

NO. 63757-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DAMARIO DILLARD,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CATHERINE SHAFFER

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the trial court exercised sound discretion in admitting relevant evidence that placed a gun in the defendant's hands one day prior to the shooting at issue in this case.

2. Whether the trial court exercised sound discretion in denying the defendant's motion for a mistrial where the defendant failed to show that he suffered prejudice as the result of a minor trial irregularity.

3. Whether the defendant's arguments regarding the felony murder rule should be rejected because they are contrary to controlling precedent.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Damarion Dillard, with murder in the second degree (intentional murder and felony murder based on assault) and two counts of assault in the first degree, all with firearm enhancements, based on his participation in a shooting on August 28, 2007 that resulted in the death of Antwon Horton and the wounding of Henry "Jay" Harris and Kevin "Little Calvin"

Rogers. CP 1-7, 110-12. A jury trial on these charges took place in April and May 2009 before the Honorable Catherine Shaffer.

At the conclusion of the trial, the jury convicted Dillard of murder in the second degree as charged for his role in Horton's killing, and convicted him of two counts of the lesser offense of assault in the second degree for his role in the shooting of Harris and Rogers. The jury also returned special verdicts on all three counts, finding that Dillard was armed with a firearm during the commission of these crimes. CP 174-78. The trial court imposed a standard-range sentence totaling 347 months in prison. CP 205-13. Dillard now appeals. CP 203.

2. SUBSTANTIVE FACTS

Damario Dillard grew up in the Central District of Seattle. RP (4/30/09) 57. According to everyone, except Dillard himself during his trial testimony, Dillard was a self-proclaimed member of the Deuce 8 street gang. RP (4/14/09) 36-37; RP (4/15/09) 94-97; RP (4/16/09) 135-37; RP (4/22/09) 49, 125; RP (4/30/09) 57-58. Deuce 8s were widely known to carry black bandannas, or "flags," to signify their membership in the gang. Dillard frequently carried such a "flag." RP (4/15/09) 97; RP (4/16/09) 136-37.

During the summer of 2007, it was common knowledge that the Deuce 8s were involved in a heated and violent rivalry with members of another Central District gang known as Low Profile, or "LP" for short. RP (4/14/09) 33; RP (4/15/09) 98; RP (4/16/09) 132-33; RP (4/22/09) 135; RP (4/29/09) 68. LP members were known to carry purple "flags." RP (4/22/09) 136. Antwon Horton and Kevin "Little Calvin" Rogers, both of whom also grew up in the Central District, were members of LP. RP (4/16/09) 131-35; RP (4/22/09) 136; RP (4/27/09) 70-71.

For a few days prior to the shooting in this case, Dillard (who was known by the nickname "Alki"¹) had been spending most of his time at the home of a friend, Amber Corner. Corner and her roommate, Raquael Grace, lived in a two-bedroom apartment on the 7th floor of the Dakota Apartments in south Seattle. RP (4/14/09) 28-30. Corner and Grace had a rule that only one of them would have guests at any given time. RP (4/14/09) 31. This was because Corner's friends were Deuce 8s, and Grace's friends were LPs. RP (4/14/09) 32-33.

¹ Dillard's nickname is spelled "Alki" throughout the record. However, it is not pronounced like the waterfront neighborhood in West Seattle. Rather, it is pronounced "AL-kee." Ex. 277.

Approximately one day prior to the shooting, Dillard was spending time at Corner's apartment with an individual nicknamed "S.S." and a young woman named Laura Jeffries. Jeffries saw S.S. and Dillard "cleaning" a gun in the living room. RP (4/22/09) 127. Over Dillard's objection, Jeffries explained that she saw Dillard wiping the cartridges with his black Deuce 8 "flag," and then loading the cartridges into the magazine. RP (4/22/09) 128-31; RP (4/23/09) 22.

On August 27, 2007, Dillard was at Corner's apartment with Jeffries and a young man nicknamed "B.G." Corner, Jeffries, and B.G. were drinking and snorting cocaine; Dillard was only drinking. RP (4/22/09) 132. Raquael Grace was also at home, and she was visiting with the Asher sisters, Terasa and Larishica, who lived downstairs in the Dakota Apartments. RP (4/13/09) 41-45.

