

original

NO 34945-1-II.  
Cowlitz County No 05-1-01478-1.

---

**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**GREGORY ALLEN DOANE**

**Appellant.**

---

**BRIEF OF APPELLANT**

---

ANNE CRUSER/WSBA #27944  
Attorney for Appellant

P. O. Box 1670  
Kalama, WA 98625  
360 - 673-4941

FILED  
COURT OF APPEALS  
06 NOV -1 PM 1:35  
BY *[Signature]*  
CLERK OF COURT

PM 10/30/06

TABLE OF AUTHORITIES

A. ASSIGNMENTS OF ERROR ..... 1

    I. MR. DOANE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL..... 1

    II. THE COURT COERCED THE JURY INTO RETURNING A SPECIAL VERDICT..... 1

    III. THE COURT ERRED IN INCLUDING A POINT IN MR. DOANE’S OFFENDER SCORE REFLECTING THAT HE WAS ON COMMUNITY CUSTODY AT THE TIME OF THE CURRENT OFFENSE. .... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

    I. MR. DOANE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO TIMELY OBJECT TO IMPROPER TESTIMONY FROM DETECTIVE ULLMAN..... 1

    II. THE TRIAL COURT COERCED THE JURY INTO RETURNING A SPECIAL VERDICT BY GIVING AN IMPROPER INSTRUCTION WHEN THEY FAILED TO RETURN A UNANIMOUS ANSWER. .... 1

    III. MR. DOANE’S RIGHT TO A JURY TRIAL WAS VIOLATED WHEN THE COURT INCLUDED A POINT ON HIS OFFENDER SCORE BASED ON ITS DETERMINATION THAT HE WAS ON COMMUNITY CUSTODY AT THE TIME OF THE CURRENT OFFENSE. .... 1

C. STATEMENT OF FACTS..... 1

    1. PROCEDURAL HISTORY..... 1

    2. FACTUAL HISTORY ..... 2

D. ARGUMENT ..... 10

**I. MR. DOANE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO TIMELY OBJECT TO IMPROPER TESTIMONY FROM DETECTIVE ULLMAN..... 10**

**II. THE TRIAL COURT COERCED THE JURY INTO RETURNING A SPECIAL VERDICT BY GIVING AN IMPROPER INSTRUCTION WHEN THEY FAILED TO RETURN A UNANIMOUS ANSWER. .... 14**

**III. MR. DOANE’S RIGHT TO A JURY TRIAL WAS VIOLATED WHEN THE COURT INCLUDED A POINT ON HIS OFFENDER SCORE BASED ON ITS DETERMINATION THAT HE WAS ON COMMUNITY CUSTODY AT THE TIME OF THE CURRENT OFFENSE. .... 21**

**E. CONCLUSION..... 23**

## TABLE OF AUTHORITIES

### **Cases**

<i>State v. Bandura</i> , 85 Wn.App. 87, 931 P.2d 174, <i>review denied</i> , 132 Wn.2d 1004 (1997).....	11
<i>State v. Boogaard</i> , 90 Wn.2d 733, 585 P.2d 789 (1978) .....	17, 18
<i>State v. Brown</i> , 128 Wn.App. 307, 116 P.3d 400 (2005).....	24
<i>State v. Giles</i> , 132 Wn.App. 738, 132 P.3d 1151 (2006).....	25
<i>State v. Goldberg</i> , 149 Wn.2d 888, 72 P.2d 1083 (2003).....	19, 20, 21
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	11
<i>State v. Hochhalter</i> , 131 Wn.App. 506, 128 P.3d 104 (2006) .....	24
<i>State v. Hunt</i> , 128 Wn.App. 535, 116 P.3d 450 (2005) .....	24
<i>State v. Jones</i> , 126 Wn.App. 136, 109 P.3d 755 (2005) .....	23, 24
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251(1995).....	11
<i>State v. Mierz</i> , 127 Wn.2d 460, 901 P.2d 186 (1995).....	11
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052 (1984) .....	11

