No. 90382-4
Court of Appeals No. 69754-4-I

Filed
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THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RAVIS L. DUNN,

Petitioner.

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

The Honorable Kimberley Prochnau

PETITION FOR REVIEW

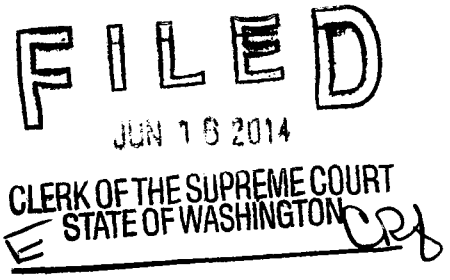

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Constitution

Washington Constitution

United States Supreme Court Decisions

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

Rules

A. IDENTITY OF PETITIONER

Ravis L. Dunn, petitioner here and appellant below, requests this Court grant review of the decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4, Mr. Dunn requests this Court grant review of the unpublished decision of the Court of Appeals, No. 69754-4-I (April 21, 2014). A copy of the decision is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. The constitutional prohibition of double jeopardy protects a criminal defendant from multiple punishments for the same offense. Accordingly, where an assault in the second degree elevates a robbery to the first degree and serves no independent purpose, the assault merges into the robbery and cannot be separately punished. Here, Mr. Dunn was convicted of assault in the second degree either by an assault that recklessly inflicted substantial bodily harm or by an assault with a deadly weapon. He was also convicted of robbery in the first degree by taking the property from the person of another while armed with or display of a firearm or other deadly weapon. The Court of Appeals ruled that the assault did not merge into the robbery because the assault required proof of an actual battery whereas the robbery required only proof of display of a firearm and taking of property from the person of another, even though

the assault served no purpose other than to induce the victim to relinquish his property and to overcome his resistance. Does the Court of Appeals' ruling conflict with decisions by United States Supreme Court and by this Court regarding double jeopardy and the merger doctrine, raise a significant question of law under the federal and state constitutions, and involve an issue of substantial public interest that should be determined by this Court pursuant to RAP 13.4(b)(1), (3), and (4)?

2. The constitutional right to due process and to trial by a fair and impartial jury includes the right to have each juror reach a verdict uninfluenced by judicial coercion. Here, in response to the jury's note that it was deadlocked, the court ordered the jurors to return the following morning to continue deliberations. In the morning, however, one juror was ill and the court ordered the jurors to return in the afternoon. In the afternoon, all jurors reconvened and returned guilty verdicts within twelve minutes of resuming deliberations. The Court of Appeals ruled the trial court did not impermissibly coerce the jurors into returning a verdict because the court's questions to the jury regarding a deadlock were neutral and one juror believed the jury was not deadlocked. Does this ruling conflict with decisions by this Court regarding a deadlocked jury, raise a significant question of law under the federal and state constitutions, and

involve an issue of substantial public interest that should be determined by this Court pursuant to RAP 13.4(b)(1), (3), and (4)?

D. STATEMENT OF THE CASE

In the afternoon of July 16, 2011, Shanon Cassidy was shot during a robbery. Mr. Cassidy's accounts of the incident vary. In an interview immediately after the incident, Mr. Cassidy told the investigating detective that he met Mr. Dunn and Rachelle Lawson at a friend's house, and Mr. Dunn offered to sell him a Tim Tebow sports jersey. Ex. 32 at 4, 6. Mr. 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 reached into Mr. Cassidy's front pockets where he had additional cash, when Mr. Cassidy tried to grab the gun, and 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.

At trial, however, Mr. Cassidy testified Mr. Dunn offered to sell him a Mariner's sports jersey, he followed Mr. Dunn and Ms. Lawson to a parked car, Mr. Dunn pulled out a grey gun and said, "look you know what this [sic] about nigger," put the gun to Mr. Cassidy's head, and Mr.

Cassidy turned over his wallet, which he described as brown and yellow. 8/16/12 RP 45, 75. Mr. Dunn then patted Mr. Cassidy's rear pocket for his check book, they "tussled" for the gun, and Mr. Dunn took a step back and shot Mr. Cassidy. 8/6/12 RP 48, 49-51, 90.