At some point late that evening, Raquael Grace received a call from her cousin, Henry "Jay" Harris. RP (4/22/09) 45. Harris explained that he had been in an argument with his girlfriend, and his girlfriend had sprayed mace on him, so he wanted to come over to wash his face. Harris further explained that Antwon Horton and Kevin "Little Calvin" Rogers were with him. RP (4/22/09) 52-53.

Although Grace knew that Dillard was a rival of Horton and Rogers due to their gang affiliations, Grace agreed. RP (4/22/09) 54.

Grace asked Amber Corner if her guests were leaving after explaining who was coming over. Corner agreed to take her guests into the bedroom so that there would not be a problem. RP (4/22/09) 55. Dillard was upset when he heard that LP members were coming over, and it made him "skittish." RP (4/22/09) 134, 138. Nonetheless, he went into the bedroom with Corner, Jeffries, and B.G. RP (4/22/09) 60.

Harris, Horton, and Rogers arrived at the Dakota Apartments at approximately 11:30 p.m. RP (4/15/09) 83-85. They went up to Grace and Corner's apartment; Harris washed his face in the kitchen and started charging his cell phone, while Horton, Rogers, the Asher sisters, and Grace watched music videos in the living room. RP (4/15/09) 86. Meanwhile, Dillard was becoming more agitated; he was sitting in the bathroom in Amber Corner's bedroom, holding the gun on his lap. RP (4/22/09) 137-38. Laura Jeffries asked Dillard if he wanted her to walk to the nearby Safeway store and call his best friend and fellow Deuce 8, Will Davis. Dillard agreed. RP (4/22/09) 139. Jeffries left the apartment, walked to the Safeway, and called Davis; upon her

return, she told Dillard that Davis was on his way. RP (4/22/09) 143.

But Dillard was still agitated. He said something to the effect that he was going to scare "these niggas" out of the apartment, meaning Harris, Horton and Rogers. RP (4/22/09) 145. He then stuck his arm out of Amber Corner's bedroom window and fired three shots.² RP (4/22/09) 144, 145-47.

Harris, Horton, Rogers, and the others were startled by the gunfire. Harris ran to the living room window, but did not see anyone outside. RP (4/15/09) 89-90. Harris decided that he wanted to move his car from the parking lot to a spot closer to the front door, but he was reluctant to go outside. Shortly thereafter, however, he saw a police car patrolling the parking lot, so Harris went outside and moved his car. RP (4/15/09) 91. After a brief conversation with Officer Shepherd, the officer who was patrolling in response to a report regarding the gunshots, Harris moved his car as close to the front door as he could. RP (4/15/09) 91-92; RP (4/16/09) 101.

² Bullets were recovered from apartments in the senior citizens' apartment complex across from the Dakota Apartments. RP (4/14/09) 13-14; RP (4/15/09) 64-66.

In the meantime, Jeffries looked out the window and saw two people who looked like Will Davis and S.S. Dillard decided to leave the apartment at that point. RP (4/22/09) 147-50. Dillard and Henry Harris crossed paths as Harris was returning to the apartment after moving his car and as Dillard was leaving. Harris was surprised to see Dillard because he did not know that Dillard had been in the apartment. RP (4/15/09) 98-99.

Almost as soon as Harris returned to the apartment, Raquael Grace asked Harris when he and his friends would be leaving. RP (4/15/09) 101. Unbeknownst to the others, Grace had plans to meet Dion Macklin, a Deuce 8 member known as "Chicago," so that he could spend the night with her.³ Macklin had just called Grace to let her know he had arrived at the Dakota Apartments. RP (4/22/09) 65-68. Harris was offended when Grace asked him when he would be leaving, so Harris, Horton and Rogers got up and got ready to leave at that point. RP (4/15/09) 101. Grace and the Asher sisters walked Harris, Horton and Rogers to the elevators and said their goodbyes. RP (4/15/09) 102; RP (4/22/09) 68-69. At

³ Grace referred to her plans for a secret tryst with Macklin as a "sneaky freaky." RP (4/22/09) 68.

this point, it was just before 1:00 a.m. on August 28, 2007.

RP (4/15/09) 103.