### **Rules**

CrR 6.15 .....	15, 17, 22
----------------	------------

**A. ASSIGNMENTS OF ERROR**

**I. MR. DOANE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.**

**II. THE COURT COERCED THE JURY INTO RETURNING A SPECIAL VERDICT.**

**III. THE COURT ERRED IN INCLUDING A POINT IN MR. DOANE'S OFFENDER SCORE REFLECTING THAT HE WAS ON COMMUNITY CUSTODY AT THE TIME OF THE CURRENT OFFENSE.**

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**I. MR. DOANE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO TIMELY OBJECT TO IMPROPER TESTIMONY FROM DETECTIVE ULLMAN.**

**II. THE TRIAL COURT COERCED THE JURY INTO RETURNING A SPECIAL VERDICT BY GIVING AN IMPROPER INSTRUCTION WHEN THEY FAILED TO RETURN A UNANIMOUS ANSWER.**

**III. MR. DOANE'S RIGHT TO A JURY TRIAL WAS VIOLATED WHEN THE COURT INCLUDED A POINT ON HIS OFFENDER SCORE BASED ON ITS DETERMINATION THAT HE WAS ON COMMUNITY CUSTODY AT THE TIME OF THE CURRENT OFFENSE.**

**C. STATEMENT OF FACTS**

**1. PROCEDURAL HISTORY**

The Cowlitz County Prosecuting Attorney charged Appellant, Gregory Doane, by Amended Information with delivery of a controlled substance, methamphetamine, and further alleged that the delivery

occurred within 1,000 feet of a Longview School District bus stop located at 1210 9<sup>th</sup> Avenue in Longview, Washington. CP 7. A jury trial commenced on May 17<sup>th</sup>, 2006 before the Honorable James Warne. Trial Report of Proceedings. Mr. Doane was convicted as charged, and the jury returned a special verdict answering yes, he committed the crime within 1000 feet of a school bus stop. CP 28, 29. At sentencing, the court included a point in Mr. Doane's offender score based on its finding that he was on community custody at the time he committed the current offense. CP 30, 32. Mr. Doane objected to the court's inclusion of this point on his offender score based on its own finding of fact, and maintained that this finding must be made by a jury. Trial RP, 2. Mr. Doane made this argument prior to trial as well as at sentencing. Trial RP 2, Sentencing RP (6-1-06), 4. Mr. Doane was given a sentence within the standard range as determined by the court. CP 35. This timely appeal followed. CP 42.

## **2. FACTUAL HISTORY**

The Cowlitz-Wahkiakum Narcotics Task Force arrested Mr. Michael Nolte for manufacturing marijuana and possession of cocaine. Trial RP, 30-31. As an alternative to going to jail, the Task Force offered Mr. Nolte the opportunity to work with the Task Force on going after his suppliers, or any other suppliers he might know. Trial RP 32. Detective Ullman of the Task Force considered Mr. Nolte a "fairly sizeable

supplier.” Id. at 33. Mr. Nolte entered into a contract with the State in which, in exchange for his work, he would be given a reduced charge and a recommendation from the State of no jail time. Id. at 35. Had he not entered into this agreement, his sentence could have been as high as 60 months. Id. One of Mr. Nolte’s targets was Mr. Doane. Id. at 39.

At trial, following opening statements, the court gave instructions to the jury prior to their noon recess. During these instructions, the court admonished the jury not to do any independent investigation on its own. Trial RP, 18. As part of this instruction, the court stated “You’ve heard that this offense occurred at Bob’s.” Trial RP, 18. The court also instructed the jury that either side could appeal the verdict to the Court of Appeals. Id. at 11-12. During pre-trial motions the parties discussed a potential sentencing issue regarding Mr. Doane’s standard range. The defense indicated that it believed Mr. Doane was entitled to have a jury determine whether he was on community custody at the time he allegedly committed this offense. Id. at 2. The court made the following ruling:

The issue of whether community custody as an enhancing factor in sentencing has to be pleaded and proven or simply a matter of calculation of the score, about which our Court of Appeals have taken different positions. It’s been decided here, by our Superior Court, to be that the issue of community custody is not a matter that needs to be pleaded and proven, it is simply a clerical issue to be decided essentially by review of records.

