d 789 (1978). Criminal Rule 6.15 guards against such coercion by prohibiting the trial court from instructing the jury, once deliberations have begun, "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." CrR 6.15(f)(2).

To prevail on a claim that the trial court improperly interfered with the verdict, the defendant bears the burden of proving a reasonably substantial possibility that the verdict was improperly influenced by the court's actions. State v. Ford, 171 Wn.2d 185, 188-89, 250 P.3d 97 (2011), cert. denied, 132 S. Ct. 1760 (2012). Such proof requires an affirmative showing of influence, not mere speculation or a tendency to influence the jury. Id.; State v. Watkins, 99 Wn.2d 166, 177-78, 660 P.2d 1117 (1983). Specifically, the defendant must show that the jury was still deliberating and undecided, that judicial action was designed to force or compel a decision, and that such conduct was improper. Ford, 171 Wn.2d at 193.

A criminal defendant also has a right to have his case completed by the particular jury impaneled and sworn to try his cause. Jones, 97 Wn.2d at 162-63; State v. Connors, 59 Wn.2d 879, 883, 371 P.2d 541 (1962). If a court discharges a jury without the defendant's consent, double jeopardy principles will bar retrial unless the "discharge was necessary in the interest of the proper administration of public justice." Id. A deadlocked jury constitutes a manifest necessity permitting the trial court to discharge the jury and declare a mistrial. State v. Barnes, 85 Wn. App. 638, 656-57, 932 P.2d 669 (1997); State ex rel. Charles v. Bellingham Municipal Court, 26 Wn. App. 144, 147-48, 612 P.2d 427 (1980).

The question of whether a jury is deadlocked is a question for the court, not for the jury itself. State v. Taylor, 109 Wn.2d 438, 443, 745 P.2d 510 (1987), disapproved of on other grounds by State v. Labanowski, 117 Wn.2d 405, 816 P.2d 26 (1991). Factors the court should consider in making such a determination include the length of time the jury has been deliberating, the volume and complexity of the evidence, and the complexity of the issues in the case. Boogaard, 90 Wn.2d at 739; Barnes, 85 Wn. App. at 656. If, after considering such factors, the court finds that "extraordinary and striking circumstances" exist, it may declare a mistrial. Jones, 97 Wn.2d at 165; Barnes, 85 Wn. App. at 656. "The decision to discharge the jury should be made only when it 'appears to the trial judge that there is no reasonable probability of the jury arriving at an agreement even if given more time.'" Taylor, 109 Wn. 2d at 443 (quoting Bellingham Mun. Ct., 26 Wn. App. at 148).

Because the trial court has observed the presentation of the evidence and understands the complexity of the case, it alone is in the "best position to determine whether a jury's stalemate is only a temporary step in the deliberation process or the unalterable conclusion to that process." Id. at 442; see also State v. Strine, 176 Wn.2d 742, 757, 293 P.3d 1177 (2013) ("The trial judge is in the best position to assess all the factors which must be considered in making a necessarily discretionary

determination whether the jury [would] be able to reach a just verdict if it continue[d] to deliberate." (citation and internal quotation marks omitted)). Thus, the trial court's determination of whether a jury is hopelessly deadlocked is reviewed for abuse of discretion. Taylor, 109 Wn.2d at 442-43; Jones, 97 Wn.2d at 163. This is particularly so in light of the court's responsibility to respect both of the defendant's competing rights: to a verdict completed by a particular tribunal, and to a verdict free from pressure. Jones, 97 Wn.2d at 163-64.

Here, Dunn has failed to demonstrate that the trial court improperly interfered with the jury's deliberations. First, the trial court did not violate CrR 6.15(f)(2). Specifically, the court asked the presiding juror, "Is there a reasonable probability of the jury reaching a unanimous verdict within a reasonable time." 6RP 10. When the presiding juror responded, "No," the court further inquired, "Is there any member of the jury that disagrees with that statement?" 6RP 10. The two questions did not "suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate." CrR 6.15(f)(2). Nor were the two questions designed to "force or compel a decision." Ford, 171 Wn.2d at 193. Instead, the limited questioning was decidedly neutral and designed to determine whether the jury indeed considered itself deadlocked. Compare State v. McCullum, 28 Wn. App. 145, 148,

153, 622 P.2d 873 (holding that the judge's question, "Is there any benefit in the jury deliberating further?", posed to each juror individually, was neutrally worded and did not constitute judicial coercion), rev'd on other grounds, 98 Wn.2d 484, 656 P.2d 1064 (1983).