Dion Macklin kept calling Raquael Grace to tell her he was outside waiting for her to let him into the building. RP (4/22/09) 68-69. But then, just after Harris, Horton and Rogers got into the elevator, Dillard got on Macklin's phone and asked Grace why she had "all them niggas" in her apartment. RP (4/22/09) 71. Grace responded that they were her cousins, and that they were leaving. Grace then heard someone who sounded like Dillard saying, "They're leaving. They're leaving." The call ended immediately after that. RP (4/22/09) 71-73.

When Grace walked back into her apartment with the Asher sisters, Amber Corner was highly agitated; she was jumping up and down on the couch, shouting that the Deuce 8s were outside and that "[s]omebody is going to die tonight." RP (4/13/09) 68; RP (4/22/09) 75. Grace frantically tried to call Harris to warn him, but it was too late. RP (4/22/09) 75.

As Harris, Horton and Rogers walked out of the building and towards Harris's car, they encountered a group of seven Deuce 8s, including Dillard. RP (4/15/09) 104, 127-30. Harris heard one of them say, "What's up, nigga. What's up with it now." RP (4/15/09)

104. The next thing that anyone heard was a barrage of continuous gunfire. RP (4/10/09) 10; RP (4/15/09) 104.

Four of the seven Deuce 8s had guns, including Dillard. They fired at least 29 rounds at Harris, Horton and Rogers. RP (4/21/09) 139, 158-59; RP (4/22/09) 6-7, 9. Harris, Horton and Rogers turned and tried to run away from the gunfire. RP (4/16/09) 155. Harris and Rogers both were shot in the lower legs. RP (4/15/09) 133; RP (4/16/09) 156. Horton was shot in the back of the head, and he fell on his face on the sidewalk. RP (4/16/09) 156; RP (4/27/09) 135, 140.

The Deuce 8s scattered and left the scene in at least two different vehicles. RP (4/10/09 - I) 17-20; RP (4/17/09) 104-08. As they were leaving the scene, one of them said, "Did you get him?" RP (4/17/09) 106. Before leaving the scene, Dillard ditched his gun behind the tire of an RV that was parked in front of the building. RP (4/17/09) 109; Exs. 277, 278.

Harris hid behind some dumpsters until the shooting stopped. RP (4/15/09) 105. His cell phone was vibrating in his hand as he fled because Grace was still trying to call him to warn him. RP (4/15/09) 114-15. After the shooters fled the scene, Harris got up, retrieved his car keys, and got into his car as quickly as he

could. RP (4/15/09) 116-17. At this point, Grace called again; Harris answered and told Grace he had been shot. He stayed on the phone with her as he drove away. RP (4/15/09) 117. After a short distance, Harris pulled into the parking lot of a Chevron station to ask for help. He got out of the car and fell. RP (4/15/09) 120. After the police arrived, Harris was taken to Harborview, where he was treated for a broken bone and vascular damage. RP (4/15/09) 131-32.

Despite the injury to his leg, Kevin Rogers kept running until he collapsed in the middle of Rainier Avenue. A police car pulled up and the officer called for an ambulance. RP (4/16/09) 156-59, 161-62. Rogers also went to Harborview. He was unable to walk on his injured leg for several weeks, and he testified that it still hurts in cold weather. RP (4/16/09) 164-65.

Antwon Horton suffered massive brain damage and was taken off of life support on August 28, 2007. RP (4/21/09) 79-86.

Dillard was not found by the police until January 11, 2008, at the funeral of Deuce 8 member Allen Joplin. RP (4/27/09) 18-19. After his arrest, Dillard agreed to a video- and audio-recorded

interview with Seattle Police Detectives Ramirez and Mudd. RP (4/28/09) 58. During the interview, Dillard admitted firing his .40 caliber pistol out of Amber Corner's bedroom window, and he admitted firing that gun in the direction of Harris, Horton and Rogers. Exs. 277, 278. However, he claimed that he was not intending to hit anyone with the bullets he was firing, and said he was "just shooting just to be shooting." Ex. 277; Ex. 278, pg. 10. When asked if he was responsible for Antwon Horton's murder, Dillard said that he was shooting "towards him but I didn't shoot at him."⁴ Ex. 277; Ex. 278, pg. 16. On the other hand, Dillard admitted that he kept firing until his gun was empty. Ex. 277; Ex. 278, pg. 24.