Id. at 2-3.

The trial testimony began with Detective Ullman of the Task Force. Detective Ullman testified about the agreement the Task Force made with Mr. Nolte. Id. at 30-38. Ullman testified that on June 22<sup>nd</sup>, 2005 he and Mr. Nolte arranged a controlled drug buy with Mr. Doane as the target. Id. at 39. The Task Force learned of Mr. Doane through Mr. Nolte. Id. at 39. Regarding Mr. Doane, Detective Ullman testified:

Some of the dealers that we'll go after may actually be a lower level dealer. The specific target of the task force is your mid to upper level dealers and that's who we primarily focus our attention on. However, to get to those, at times we have to start lower and we'll go after a lower level dealer and then work our way up and try to get them to cooperate to go up the chain. And that's what this situation was. I knew that Mr. Doane was not a high level dealer, however, I knew who his supplier was, and that's why we were targeting Mr. Doane.

Id. at 39. Defense counsel did not object to this testimony at this time. Id.

On June 22<sup>nd</sup>, 2005 Detective Ullman met Mr. Nolte at a location in Kelso and discussed the proposed buy. Id. at 41-42. Task Force detectives searched Mr. Nolte and found no drugs or contraband on him. Id. at 42. They found three dollars on him. Id. Detective Ullman gave Mr. Nolte \$100 in twenty dollar bills, the serial numbers of which had been pre-recorded. Id. at 43. Detectives also searched Mr. Nolte's vehicle. Id. at 45. Detective Ullman then directed Mr. Nolte to call Mr.

Doane to arrange the alleged buy. Id. at 47.<sup>1</sup> The detectives and Mr. Nolte went to Bob's Merchandise in Longview at 1111 Hudson Street and parked their cars. Id. at 49.

According to Detective Ullman, Mr. Doane got out of his car and got into the informant's car on the passenger side. Id. at 49. At about this time, a third subject, who was never identified by the State, got into the passenger side of Mr. Doane's vehicle. Id. at 49. Mr. Doane stayed in Mr. Nolte's car for a few minutes and then returned to his own car. Id. at 50. After a brief conversation between Mr. Doane and the unidentified man, Mr. Doane drove out of the parking lot. Id. at 51. Detective Ullman then called Mr. Nolte and asked him what was going on, and Nolte replied that the other men were going to get the meth. Id. Detective Ullman remained at his location and waited. Id. at 51. After a few minutes Mr. Doane's vehicle returned to the parking lot. Id. at 52. The unidentified man was still in Mr. Doane's car. Id. According to Detective Ullman, Mr. Doane then got out of his car and got back into Mr. Nolte's car. Id. At that point Detective Ullman left his car and walked into the store, fearing his stationary presence would look suspicious. Id. Once Ullman got into the store he saw Mr. Doane get out of Mr. Nolte's car and get back into his own car, at which point he left. Id.

---

<sup>1</sup> The transcript is missing six minutes of audio at this point.

After that, the detectives got into their car and drove to a pre-determined location to meet Mr. Nolte. Id. at 53-54. When they met Mr. Nolte, he gave them a small ziplock type baggie containing a white crystal substance. Id. at 55. The detectives then searched Mr. Nolte again and found the same three dollars he had at the time of the first search, but nothing else. Id. The crystal substance later tested positive for methamphetamine. Id. at 94. Mr. Doane was not arrested or searched after this incident. Id. at 43. As such, the pre-recorded buy money was never recovered. Id. at 43.

Detective Ullman admitted that although they had the option of placing a body wire on Mr. Nolte, no effort was made to do that in this case. Id. at 79. Mr. Doane was arrested on November 18<sup>th</sup>, 2003 following an unrelated traffic accident. Id. at 136-138.

Prior to the cross examination of Detective Ullman, defense counsel advised the court that she had a motion she wished to make, to which the court replied he would take it up at the recess. Id. at 76.