Three neighbors witnessed the incident, none of whom observed either Mr. Dunn or Mr. Cassidy step back from the altercation before the gun was fired. 8/2/12 RP 217-18, 220, 221; 8/6/12 RP 105, 107, 125-26.

Mr. Dunn was charged with robbery in the first degree by taking property from the person of another while either armed with or displaying a firearm, assault in the second degree with a handgun, thereby recklessly inflicting substantial bodily harm, and unlawful possession of a firearm in the first degree. CP 15-16. He was also charged with the aggravating circumstance of committing the robbery and the assault while armed with a firearm. CP 15, 16.

The matter was tried before a jury. After deliberating more than eight hours over two days, the jury 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 juror 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 148 (Jury Trial Clerk's Minutes, p. 15). In the afternoon, the entire panel, including the ill juror, reconvened and twelve minutes later they informed the bailiff they had reached a verdict. CP 148 (Jury Trial Clerk's Minutes, p. 15). The jurors were polled and each juror responded that the verdicts represented the verdicts of the jury and his or her individual verdicts. 8/9/12 RP 15-18.

On appeal, Mr. Dunn argued the conviction for assault in the second degree merged into his conviction for robbery in the first degree and the trial court impermissibly coerced the deadlocked jury to reach a verdict. The court affirmed the convictions, and ruled the assault did not merge into the robbery, because the robbery, as charged, did not necessarily require proof of an assault whereas the assault required proof of an actual battery. Opinion at 7-11. The court further ruled the trial court did not coerce a verdict because the trial court's questions to the jury regarding a deadlock were neutral and the fact that one juror believed the jury was not deadlocked supported the trial court's decision to order the jury to continue deliberations. Opinion at 12-15.

Mr. Dunn filed a Motion for Reconsideration which was denied on May 9, 2014.

E. ARGUMENT

1. The Court of Appeals erred in failing to rule that the conviction for assault in the second degree merged into the conviction for robbery in the first degree, where the assault furthered the robbery and served no independent purpose.

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 be merged into his conviction for robbery in the first degree 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. 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). Thus, although 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).

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). 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).

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. Accordingly, second degree assault merges into first degree robbery when the assault facilitates the robbery and the two crimes do not have an independent purpose or effect. *State v. Freeman*, 153 Wn.2d 765, 780, 108 P.3d 753 (2005); *see also State v. Chesnokov*, 175 Wn. App. 345, 350, 305 P.3d 1103 (2013) ("[S]econd degree assault merges into first degree robbery when there is no independent purpose for each crime.").

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 48-49. Mr. Cassidy resisted, they wrestled for the weapon, and Mr. Dunn fired. 8/6/12 RP 49-51. This was corroborated by the three neighbors, all of whom testified the weapon fired during the struggle for the gun. 8/2/12 RP 217-18, 220, 221; 8/6/12 RP 105, 107, 125-26. 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 robbery.

Nonetheless, the Court of Appeals ruled the offenses did not merge because of the manner in which the jury was instructed:

> Here, it was *not* necessary for the jury first to convict Dunn of assault in the second degree in order to convict him of robbery in the first degree. This is so because the jury was instructed that the assault charge was predicated only on an *actual battery*. To convict Dunn of robbery in the first degree, however, the jury did not need to find that an actual battery occurred - it only had to find that Dunn was armed with or displayed a deadly weapon. Thus, the State's proof of robbery in the first degree was complete upon the introduction of evidence that Dunn had wielded a firearm and taken Cassidy's wallet.

Opinion at 10 (emphasis in original). This is incorrect. The jury was instructed that robbery in the first degree involves the use of force to obtain property from the person of another, while armed with or displaying a deadly weapon, an act that necessarily involves an actual battery.[1] The jury was instructed that assault in the second degree

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[1] The instructions for robbery in the first degree 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).

involves the use of force and either the infliction of substantial bodily harm or a harmful or offensive touching with a deadly weapon.[2] Significantly, the court did not refer to the definitional instruction for robbery.

> 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]; ....

CP 36 (Instruction No. 6).

[2] The instructions for assault in the second degree 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).