Second, the jury itself communicated to the court that it was not deadlocked. Although the presiding juror—and perhaps other jurors—may have thought the jury was at an impasse, not all jurors agreed with that assessment. 6RP 10. Under such circumstances, the trial court could not have found that there was "no reasonable probability of the jury arriving at an agreement even if given more time." Taylor, 109 Wn. 2d at 443. Declaring a mistrial at that point surely would have violated Dunn's right to have his trial completed by the particular tribunal, and barred a retrial due to double jeopardy.

Indeed, even if a juror had not indicated that she thought that there was a reasonable possibility of reaching a verdict within a reasonable amount of time, the trial court would have acted well within its discretion by ordering the jury to continue to deliberate. The jury had been deliberating for only about one court day—not a particularly long period of time. Although the trial was only two and a half days long, twelve witnesses testified. Most of those were witnesses to the crime itself, who had different vantage points and disagreed with each other over certain

aspects of the events. Thirty exhibits were admitted into evidence, including photographs, identification montages, and recordings. Dunn was charged with three crimes and two firearm enhancements. CP 15-16. The jury was also permitted to consider the lesser included charge of Attempted Robbery in the First Degree. CP 58-59. Thus, the jury had six verdict forms to consider. CP 58, 63-68. Given the comparatively short length of time the jury had deliberated, the volume and complexity of the evidence, and the complexity of the issues in the case, the trial court did not abuse its discretion in refusing to discharge the jury after it initially indicated that it was deadlocked.

Dunn argues that the court's instruction to the jury that it could inform the court again if it was deadlocked was somehow coercive. Brief of Appellant at 22. After hearing that at least one juror thought the jury could reach a verdict, the trial court told the jury:

> 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 these 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.

6RP 11.

Again, this language was neutral, and did not suggest to the jury that it was required to reach a verdict. Nor was it confusing. Although the presiding juror had once told the court it was at an impasse, further questioning revealed that the jury was not yet hopelessly deadlocked. Moreover, the jury had already been instructed that it was not required to reach a verdict. Instruction 2 informed the jury:

> As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to reexamine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

CP 32 (emphasis added). Jurors are presumed to follow their instructions. State v. Ervin, 158 Wn.2d 746, 756, 147 P.3d 567 (2006). "When a jury is deadlocked on a general verdict, the trial court has the authority, within limits, to instruct the jury to continue deliberations." Goldberg, 149 Wn. 2d at 894. This is just what the trial court did.

Dunn also complains that the trial court "waited for [an] ill juror to recover sufficiently to continue deliberations," which "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." Brief of Appellant at 22. This is rank speculation. The record does not reveal the nature of the juror's illness, or what she communicated to the bailiff regarding her ability to return to deliberate. Waiting for an ill juror to return, immediately after a juror advised the court that she believed that the jury could reach a verdict within a reasonable amount of time, was more likely to "avoid additional recesses and additional fruitless time at the courthouse" than dismissing the ill juror, seating the alternate, and instructing the jury to begin deliberations anew. CrR 6.5; State v. Ashcraft, 71 Wn. App. 444, 463-64, 859 P.2d 60 (1993).

Moreover, this complaint regarding the coercive nature of the trial court's failure to dismiss the ill juror and replace her with an alternate does not cite to any case law finding such an exercise of discretion to warrant reversal. Indeed, Dunn does not cite to any authority governing when a trial court should replace a deliberating juror with an alternate, nor does he even assign error to the court's decision. Instead, his complaint is made in a cursory two sentences. This Court should dismiss this complaint out of hand. Escude ex rel. Escude v. King Cnty. Pub. Hosp. Dist. No. 2, 117 Wn. App. 183, 190 n.4, 69 P.3d 895 (2003) ("It is well settled that a party's failure to assign error to or provide argument and

citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error.").

Dunn has not met his burden to affirmatively show a substantial possibility that the jury's verdicts were improperly influenced by the court's actions. His convictions should be upheld.

D. CONCLUSION

For all of the foregoing reasons, Dunn's convictions for Robbery in the First Degree, Assault in the Second Degree, and Unlawful Possession of a Firearm in the First Degree should be affirmed.

DATED this 4th day of December, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
ERIN H. BECKER, WSBA #28289
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Sarah M. Hrobsky, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. RAVIS L. DUNN, Cause No. 69754-4-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 5th day of December, 2013

L Brame

Name
Done in Seattle, Washington