Following the testimony of Mr. Nolte, defense counsel was granted the opportunity to make the motion she referenced following the direct testimony of Detective Ullman. Id. at 129. She moved for a mistrial based upon Detective Ullman's direct testimony that Mr. Doane was a low level drug dealer. Id. She argued:

Obviously whether or not Mr. Doane is a drug dealer is the very question at issue here. He also testified that Mr. Doane's supplier is an upper level dealer, indicating again that Mr. Doane is involved in and has, in his opinion my client is involved in drug dealing and is being supplied with drugs. That is so prejudicial to my client that I think a mistrial is warranted.

Id. at 129-130. She also admitted that she did not object at the time and offered no explanation for her failure to do so. Id. at 130.

Rick Lecker, the Transportation supervisor for the Longview School District, testified that there is a bus stop at 1210 9<sup>th</sup> Avenue in Longview, and that the stop is designated by the Longview School District. Id. at 98. Detective Ullman testified that he measured the distance from the exact location where the vehicles were parked in Bob's parking lot to the location at 1210 9<sup>th</sup> Avenue, which he believed to be a school bus stop based on published information from the Longview School District. Id. at 62. He testified that he took two separate measurements from two different routes between the location at Bob's and 1210 9<sup>th</sup> Avenue. Id. at 71. The first measurement was 852 feet and the second measurement was 943 feet. Id.

Mr. Doane did not testify at the trial. After retiring for deliberations, the jury sent to notes to the court. The first note said: "Would like to see the R.C.W. about delivery of controlled substance near a school bust stop." CP 26. It was submitted at 4:48, and reflects that the

attorneys were called at 4:49. CP 26. The court responded: “You will have to refer to the court’s instructions previously given.” CP 26. The second note said: “We have a juror who will not vote yes because he does not agree with the law. What do we do?” CP 27. This note was submitted at 5:20. CP 27. The note does not reflect that the attorneys were advised of this note, and the Report of Proceedings does not reflect they were advised of this note. CP 27. The note does contain boilerplate language, however, which says: “**COURT’S RESPONSE:** (After affording all counsel/parties opportunity to be heard.) CP 27. The court responded: “Refer to the instructions.” CP 27.

When the jury returned its verdict, the following exchange occurred between the jury and the court:

Judge: Be seated. Mr. Hansen, I see you’re carrying papers. Does that mean you’re the foreperson?

Hansen: Yes.

Judge: Has the jury reached verdicts in this matter?

Hansen: Yes, we have.

Judge: Would you hand the verdict forms to the bailiff, please. **It’s supposed to be 12-0 on everything. I’m going to send you back to do some more talking.** All right.

Id. at 190. The judge did not consult the attorneys prior to sending the jury back, nor did defense counsel object or make any motions. Id. The Report of Proceedings indicates that the jury then left the courtroom, and then the judge said the following:

Well, what's happened is this, on the general verdict form they found the defendant guilty. On the question of whether there was a violation of the school zone ordinance, they voted 11-1. So, 11 yes, 1 no. Okay. Go back and talk some more. That's where we are.

Id. at 191. Again, the parties said nothing. Id. The court then instructed the defendant to remain in the courtroom, stating "...I don't think they'll be too long." Id. The jury then returned, and the time is not noted by the transcriber.

The judge asked the foreperson if the jury had reached a verdict, to which the foreperson replied they had. Id. at 192. The jury then returned a verdict of guilty to the crime of delivery of a controlled substance, and a special verdict answering "yes" to the question of whether the delivery occurred within 1000 feet of a school bus stop. Id., CP 28, 29. The jury was polled and each answered that the verdicts were their verdicts and the verdicts of the jury. Id. at 193-197.

At sentencing, defense counsel reiterated that Mr. Doane objected to the court's inclusion of a point in his offender score reflecting the fact that he was on community custody at the time of the current offense,

because such finding was not made by a jury. Sentencing RP (6-1-06), 4. Other than that, the defense agreed with the State's calculation of Mr. Doane's offender score. Id.