Moreover, the robbery was not complete upon the taking of Mr. Cassidy's wallet. According to Mr. Cassidy, the robbery continued 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 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). For example, 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.

The Court of Appeals relied on *State v. Esparza*, 135 Wn. App. 54, 143 P.3d 612 (2006), to "reinforce" its ruling. Opinion at 11-12. In *Esparza*, the court ruled the defendant's conviction for assault in the first degree did not merge into his conviction for attempted robbery in the first degree. 135 Wn. App. at 57. In so ruling, the court noted that any number of the acts proven at trial could establish the "substantial step" necessary for prove attempted robbery in the first degree and, therefore, proof of the assault was not necessary to elevate the robbery to the first degree. *Id.* at 63-64. In *Kier*, however, this Court limited *Esparza* to attempt crimes. "Importantly, the elevated charge at issue in *Esparza* was attempted first degree robbery. Proof of an attempted robbery requires only proof of intent to commit robbery and a substantial step toward carrying out that intent. ... Kier was convicted of completed first degree robbery, which required more than a substantial step." 164 Wn.2d at 806-07 (emphasis in original). Accordingly, *Esparza* is distinguishable.

The assault occurred during the course of the robbery and served no independent purpose other than to facilitate the robbery and to overcome Mr. Cassidy's resistance. Accordingly, the conviction for

assault merged into the conviction for robbery in the first degree. The decision of the Court of Appeals to the contrary conflicts with decisions by United States Supreme Court and by this Court regarding double jeopardy and the merger doctrine, raises a significant question of law under the federal and state constitutions, and involves an issue of substantial public interest. Pursuant to RAP 13.4(b)(1), (3), and (4), this Court should accept review.

2. The Court of Appeals erred in failing to rule that the trial court coerced a verdict when it ordered a deadlocked jury to continue deliberations.

Mr. Dunn's' right to due process and a fair trial before an impartial jury was violated when the trial court ordered a 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).

When deciding whether to declare a jury deadlocked, the primary consideration is the complexity of the case and the length of deliberations relative to the length of the trial. *State v. Taylor*, 109 Wn.2d 438, 443, 745 P.2d 510 (1987). A court also may consider any progress in the deliberations and the jury's assessment that it is deadlocked. *Id.* The court may 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). 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.

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

Under the circumstances here, the court's conduct was inherently coercive. 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, before it informed the court that it was unable to reach a verdict. CP 148 (Jury Trial Clerk's Minutes, p. 13-15); 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.

Although the jury had already deliberated more than eight hours, the court, without any explanation, ordered the jury to continue deliberations even as it invited the jury to inform the court if it was deadlocked. 8/8/12 RP 11. But that is exactly what the jury did, to no avail. In addition, rather than call on the alternate juror, the court waited for the ill juror to recover sufficiently to continue deliberations. CP 148 (Jury Trial Clerk's Minutes, p. 15). These procedures 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, as evidenced by the verdict rendered only twelve minutes after it resumed deliberations. 8/9/12 RP 14; CP 148 (Jury Trial Clerk's

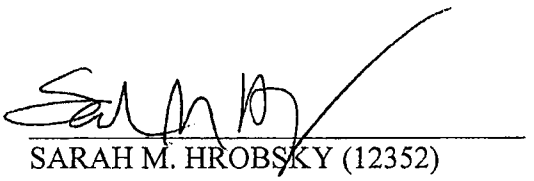
Minutes, p. 15). The decision of the Court of Appeals to the contrary conflicts with decisions by United States Supreme Court and by this Court regarding a deadlocked jury, raises a significant question of law under the federal and state constitutions, and involves an issue of substantial public interest. Pursuant to RAP 13.4(b)(1), (3), and (4), this Court should accept review.

F. CONCLUSION

For the foregoing reasons, Mr. Dunn requests this Court accept review of the Court of Appeals decision in this case.