Dillard also testified at trial. He claimed that he was not a Deuce 8, and said that he fired his gun in the air when the other shooters were firing their guns. RP (4/29/09) 57, 103-05.

⁴ Forensic analysis of the evidence proved that Dillard did not fire the bullet that killed Antwon Horton, and there was no way to determine who shot Harris and Rogers. RP (4/27/09) 27. Accordingly, Dillard was prosecuted as an accomplice.

C. ARGUMENT

1. THE TRIAL COURT EXERCISED SOUND DISCRETION IN ADMITTING TESTIMONY FROM A WITNESS WHO SAW THE DEFENDANT LOADING HIS GUN THE DAY BEFORE THE SHOOTING.

Dillard first claims that the trial court erred in allowing Laura Jeffries to testify that she saw Dillard loading a gun the day before the shooting. More specifically, Dillard claims that her description of him wiping the cartridges with a black bandanna – a symbol of Deuce 8 membership – as he loaded the cartridges into the magazine was impermissible propensity evidence admitted in violation of ER 404(b). Opening Brief of Appellant, at 18-23. This claim should be rejected.

This evidence is eyewitness testimony that placed a loaded gun in Dillard's hands only a day or so before the shooting, and it establishes that Dillard loaded that gun himself. As such, this was highly relevant, probative evidence of Dillard's intent. In addition, the jury could reasonably infer that Dillard wiped the cartridges in an effort to avoid leaving physical evidence behind, which is also probative of Dillard's intent. Moreover, the fact that Dillard used a black bandanna, or "flag," to wipe the cartridges is evidence of his Deuce 8 membership, which he denied during his own trial

testimony. The trial court exercised sound discretion in admitting this evidence, and this Court should affirm.

Evidentiary rulings are matters addressed to the sound discretion of the trial court. State v. Atsbeha, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001). A trial court abuses its discretion in deciding whether evidence is admissible only when its decision is manifestly unreasonable or is based on untenable grounds. State v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999). A reviewing court will find an abuse of discretion only if it finds that no reasonable person would have ruled as the trial judge did.

Atsbeha, 142 Wn.2d at 914.

Under ER 404(b), evidence of the defendant's other crimes, wrongs, or acts is admissible if relevant to prove identity, motive, preparation, plan, absence of mistake or accident, or for any purpose other than showing the defendant's criminal character or propensity.⁵ State v. Russell), 125 Wn.2d 24, 66, 882 P.2d 747

⁵ As an aside, the evidence at issue here does not appear to fall under the rubric of ER 404(b) at all. Loading a gun, in and of itself, is not a bad act and does not indicate a propensity for anything other than the obvious, i.e., keeping a gun loaded. Indeed, under Dillard's formulation of ER 404(b), evidence of virtually any action taken by a criminal defendant in the 24 hours prior to committing a crime would be subject to an ER 404(b) analysis. This is clearly not the law. In any event, however, whether analyzed under ER 404(b) or not, Laura Jeffries's testimony that she saw Dillard wiping cartridges with a black bandanna and loading them into the gun's magazine only a day or so before the shooting is clearly admissible evidence.

(1994). As is true of evidentiary rulings generally, a trial court's decision to admit evidence under ER 404(b) is reviewed for manifest abuse of discretion. State v. Dennison, 115 Wn.2d 609, 627-28, 801 P.2d 193 (1990). As noted above, the trial court abuses its discretion only if its decision is made on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). And again, the trial court's decision will be overturned only if no reasonable judge would have ruled as the trial court did. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

Washington courts have repeatedly recognized that evidence showing that a defendant brought a loaded gun to the scene of a murder is proof of the defendant's premeditated intent to kill. State v. Gentry, 125 Wn.2d 570, 598, 888 P.2d 1105 (1995); State v. Bingham, 105 Wn.2d 820, 827, 719 P.2d 109 (1986); State v. Massey, 60 Wn. App. 131, 145, 803 P.2d 340 (1990), *abrogated on other grounds*, State v. Broadway, 133 Wn.2d 118, 129-31, 942 P.2d 363 (1997). Moreover, testimony from an eyewitness who had seen the defendant carrying and playing with a gun before the crime occurred has also been found to be probative evidence of the defendant's intent to commit a crime. State v. Powell, 139 Wn.