**D. ARGUMENT**

**I. MR. DOANE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO TIMELY OBJECT TO IMPROPER TESTIMONY FROM DETECTIVE ULLMAN.**

Criminal defendants are guaranteed reasonably effective representation by counsel at all critical stages of a case. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 186 (1995). Sentencing is a critical stage of a criminal case. *State v. Bandura*, 85 Wn.App. 87, 97, 931 P.2d 174, review denied, 132 Wn.2d 1004 (1997). To obtain relief based on a claim of ineffective assistance of counsel, a defendant must establish that (1) his counsel's performance was deficient; and (2) the deficient performance was prejudicial. *Strickland* at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251(1995). A legitimate tactical decision will not be found deficient. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Here, Detective Ullman characterized Mr. Doane as a drug dealer. The parties and the court agreed that such a characterization constituted an

improper opinion by Detective Ullman on the guilt of Mr. Doane. This was an ultimate issue to be decided by the jury. Defense counsel inexcusably and inexplicably failed to object to this testimony at the time it was given. In denying defense counsel's later motion for a mistrial, the court held that had an objection been raised at the time, it likely could have been cured.

Although the court suggested that defense counsel likely didn't timely object because she feared it would draw the jury's attention to the improper opinion, defense counsel never offered an explanation for her failure to object. Trial RP, 132. And this explanation, had it been proffered, simply defies logic. The jury's attention was already drawn to the remark, which is why it was considered a worthy basis for a motion for a mistrial. The theory that an attorney should sit silent in the face of an extremely prejudicial remark by a witness, on the theory that the jury won't notice it unless they register an objection, is utterly nonsensical. If anyone in the courtroom seriously believes the jury didn't notice the remark, then it isn't prejudicial.

Even more troubling is that when an attorney sits in silence as a law enforcement officer testifies that her client is a drug dealer, rather than leap to her feet and register an objection to such an improper characterization, it appears to the jury first, that the allegation is true, and

that second, the defendant's guilt is a foregone conclusion. It is difficult to imagine a more prejudicial situation than an attorney leaving the jury with the impression that she believes her client, who is on trial for delivery of a controlled substance, is a drug dealer. In the face of such a remark an attorney should register an immediate objection so that the jury will know that she doesn't believe her client is a drug dealer and that such testimony is improper and unfair. Because we know the objection would have been sustained, the jury would have seen confirmation from the court that the question of whether Mr. Doane was a drug dealer was for them to decide, not Detective Ullman. In other words, the trial process would have retained its intended legitimacy. By not giving the court the opportunity to instruct the jury to disregard the improper remark, the jury was left with the impression that Mr. Doane's guilt was a foregone conclusion and the trial was merely a procedural exercise.

Further, by not registering an objection to this testimony, the remark was never stricken from the record. It remained a part of the body of evidence the jury was entitled to consider when determining Mr. Doane's guilt or innocence. Compounding this ineffective representation, defense counsel declined the court's later invitation to give the jury a curative instruction. Trial RP, 132. Again, if counsel felt it necessary to move for a mistrial she surely believed the remark was incurably

prejudicial and remained in the minds of the jury. So why not seek a curative instruction? Again, by not seeking an instruction the remark remained a part of the evidence the jury was permitted to consider. The jury's inevitable perception that defense counsel agreed that her client was a drug dealer persisted as well.

The deficient performance of counsel was prejudicial to Mr. Doane. The evidence in this case was not so strong that absent this improper characterization of him as a drug dealer, they would likely have reached the same result. The primary witness against Mr. Doane was an admitted drug dealer (Mr. Nolte) who, by the State's admission, was highly placed in the drug dealing community. He had been arrested on cocaine and marijuana manufacturing charges and got a substantial benefit by agreeing to frame others for dealing drugs. While he had been facing up to 60 months' incarceration, he extracted a promise from the State to recommend no jail time in exchange for his work against Mr. Doane. Further, Mr. Doane was not arrested and searched after this alleged drug deal and the pre-marked buy money was never recovered. Mr. Doane did not remain in the continuous observation of the Task Force during this alleged drug deal and what's more, there was a third person there during this entire incident who the State never identified or produced at trial. The evidence was not so overwhelming that it can be said the outcome would

not have been different absent the jury being told by a police detective that Mr. Doane was a drug dealer. Mr. Doane was denied effective assistance of counsel and he is entitled to a new trial.