DATED this 4th day of June, 2014.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RAVIS L. DUNN, Appellant.	DIVISION ONE No. 69754-4-I UNPUBLISHED OPINION FILED: April 21, 2014

DWYER, J. — Ravis Dunn and Rachelle Lawson lured Shannan Cassidy out of a house and down to a vehicle with the promise of selling him a sports jersey. Dunn then pulled out a pistol, brandished it at Cassidy, and said, "you know what this is, nigga." Thinking that he was being robbed, Cassidy gave Dunn his wallet. When Dunn began to check Cassidy's pockets, Cassidy pushed the gun away and the two "tussled." After disentangling himself, Dunn stepped back and shot Cassidy in the hip.

The State charged Dunn with robbery in the first degree and assault in the second degree. With respect to the assault charge, the jury was instructed that it could only convict on that charge if it found that an actual battery had been committed. The jury convicted Dunn on both charges. On appeal, Dunn contends that his assault conviction elevated the robbery to robbery in the first degree, which should cause his assault conviction to merge into his robbery

conviction. He also contends that his right to a trial by a fair and impartial jury was violated. In affirming Dunn's convictions, we conclude that each offense required proof of a fact not necessary to convict Dunn of the other offense, and that the assault conviction, as charged and consistent with the jury's instructions, did not elevate the robbery to robbery in the first degree. Further, we conclude that Dunn's right to a fair and impartial jury was not violated. Accordingly, we affirm.

I

On July 16, 2011, Dunn encountered Rachelle Lawson, a friend he had known for a number of years, at a bar. Lawson had argued with her boyfriend earlier. Because she did not want to go home to see him, she left the bar with Dunn in her boyfriend's Ford Bronco. The two drove to a home in West Seattle. At the home were some of Dunn's friends, including Rebekah Gonzales,[1] Nicole Parke, and Kim Wilbur. Also present was Parke's friend, Shannan[2] Cassidy. After socializing with Dunn's friends, Lawson and Dunn left the house around 4:00 a.m. Before Lawson and Dunn left the house, however, Cassidy had discussed sports jerseys while Dunn was present.

The following afternoon, Lawson and Dunn returned to the same home in West Seattle in the Ford Bronco. At some point that afternoon, Cassidy—who was still present at the West Seattle home when Lawson and Dunn returned—left the house to look at sports jerseys stored in the Bronco. Although there was

[1] Now Rebekah MacMaster.

[2] There is a claimed confusion over the spelling of Cassidy's first name. At trial, Cassidy spelled his first name "Shannan." Accordingly, so will we.

conflicting testimony as to who asked Cassidy to look at the jerseys and as to who walked out to the Bronco with him, all accounts confirm that Cassidy left the house to look at the jerseys. Lawson testified that the jerseys had been gifts she had given to her boyfriend, which she had taken back following their argument.

Once Cassidy walked outside and approached the Bronco, Dunn produced a pistol, which he pointed at Cassidy's head, stating, "You know what this is, nigga." Cassidy thought that he was being robbed. In response, Cassidy pulled his wallet out of his pocket and handed it to Dunn. After Cassidy handed his wallet to Dunn, Dunn checked Cassidy's pockets for other valuables. Dunn felt Cassidy's checkbook in one of Cassidy's back pockets and tried to remove it, at which point the two started "tussling over the gun." Once Dunn managed to disentangle himself from Cassidy, Dunn stepped back and shot Cassidy in the hip. After Dunn shot Cassidy, Dunn, Lawson, and another man named Quayvis,[3] got in the Bronco and drove away.

The State charged Dunn with robbery in the first degree, assault in the second degree, and unlawful possession of a firearm in the first degree. The robbery and assault charges included the allegation that Dunn committed the offenses while armed with a firearm. Lawson was initially charged with rendering criminal assistance in the first degree. Later, she pleaded guilty to a reduced charge and agreed to testify against Dunn. The information was then amended to eliminate mention of Lawson's charge from Dunn's charging document.

[3] 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. None of the occupants of the house, including Cassidy, ever saw Quayvis.

The case was tried to a jury. On August 8, 2012 at 1:30 p.m., after deliberating for more than eight hours over the course of two days, the jury 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." The trial court then brought the jury into the courtroom and asked the presiding juror, "Is there a reasonable probability of the jury reaching a unanimous verdict within a reasonable time[?]" The presiding juror responded, "No." The court then asked, "Is there any member of the jury that disagrees with that statement. If so, please raise your hand." One of the jurors raised her hand. The court then released the jurors for the day, instructing them to return the next day to continue deliberations.

