

No. 64801-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SHIRWA ABDI MUSE,

Appellant.

[Handwritten signature and notes]

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

The Honorable Bruce E. Heller

REPLY BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

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

TABLE OF CONTENTS

A. ARGUMENT 1

THE COURT’S POLLING OF THE JURY THEN
INSTRUCTING THEM AFTER DISCOVERING THE
NUMERICAL SPLIT VIOLATED MR. MUSE’S RIGHT
TO A JURY TRIAL..... 1

1. The court’s continued polling of the jury *after*
discovering the lack of unanimity alone violated Mr.
Muse’s right to a jury trial. 1

2. In the alternative, the court’s instruction following
to the jury to continue deliberations following its
discovery of the numerical split in the jury resulted in
a coerced verdict..... 3

B. CONCLUSION 5

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Boogaard, 90 Wn.2d 733, 585 P.2d 789 (1978)..... 1, 2

State v. Jones, 97 Wn.2d 159, 641 P.2d 708 (1982).....4

A. ARGUMENT

THE COURT'S POLLING OF THE JURY THEN
INSTRUCTING THEM AFTER DISCOVERING THE
NUMERICAL SPLIT VIOLATED MR. MUSE'S RIGHT
TO A JURY TRIAL

1. The court's continued polling of the jury after discovering the lack of unanimity alone violated Mr. Muse's right to a jury trial.

In his opening brief, Mr. Muse submitted that the court's polling of the jury, thus discovering its division and numerical breakdown, alone violated his right to a jury trial. The State failed to address this issue in its response brief.

Questions by the judge to the jury inquiring into the extent of the jury's division and its numerical breakdown are prohibited. *State v. Boogaard*, 90 Wn.2d 733, 738, 585 P.2d 789 (1978). In addition to the coercive power of the court's instruction in *Boogaard* to the jury to continue to deliberate for a prescribed length of time, was the Supreme Court's unequivocal ban on asking the jury to state its numerical split. *Id.*

We deem it essential to the fair and impartial conduct of the trial that the inquiry [on how the jury stands] itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the

trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious, although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. *Such a practice, which is never useful and is generally harmful, is not to be sanctioned.*

...
The polling of jurors upon a question involving their deliberations threatens the prospect of a verdict free from outside influence. That sound procedure does not contemplate such questioning is manifest from the fact that neither the statutes of this State nor the rules of court make any provision for polling of the jury before the verdict is returned.

Boogaard, 90 Wn.2d at 738, 740 (emphasis added).

The State's attempt to distinguish *Boogaard* evidences a plain misunderstanding of the Supreme Court's decision. The State merely reads *Boogaard* to stand for the proposition that courts may not order a jury to deliberate for a specific period of time. Brief of Respondent at 7. As argued, *Boogaard* also determined that a trial court's act of polling and establishing both the division of the jury and its numerical split was erroneous. The State either ignores the portion of the decision or plainly misunderstands *Boogaard*.

The court's polling of the jury plainly violated the ban pronounced by *Boogaard*. Pursuant to *Boogaard*, Mr. Muse is

entitled to reversal of his convictions and remand for a new trial. *Boogaard*, 90 Wn.2d at 740 (“Since we have determined that the questioning of the individual jurors tended to and most probably did influence the minority jurors to vote with the majority, . . . a new trial must be ordered.”).

2. In the alternative, the court’s instruction following to the jury to continue deliberations following its discovery of the numerical split in the jury resulted in a coerced verdict. Mr. Muse submitted that, in light of the fact the vast majority of the jury felt further deliberations would *not* result in a verdict and that the jury was hopelessly deadlocked, the court’s instructions to continue to deliberate were inherently coercive resulting in a coercive verdict. The State responds that the court would have committed error if it had declared a mistrial. Brief of Respondent at 9-12. The State’s argument ignores the record in this case.

Initially, the State contends Mr. Muse cannot show the verdict may have been different absent the court’s machinations, since the jury found Mr. Muse guilty of *essentially* second degree assault. Brief of Respondent at 9. This is a clear misstatement of the record. What the jury had found in the first round of deliberations was a unanimous verdict of guilty to *fourth* degree

assault with a finding on the deadly weapon special verdict. RP 430-31. This is *not* a finding on second degree assault; it is a inconsistent and nonsensical verdict from which nothing can be inferred.

More to the point, contrary to the State's argument, the inference that the jury was coerced into reaching a verdict is amply supported by the continued in-court discussions by the jurors with the judge. The jurors repeatedly asked about the need for unanimity, and at least one juror emphatically stated further deliberations would be futile given the unanimity requirement. RP 434. The court curtly ended any further discussion with its instruction which ultimately led to Mr. Muse's conviction a few hours later that day. Plainly the court's instruction was coercive and violated Mr. Muse's right to a fair and impartial jury.

Contrary to the State's argument, the decision in *State v. Jones*, 97 Wn.2d 159, 641 P.2d 708 (1982), adds nothing to the discussion. *Jones* merely stands for the proposition that, absent a statement of the jury through its foreperson that it is hopelessly deadlocked, the court erres in declaring a mistrial since there is no "extarordinary and struiking circumstances" authorizing a mistrial. *Id.* at 164-65. Here, the jury was split regarding whether further

deliberations would lead to a verdict with only three jurors agreeing that further deliberations were possible. RP 434. But, the court did have a sufficient basis to declare a mistrial given the majority of jurors' conclusion that further deliberations would not be beneficial. *Jones* does not compel any conclusion one way or the other in this case.

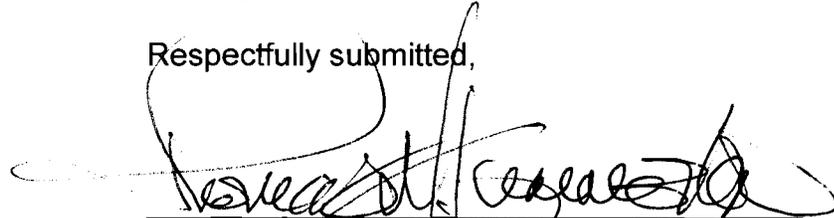
Mr. Muse is entitled to reversal of his conviction and remand for a new trial.

B. CONCLUSION

For the reasons stated, Mr. Muse requests this Court reverse his conviction on count one and remand for a new trial.

DATED this 12th day of November 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over a horizontal line. The signature is stylized and cursive.

THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 64801-2-I
v.)	
)	
SHIRWA MUSE,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF NOVEMBER, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MAFE RAJUL, DPA	(X)	U.S. MAIL
KING COUNTY PROSECUTOR'S OFFICE	()	HAND DELIVERY
APPELLATE UNIT	()	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

SIGNED IN SEATTLE, WASHINGTON THIS 12TH DAY OF NOVEMBER, 2010.

X _____ 

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