App. 808, 812, 815, 162 P.3d 1180 (2007), *rev'd on other grounds*, 166 Wn.2d 73, 206 P.3d 321 (2009). Indeed, it is difficult to imagine how eyewitness testimony placing a loaded gun in a defendant's hands prior to a shooting would *not* be relevant and admissible.

In this case, Laura Jeffries testified that approximately one day prior to the shooting, she saw Dillard and another individual "cleaning" Dillard's gun in the living room of Amber Corner's apartment. RP (4/22/09) 127. When pressed, Jeffries stated that Dillard was wiping the cartridges with a black bandanna, or "flag," and then loading the cartridges into the magazine. RP (4/22/09) 128-31. Jeffries repeated this testimony during cross-examination, and she further stated on cross-examination that she assumed that Dillard was wiping the cartridges in order to remove his fingerprints. RP (4/23/09) 21-24.

In accordance with well-settled law, evidence placing a loaded gun in the hands of the defendant prior to the commission of a crime is highly probative evidence of intent. The trial court admitted this evidence for this purpose, noting that Dillard's intent was a disputed issue in the case. The trial court further noted that Dillard's use of his gang bandanna to remove physical evidence

from the cartridges was also probative of Dillard's intent.⁶ RP (4/3/09) 84-86. The trial court's ruling is clearly based on tenable grounds, in light of the authorities cited above, and Dillard's arguments to the contrary are without merit.

Nonetheless, Dillard maintains that the trial court's ruling was erroneous because this evidence "showed an intent or readiness to commit assault or other crimes, *generally*," rather than the specific crimes at issue here, and that the error was prejudicial because Dillard's defense was "his lack of intent to assault anyone." Opening Brief of Appellant, at 22-23 (*italics in original*). This is a completely self-defeating argument. Dillard's defense was indeed that he did not intend to assault anyone. Ex. 277; RP (4/30/09) 104. He also claimed that he was carrying a gun because it was "just a habit." RP (4/30/09) 130. Accordingly, evidence proving that Dillard had the intent and was ready to commit an assault with the gun only a day prior to the shooting at issue was clearly admissible because it directly rebutted Dillard's claims.

In sum, the trial court exercised sound discretion in admitting evidence placing a loaded gun in Dillard's hands the day before the

⁶ Dillard was successful in this effort, as no DNA was found on the .40 caliber cartridge casings left behind at the scene of the shooting. RP (4/24/09) 46-47.

shooting occurred. This Court should reject Dillard's arguments, and affirm.

2. THE TRIAL COURT EXERCISED SOUND DISCRETION IN DENYING DILLARD'S MOTION FOR A MISTRIAL BECAUSE DILLARD DID NOT MAKE THE REQUISITE SHOWING OF PREJUDICE.

Dillard next claims that the trial court erred in denying his motion for a mistrial after a brief portion of his video- and audio-recorded statement to the detectives that had not been played during the trial was inadvertently played for the jury during deliberations. This claim should be rejected for several reasons.

First, Dillard misconstrues the record. The portion of the statement that he contends was played during deliberations had been physically redacted from the video and was never played for the jury. Second, the brief portion of the statement that actually was played during deliberations is virtually inaudible. Thus, as the trial court observed, it is extremely unlikely that the jurors could hear it, and the jury had already been instructed that the detectives' statements were not evidence. Accordingly, there was no prejudice. Third, as the trial court also observed, although this portion of Dillard's statement was muted by the agreement of the

parties during trial, the trial court would have admitted it if the court had been asked to rule on the issue. There was no prejudice for this reason as well. Lastly, the jury convicted Dillard of lesser offenses on two out of the three counts charged. In sum, Dillard has not shown that the trial court abused its discretion in ruling that a mistrial was not warranted. This Court should affirm.