The following morning, one of the jurors was ill. The trial court excused the remaining jurors until the afternoon. In the afternoon, the entire jury, including the ill juror, resumed deliberations and ultimately returned verdicts of guilty as charged on all counts, concluding additionally that Dunn was armed with a firearm during the commission of the robbery and the assault.

At sentencing, Dunn asserted that the convictions for robbery in the first degree and assault in the second degree should merge, and that the trial court should therefore vacate the conviction for assault in the second degree. The trial court rejected Dunn's assertion and imposed a sentence of 225 months in prison.

Dunn appeals from the judgment and sentence.

II

Dunn claims that he should not have been convicted of both robbery in the

first degree and assault in the second degree. This requires us to address several issues. The first issue is whether the legislature has, either expressly or implicitly, evinced an intent to punish separately the offenses of assault in the second degree and robbery in the first degree. The next question, which requires us to apply the Blockburger[4] test, is whether each offense contains an element that the other does not. The final issue is whether, in order for the jury to convict the defendant of robbery in the first degree, it was *necessary* for the jury to convict the defendant of assault in the second degree.

The double jeopardy clauses of our state and federal constitutions protect against multiple punishments for the same offense.[5] WASH. CONST. art. I, § 9; U.S. CONST. amend. 5; State v. Calle, 125 Wn.2d 769, 772, 888 P.2d 155 (1995). Although the State may bring multiple charges arising from the same criminal conduct, "'[w]here a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense.'" State v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753 (2005) (quoting In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004)). "If the legislature authorized cumulative punishments for both crimes, then double jeopardy is not offended." Freeman, 153 Wn.2d at 771.

Recently, in State v. Esparza, 135 Wn. App. 54, 143 P.3d 612 (2006), we

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

[5] The Washington double jeopardy provision, WASH. CONST. art. I, § 9, is coextensive with the Fifth Amendment as interpreted by the United States Supreme Court. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Claims of double jeopardy are reviewed de novo. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

reiterated our approach to resolving double jeopardy issues, as elucidated by our Supreme Court in Freeman.

> "Because the question largely turns on what the legislature intended, we first consider any express or implicit legislative intent. Sometimes the legislative intent is clear, as when it explicitly provides that burglary shall be punished separately from any related crime. RCW 9A.52.050. Sometimes, there is sufficient evidence of legislative intent that we are confident concluding that the legislature intended to punish two offenses arising out of the eparately without more analysis. E.g., [State v.] Calle, 125 Wn.2d [769,] 777-78[, 888 P.2d 155 (1995)] (rape and incest are separate offenses).
>
> Second, if the legislative intent is not clear, we may turn to the Blockburger test. See Calle, 125 Wn.2d at 777-78, 888 P.2d 155; Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). If each crime contains an element that the other does not, we presume that the crimes are not the same offense for double jeopardy purposes. Calle, 125 Wn.2d at 777; Blockburger, 284 U.S. at 304 (establishing "same evidence" or "same elements" test); State v. Reiff, 14 Wash. 664, 667, 45 P. 318 (1896) (double jeopardy violated when "'the evidence required to support a conviction [of one crime] would have been sufficient to warrant a conviction upon the other'") (quoting Morey v. Commonwealth, 108 Mass. 433, 434 (1871)).
>
> When applying the Blockburger test, we do not consider the elements of the crime on an abstract level. "'[W]here *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 a fact* which the other does not.'" [In re Personal Restraint of] Orange, 152 Wn.2d [795,] 817[, 100 P.3d 291 (2004)] (quoting Blockburger, 284 U.S. at 304 (citing Gavieres v. United States, 220 U.S. 338, 342, 31 S. Ct. 421, 55 L. Ed. 489 (1911))). However, the Blockburger presumption may be rebutted by other evidence of legislative intent. Calle, 125 Wn.2d at 778.
>
> Third, if applicable, the merger doctrine is another aid in determining legislative intent, even when two crimes have formally different elements. Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime. [State v. Vladovic, 99 Wn.2d [413,] 419[, 662 P.2d 853 (1983)].
>
> Finally, even if on an abstract level two convictions appear to

> be for the same offense or for charges that would merge, if there is an independent purpose or effect to each, they may be punished as separate offenses. State v. Frohs, 83 Wn. App. 803, 807, 924 P.2d 384 (1996) (citing State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979))."