**II. THE TRIAL COURT COERCED THE JURY INTO RETURNING A SPECIAL VERDICT BY GIVING AN IMPROPER INSTRUCTION WHEN THEY FAILED TO RETURN A UNANIMOUS ANSWER.**

CrR 6.15 (f) (2) states: “After jury deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, or the length of time a jury will be required to deliberate.” Here, the court gave the jury exactly the type of instruction prohibited by CrR 6.15 (f) (2). The special verdict form said the following:

We, the jury, return a special verdict by answering as follows:

Did the defendant deliver a controlled substance to a person within one thousand feet of a school bus route stop designated by a school district?

ANSWER:

\_\_\_\_\_ Yes

\_\_\_\_\_ No

\_\_\_\_\_ No Unanimous Agreement

CP 29.

When the jury entered the courtroom to render its verdict, the foreperson handed the verdict forms to the court. When the court looked

at the forms the court saw that the jury foreperson had written "11" on the line next to "Yes," and "1" on the line next to "No." CP 29. Also, something was written next to the word "No," that was later crossed out. CP 29. When the judge looked at the verdict forms he immediately said, without revealing what the forms said, "It's supposed to be 12-0 on everything. I'm going to send you back to do some more talking. All right." Trial RP, 190. At that point the jury was escorted from the courtroom back to the jury room. *Id.* The court did not even consider the possibility that the jury had in fact returned an answer of "No" to the special verdict, or that the jury might be hung on the question. The court did not conduct any inquiry of the jury as to whether they were deadlocked on the question of the special verdict or whether further deliberations would be worthwhile. Nor did the court seek input from the attorneys on how they believed it should proceed. The court simply instructed the jury, *sua sponte*, that they were required to be unanimous (i.e. that they were required to return a verdict) and sent them back very abruptly. Most likely, this response took the attorneys by surprise and they didn't have the opportunity to stop what was happening. Furthermore, it is the court's responsibility to comply with CrR 6.15 (f) (2) and not to coerce the jury into reaching a verdict.

The court erred in giving this instruction and sending the jury back to the jury room for the following reasons: First, this instruction clearly conflicted with the previous instruction of the court, the basic concluding instruction, which correctly instructed the jury that *if* they return a verdict, such a verdict must be unanimous. CP 25. There is, of course, no requirement that a jury return a verdict. By telling the jury “It’s supposed to be 12-0 on everything,” the court misstated the law and told the jury it was *required* to return a verdict. The court made no room for the possibility that the jury was deadlocked on this question.

Second, this instruction violated the clear wording of CrR 6.15 (f) (2), which prohibits the court from instructing the jury, after it has begun its deliberations, from instructing the jury in way which suggests the need for agreement. The Supreme Court has admonished that “[t]he purpose of this rule is to prevent judicial interference in the deliberative process. We have previously held that the jury should not be pressured by the judge into making a decision.” *State v. Boogaard*, 90 Wn.2d 733, 736, 585 P.2d 789 (1978). When this rule is violated, a jury may be coerced into returning a verdict and denied a fair trial. Such was the case here.