A trial court's decision to deny a motion for a mistrial is reviewed on appeal only for manifest abuse of discretion. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). The reviewing court will find an abuse of discretion only if no reasonable trial judge would have decided that a mistrial was not necessary. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). A mistrial should be granted "only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be tried fairly." State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986). Put another way, the trial court's decision to deny a motion for a mistrial should not be overturned on appeal unless the record demonstrates that a trial irregularity has prejudiced the defendant such that it has improperly affected the outcome of the trial. See Mak, 105 Wn.2d at 701. Moreover, the reviewing court must give deference to the trial court's judgment, as

the trial judge is clearly in the best position to gauge whether such irreparable prejudice has occurred. See Lewis, 130 Wn.2d at 707.

Each case must be decided on its own facts, based on the type of trial irregularity that prompted the motion in the first place. For example, when reviewing a trial court's decision to deny a motion for mistrial based on a witness's objectionable remarks during testimony, appellate courts generally examine three factors: 1) the seriousness of the irregularity; 2) whether the error involved cumulative evidence; and 3) whether the trial court properly instructed the jury to disregard the remarks. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). But even a witness's inadmissible remarks regarding the defendant's criminal history do not warrant a new trial if the remarks are relatively insignificant in the context of the entire record. See Hopson, 113 Wn.2d at 284-86 (holding that a witness's remark that the victim met the defendant before "he went to the penitentiary the last time" was not prejudicial in light of the whole record and substantial evidence of guilt). On the other hand, a new trial may be necessary if the impermissible remark references specific, prejudicial prior misconduct, particularly if the State's admissible evidence of guilt is weak. See Escalona, 49 Wn. App. at 254-56 (holding that the victim's testimony that the

defendant "already has a record and had stabbed someone" warranted granting a mistrial where the other evidence was weak and the charge at issue was an assault with a knife).

In any case, jurors are presumed to follow the trial court's instructions to disregard inadmissible evidence. Johnson, 124 Wn.2d at 77. Moreover, the trial irregularity in question must always be examined "against the backdrop of all the evidence" and in light of the record as a whole. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). Based on these standards, Dillard's claim is without merit.

As a preliminary matter, as noted above, Dillard misconstrues the record regarding this issue. In his brief, Dillard contends that the portion of his statement that was inadvertently played for the jury during deliberations is the portion where Dillard described in some detail how he beat and robbed a young Hispanic male, stole his backpack, and discovered the .40 caliber semiautomatic pistol in the stolen backpack as if it were a prize he had won. Dillard quotes this portion of the statement in his brief. See Opening Brief of Appellant, at 24-25 (quoting Pretrial Ex. 6, pgs. 20-21).

But this portion of Dillard's statement was never played for the jury. Rather, this portion of Dillard's statement was physically redacted from the video itself and from the transcript the jurors used as a listening aid during the trial. *Compare* Pretrial Exs. 3 and 6 (unredacted video and transcript) *with* Exs. 277 and 278 (redacted video and transcript utilized at trial). Thus, Dillard's arguments regarding this issue are based on an alleged error that did not actually occur.

The record shows that the portion of Dillard's statement that was muted during the trial but inadvertently played during the jury's deliberations is as follows:

RAMIREZ: How many days you had [sic] the 40 caliber before the shooting?

DILLARD: I got it the day before that happened. *I stole it from somebody.*

RAMIREZ: *You stole it from somebody.*

DILLARD: *Yeah.*

Pretrial Ex. 6, pg. 14 (italics added); Ex. 277. As noted by the trial court, the italicized remarks had been redacted from the transcript given to the jurors as a listening aid. Ex. 278, pg. 14. Accordingly, the remarks at issue came only from the recording itself. Ex. 277.

As the trial judge observed in addressing Dillard's motion for a mistrial, Dillard's statement "I stole it from somebody" is so soft and mumbled as to be virtually inaudible. Ex. 277; RP (5/7/09) 9. And, although Detective Ramirez repeated what Dillard apparently said, the trial court had already instructed the jury during the trial that the detectives' remarks on the video were not evidence:

Ladies and gentlemen, I'm going to give the State permission to publish this by playing it for you. It's clearly edited and that's at the direction of the Court for legal reasons that you should not be concerned about. I will also point out that whatever you hear the detective say on the video, what you hear the lawyers say in Court, the questions are not evidence. The answers on the tape are evidence and the testimony the witnesses give in court are evidence and not the questions the lawyers ask. Likewise, the evidence here are the statements by the defendant and not the questions the detective asked.