Esparza, 135 Wn. App. at 59-61 (quoting Freeman, 153 Wn.2d at 771-73).

A

Neither the statute for robbery in the first degree nor the statute for assault in the second degree explicitly addresses whether separate punishments may be imposed for each offense. Compare RCW 9A.56.200 (robbery in the first degree), with RCW 9A.36.021 (assault in the second degree). Moreover, neither party directs our attention to any other source of explicit or implicit legislative intent on this issue. Cf. Freeman, 153 Wn.2d at 776 (with respect to robbery in the first degree and assault in the second degree, no such evidence of legislative intent). Therefore, we must next apply the Blockburger test.

B

Application of the Blockburger test indicates that the offenses for which Dunn was convicted are not the same for constitutional double jeopardy purposes. "Under Blockburger, '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 a fact which the other does not.'" State v. Nysta, 168 Wn. App. 30, 45, 275 P.3d 1162 (2012) (quoting Blockburger, 284 U.S. at 304), review denied, 177 Wn.2d 1008 (2013). "'If there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other,

the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses.'" Nysta, 168 Wn. at 46 (quoting Vladovic, 99 Wn.2d at 423). Accordingly, "it is not enough merely to 'compare the statutory elements at their most abstract level,'" "[w]e are to consider the elements of the crimes both as charged and as proved." Nysta, 168 Wn. App. at 47 (quoting Orange, 152 Wn.2d at 818).

Dunn was charged with and convicted of robbery in the first degree and assault in the second degree. To establish robbery in the first degree, as the jury was instructed, required the jury to find that Dunn took property from Cassidy.[6] To establish assault in the second degree, however, did not require the jury to find that Dunn took property from Cassidy.[7] What assault in the second degree did require, as the jury was instructed, was for the jury to find that Dunn shot Cassidy.[8] Yet, robbery in the first degree did not require the jury to find that

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[6] The jury was instructed, in pertinent part, as follows:

> To convict the defendant of the crime of robbery in the first degree, as charged in count I, 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.

Jury Instruction 6.

[7] The jury was instructed, in pertinent part, as follows:

> To convict the defendant of the crime of assault in the second degree, as charged in Count II, each of the following two elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 16th of Jury, 2011, the defendant:
>
> (a) intentionally assaulted Shanon Cassidy and thereby recklessly inflicted substantial bodily harm; or
>
> (b) assaulted Shanon Cassidy with a deadly weapon; and
>
> (2) That this act occurred in the State of Washington.

Jury Instruction 16.

[8] The jury was instructed, in pertinent part, as follows:

> 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

Dunn shot Cassidy.[9] Whether comparing the statutory elements of each offense or examining the facts used to prove them, it is clear that each offense required the jury to find an additional element—as well as the facts supporting each element—that the other did not. Accordingly, we presume that the offenses for which Dunn was convicted are not the same for constitutional double jeopardy purposes. Calle, 125 Wn.2d at 778.

The result of the Blockburger test we reach here "creates a rebuttable presumption that the offenses are not the same." In re Pers. Restraint of Francis, 170 Wn.2d 517, 524 n.4, 242 P.3d 866 (2010). Yet, "the merger doctrine can rebut this presumption." Francis, 170 Wn.2d at 524 n.4.

C

In this case, however, application of the merger doctrine does not rebut the presumption that the offenses are not the same. Our Supreme Court has explained that the merger doctrine is an additional means of ascertaining legislative intent with respect to whether separate punishments are authorized.

> We reaffirm our holdings that the merger doctrine is a rule of statutory construction which 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).

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offensive if the touching or striking or shooting would offend an ordinary person who is not unduly sensitive.

Jury Instruction 17.

[9] The jury was instructed, in pertinent part, as follows:

> 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.

Jury Instruction 8.