RP (4/28/09) 61-62. The jury is presumed to have followed this directive from the court. In addition, Dillard's admission that he stole the gun from someone the day before the shooting is, at most, only minimally prejudicial in light of Dillard's other admissions (such as that he fired three shots out of Amber Corner's bedroom window because he was drunk, and that he emptied the remaining contents of his weapon's magazine in the direction of the shooting victims). Ex. 277; Ex. 278, pgs. 4-5, 9-11, 13-16, 18, 23-24. In light of this

record, the trial court did not abuse its discretion in deciding that irreparable prejudice had not occurred and in denying Dillard's motion for a mistrial.

Moreover, the trial court accurately observed that this brief portion of Dillard's statement was muted during its publication at trial by agreement of the parties, and not as a result of a ruling by the trial court. RP (5/7/09) 11-12. As the trial court further observed, if the court *had* been asked to make a ruling on this particular portion of Dillard's statement, the court would have admitted it because "it's part of the *res gestae* of how Mr. Dillard got the gun" only one day prior to the shooting. RP (5/7/09) 13. As is true of the cartridge-wiping evidence addressed in the previous argument section, this would have been an evidentiary ruling well within the trial court's sound discretion. Dillard's motion for a mistrial was properly denied for this reason as well.

Finally, the trial court also correctly observed that the jury convicted Dillard of the lesser offense of second-degree assault on counts II and III rather than first-degree assault as charged. RP (5/7/04) 13. If the jurors *had* been unduly prejudiced by Dillard's revelation that he stole the gun from someone the day

before the shooting, it seems unlikely that they would have convicted him only of these lesser charges.

In sum, Dillard has not shown that he was so unfairly prejudiced by playing this brief, largely inaudible portion of his statement during deliberations that nothing short of a new trial would ensure that he received a fair trial. Accordingly, the trial court exercised sound discretion in denying Dillard's motion for a mistrial, and this Court should affirm.

3. THIS COURT AND THE WASHINGTON SUPREME COURT HAVE ALREADY REJECTED DILLARD'S CLAIM THAT THE FELONY MURDER RULE VIOLATES EQUAL PROTECTION AND DUE PROCESS.

Lastly, Dillard claims that the State's decision to charge him with felony murder based on assault as one of two alternative means of committing second-degree murder violates both equal protection and due process guarantees. Opening Brief of Appellant, at 28-41. This Court and the Washington Supreme Court have already rejected these claims, and they should be rejected here as well.

As a preliminary matter, Dillard asserts that although he was charged with both intentional murder and felony murder as

alternative means, and although both of these alternative means were submitted to the jury, "intentional murder was never the state's theory of the case," and "the prosecutor never argued intentional murder in opening or closing." Opening Brief of Appellant, at 28. This assertion is incorrect. First, in opening statement, the prosecutor did not "argue" either alternative means of committing second-degree murder, because the purpose of opening statement is to tell the jury what facts the evidence will show, not to argue legal theories. Second, in closing argument, the prosecutor argued at length as to how the evidence showed that Dillard acted with intent, and how that evidence proved that Dillard was an accomplice to the intentional murder of Antwon Horton. RP (5/4/09) 14-17, 26, 28, 35-37. The prosecutor argued how the evidence proved felony murder only *after* explaining how the evidence proved intent. RP (5/4/09) 37-39. Lastly, the prosecutor correctly explained to the jurors that they could disagree as to which alternative means had been proved and still find Dillard guilty of second-degree murder, so long as each of them agreed that at least one of the alternative means had been proved beyond a reasonable doubt. RP (5/4/09) 38-40. Accordingly, Dillard's

assertion that the prosecutor relied solely on felony murder is erroneous in light of the record.

But in any event, Dillard's claim that the felony murder rule violates equal protection and due process would fail even if felony murder were the only alternative means under which Dillard was charged.