Vladovic, 99 Wn.2d at 420-21. Importantly, application of the merger doctrine is informed by the evidence of facts that the jury is required to find in order to convict. See State v. Kier, 164 Wn.2d 798, 806, 194 P.3d 212 (2008); Freeman, 153 Wn.2d at 778. Although Washington courts have previously held that convictions for robbery in the first degree and assault in the second degree merge, those cases are distinguishable from the facts of this case in that, in order for the jury in those cases to convict the defendants of robbery in the first degree, it was *necessary* for the jury to convict the defendants of assault in the second degree. See Kier, 164 Wn.2d at 806; Freeman, 153 Wn.2d at 778.

Here, it was *not* necessary for the jury first to convict Dunn of assault in the second degree in order to convict him of robbery in the first degree. This is so because the jury was instructed that the assault charge was predicated only on an *actual battery.*[10] To convict Dunn of robbery in the first degree, however, the jury did not need to find that an actual battery occurred—it only had to find that Dunn was armed with or displayed a deadly weapon.[11] Thus, the State's proof of robbery in the first degree was complete upon the introduction of evidence that Dunn had wielded a firearm and taken Cassidy's wallet. This evidence, however, as the jury was instructed, did not establish that Dunn had committed assault in the second degree. The facts that led the jury to convict

[10] "An assault is an intentional touching or striking or shooting of another person." Jury Instruction 17.

[11] The jury was instructed, in pertinent part, as follows: "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." Jury Instruction 8.

Dunn of assault in the second degree were not *necessary* to convict him of robbery in the first degree. Thus, the facts necessary to the assault in the second degree charge did not elevate the robbery to robbery in the first degree.

Esparza reinforces our analysis. In Esparza, we declined to merge an attempted robbery in the first degree charge and an assault in the second degree charge after the defendant tried to rob a jewelry store.[12] 135 Wn. App. at 57-58. In concluding that there was no double jeopardy violation, we noted that the State had to prove only that the defendant was armed with or displayed a deadly weapon in order to prove the attempted robbery in the first degree. Esparza, 135 Wn. App. at 66. We then held that,

> [s]ince it was unnecessary under the facts of this case for the State to prove that [the defendant] 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 [the defendant's] attempted robbery conviction, the merger doctrine does not prohibit [the defendant's] conviction for both attempted first degree robbery and second degree assault.

Esparza, 135 Wn. App. at 66. Just as in Esparza, here, the jury was not required to find that Dunn committed assault in the second degree in order to elevate the robbery to robbery in the first degree.[13] Accordingly, the offenses do not merge.[14] We are satisfied that Dunn's convictions do not violate the prohibition

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[12] Although Esparza involved attempted robbery in the first degree, its reasoning applies with equal force to the facts here.

[13] However, as instructed, to convict Dunn of assault in the second degree, the jury *was* required to find an actual battery—by shooting—of Cassidy. This was *not* necessary to convict Dunn of robbery in the first degree.

[14] Because neither the Blockburger test nor a merger analysis indicates that the two convictions constitute double jeopardy, we need not consider whether there was "an independent purpose . . . to each." Freeman, 153 Wn.2d at 773.

on double jeopardy.

III

Dunn next contends that his right to a trial by a fair and impartial jury was violated. This is so, he avers, because the trial court coerced the jury into reaching a guilty verdict. His contention is unavailing.

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) (quoting State v. Boogaard, 90 Wn.2d 733, 736, 585 P.2d 789 (1978)), overruled on other grounds by State v. Nunez, 174 Wn.2d 707, 285 P.3d 21 (2012). It follows that a 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); Boogaard, 90 Wn.2d at 736-37. Criminal Rule (CrR) 6.15 guards against the specter of coercion by prohibiting the trial court from instructing the jury, once deliberations have commenced, "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 of improper judicial interference with the verdict, a defendant 'must establish a reasonably substantial possibility that the verdict was improperly influenced by the trial court's intervention.'" State v. Ford, 171 Wn.2d 185, 188-89, 250 P.3d 97 (2011) (quoting State v. Watkins, 99 Wn.2d 166, 178,

660 P.2d 1117 (1983)).

> Judicial coercion must include an instance of actual conduct by the trial judge during jury deliberations that could influence the jury's decision. To make such a claim, a defendant must first make a threshold showing that the jury was still within its deliberative process. Second, though related, the defendant must affirmatively show that the jury was at that point still undecided. Third, the defendant must show judicial action designed to force or compel a decision, and fourth, the impropriety of that conduct.

Ford, 171 Wn.2d at 193.

A criminal defendant 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. 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.*'" Jones, 97 Wn.2d at 162-63 (quoting State v. Connors, 59 Wn.2d 879, 883, 371 P.2d 541 (1962)). A deadlocked jury constitutes a manifest necessity permitting the trial court to discharge the jury and declare a mistrial. State ex rel. Charles v. Bellingham Mun. Court, 26 Wn. App. 144, 147-48, 612 P.2d 427 (1980) (citing Connors, 59 Wn.2d at 883).

"[W]e review the trial court's determination of whether a deadlock exists with great deference." 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). "A trial judge has broad discretion in deciding a jury is permanently divided," the reason for which "is that he or she 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." Taylor, 109

Wn.2d at 442.

> The principal factor to be considered in assessing whether a nonunamimous jury is genuinely deadlocked is "the length of time the jury had been deliberating in light of the length of the trial and the volume and complexity of the evidence." Jones, at 164; State v. Boogaard, 90 Wn.2d 733, 739, 585 P.2d 789 (1978). The judge also may consider any progress in the deliberations. Jones, at 164. The jury's own assessment that it is deadlocked, while helpful, is not itself sufficient ground for declaring a mistrial. See United States v. Ross, 626 F.2d 77, 81 (9th Cir. 1980). 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." State ex rel. Charles v. Bellingham Mun. Court, 26 Wn. App. 144, 148, 612 P.2d 427 (1980).

Taylor, 109 Wn.2d at 443.

Dunn contends that the trial court violated CrR 6.15(f)(2). We disagree.

The trial court asked the presiding juror, "Is there a reasonable probability of the jury reaching a unanimous verdict within a reasonable time[?]" The presiding juror responded, "No." The court then asked, "Is there any member of the jury that disagrees with that statement. If so, please raise your hand." One of the jurors raised her hand.

These 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). Moreover, they were not designed to "force or compel a decision." Ford, 171 Wn.2d at 193. Instead, they were neutral questions calculated to determine whether the jury considered itself to be deadlocked. The trial court did not violate the rule.

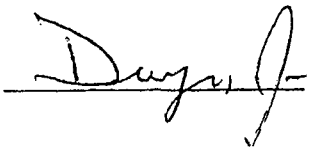
Moreover, the trial court did not abuse its discretion by concluding that the

jury was not deadlocked.

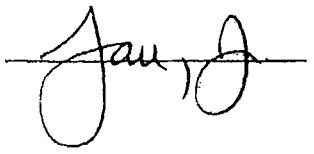
The fact that the jurors were in disagreement as to whether they were deadlocked supports the trial court's decision to allow for additional deliberations. There was no abuse of discretion in so deciding.

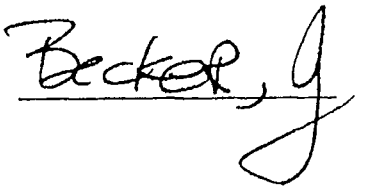
Similarly, the trial court did not err by requiring the jury to wait for the ill juror to recover sufficiently so as to be able to resume deliberating. A half-day period of repose is hardly an unknown phenomenon in jury trials. The trial judge acted wisely in keeping the jury together in order for the ill juror to have sufficient time to recover and complete the juror's service. There was no abuse of discretion in affording the ill juror that opportunity. Similarly, there was no abuse of discretion in preserving to Dunn his right to a decision at trial on the first occasion on which he was put in constitutional jeopardy.[15]

Affirmed.



We concur:





[15] In his statement of additional grounds for review, Dunn contends that the trial court erred by not finding that the jury was deadlocked and thereby coerced the jury to reach a verdict. In view of our analysis above, we reject his contention.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 69754-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Erin Becker, DPA
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: June 4, 2014