First, as to equal protection, Dillard contends that the felony murder rule is unconstitutional when the underlying felony is assault because this crime "has essentially the same elements as manslaughter," and "the prosecutor has unfettered discretion to charge either crime." Opening Brief of Appellant, at 29. This Court has already rejected this argument in State v. Armstrong, 143 Wn. App. 333, 178 P.3d 1048, rev. denied, 164 Wn.2d 1035 (2008),⁷ and again more recently in State v. Gordon, 153 Wn. App. 516, 524-27, 223 P.3d 519 (2009), rev. granted in part and denied in part, 169 Wn.2d 1011 (2010).⁸ In addition, Dillard's arguments to

⁷ Dillard claims that Armstrong did not address his argument that felony murder and manslaughter are the same crime when the underlying felony is assault. Opening Brief of Appellant, at 29. Dillard is incorrect. See Armstrong, at 340-41 (citing Wanrow).

⁸ In Gordon, the Washington Supreme Court denied the defendant's petition for review, which raised the issues related to the felony murder rule, and granted the State's petition for review, which included issues wholly unrelated to the felony murder rule.

the contrary notwithstanding, the Washington Supreme Court has quite clearly held that felony murder based on assault and manslaughter are indeed different crimes with different elements. State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005); *see also* State v. Wanrow, 91 Wn.2d 301, 312, 588 P.2d 1320 (1978).

Dillard's arguments should be rejected in accordance with these controlling precedents.

Second, under the rubric of due process, Dillard argues that felony murder based on assault is unconstitutional for two reasons: 1) because those who intend to kill and those who do not are both punished harshly, yet only the intentional killers may request manslaughter instructions; and 2) the felony murder statute is unconstitutionally vague when the underlying felony is assault. These arguments are without merit.

Dillard's first "due process" argument is merely an equal protection claim with a different label, as the core of this argument is that certain murderers are treated differently for allegedly arbitrary reasons, and that this difference in treatment is unfair. As such, this argument has already been rejected by this Court in Armstrong. *See* Armstrong, 143 Wn. App. at 343-44.

Dillard's second due process argument is plainly absurd. In order to show that the felony murder statute is unconstitutionally vague, Dillard must show beyond a reasonable doubt that citizens of ordinary intelligence would have to guess at its meaning, i.e., that they would not understand what conduct is prohibited, as specifically applied to Dillard's conduct in this case. City of Seattle v. Eze, 111 Wn.2d 22, 26, 759 P.2d 366 (1988). It strains reason to suggest that a person of ordinary intelligence would not understand that lying in wait on a street corner with a loaded gun (with several associates who also have loaded guns) and then emptying the contents of the weapon's magazine at three unsuspecting victims in an ambush-style attack could constitute the crime felony murder based on assault.

Lastly, all of Dillard's arguments regarding the felony murder rule appear to be premised on the notion that In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), is still good law. It is not. See Laws of 2003, ch. 3, § 1 (declaring that the legislature "does not agree with or accept the court's findings of legislative intent" in Andress, and expressly including assault as a predicate for felony murder). This Court should reject Dillard's arguments, and affirm.

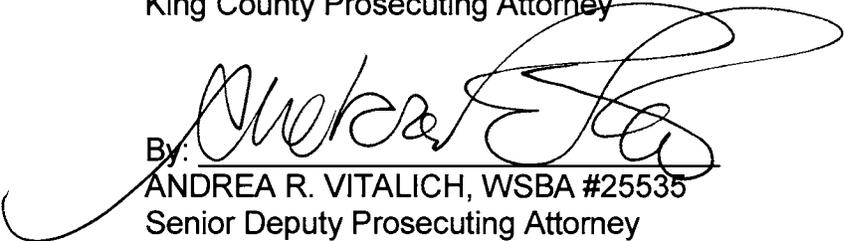
D. CONCLUSION

The trial court exercised sound discretion in making its evidentiary rulings and in denying Dillard's motion for a mistrial, and Dillard's arguments regarding felony murder are contrary to controlling precedent. For all of the reasons set forth above, this Court should affirm Dillard's convictions and sentence for murder in the second degree and two counts of assault in the second degree.

DATED this 15th day of October, 2010.

Respectfully submitted,

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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 Dana Lind, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. DAMARIO DILLARD, Cause No. 63757-6-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.

U Brame
Name
Done in Seattle, Washington

10/1/10
Date