The judge had been placed on notice that the jury was having difficulty reaching an agreement on the special verdict. The judge had been apprised that one juror was refusing to answer “yes” because he/she

did not agree with the law on this matter by way of the second jury note. CP 27. As such, the court knew that the manner in which the jury answered the special verdict was not simply the product of confusion on how to fill out the form. The judge knew, or should have known, that the basis for the jury's answer was that one juror had (until that point, anyway), refused to answer "yes" to the special verdict for reasons which inhere in the verdict. That the judge knew the split was 11 to 1 is particularly concerning because the potential for coercion is far more likely when the minority is very small. As the *Boogaard* court observed:

We have heretofore recognized that the right of jury trial embodies the right to have each juror reach his verdict uninfluenced by factors outside the evidence, the court's proper instructions, and the arguments of counsel; *and that an instruction which suggests that a juror who disagrees with the majority should abandon his conscientiously held opinion for the sake of reaching a verdict invades that right, however subtly the suggestion may be expressed.*

*Boogaard* at 736. When one puts himself in the shoes of the holdout juror in this case, the coercion is clear: He or she attempted to answer "no" and was told by the judge, unequivocally, that it must "be 12-0 on everything." What can a holdout juror do in the face of an instruction by the judge that the jury must reach a 12-0 decision? The juror would indisputably have felt that he or she had no choice but to change his or her answer.

Third and finally, instructing a jury that it must be unanimous to return *any* answer on a special verdict is a misstatement of the law. *State*

*v. Goldberg*, 149 Wn.2d 888, 72 P.2d 1083 (2003) is the controlling case on this point. In *Goldberg*, the defendant was charged with aggravated murder in the first degree. The jury returned a general verdict of guilty to the murder charge, but answered “no” on the special verdict form which pertained to the aggravator. *Goldberg* at 891. The court polled the jury by a show of hands on how many had voted “no,” and only one juror raised his hand. (Evidently, three jurors voted “no,” but the opinion is silent as to how this information came out and why the other two jurors did not raise their hands when polled by the court). The court concluded that the jury’s answer of “no” did not actually mean “no,” and that the jury was deadlocked on the special verdict. *Goldberg* at 891. The court then instructed the jury to continue deliberating. The next day, they returned an answer of “yes” on the special verdict. *Goldberg* at 891-92.

The Supreme Court, in reversing the special verdict finding, ruled that a jury must only be unanimous to return an answer of “yes” on a special verdict. *Goldberg* at 893. The Court noted that when the jury returned an answer of “no” on the special verdict, the judge erroneously concluded the jury was deadlocked on the special verdict and ordered continued deliberations. *Goldberg* at 893. The Supreme Court held that unanimity is not required to answer “no” on a special verdict, and is only required to answer “yes.” *Id.* This is in contrast to general verdicts, which

require unanimity in order to return either of the only two verdicts recognized in the law: Guilty or not guilty. *Goldberg* at 894. “When a jury is deadlocked on a general verdict, the trial court has the authority, within limits, to instruct the jury to continue deliberations... That authority does not exist with respect to a jury’s answer to a special finding as given in this case.” *Goldberg* at 894 (internal citations omitted).

The special verdict form given in *Goldberg* was similar to the one given here: It did not require unanimity in order for the verdict to be final. *Goldberg* at 894. A review of the special verdict form in this case shows the jury was given three options: “Yes,” “No,” and “No Unanimous Agreement.” In *Goldberg*, the jury had been instructed, with regard to the special verdict, that if “you have a reasonable doubt as to the question, you must answer ‘no.’” *Goldberg* at 893. The Supreme Court held that when the jury answered “no” on the special verdict form, in spite of the fact that there was a split among the jurors as to how this question should be answered, the jury was not deadlocked and had properly answered the question.

Here, the jury performed as it was instructed. It returned a verdict of guilty as to the crime, for which unanimity was required, and it answered “no” to the special verdict form, where under instruction 16, unanimity is not required in order for the verdict to be final. We find no error in the jury’s initial verdict in this case which would require continued deliberations. As instructed in this case, when the verdict was returned, the jury’s responsibilities were

completed and the jury's judgment should have been accepted. We hold that it was error for the trial court to order continued deliberations and we vacate the finding on the aggravating factor.

Like the jury in *Goldberg*, the jury here was instructed that if it had a reasonable doubt that the defendant delivered the controlled substance to a person within one thousand feet of a school bus route stop, it was their duty to answer the special verdict "no." Even more compelling in this case, the jury was given a *third* option, which was "no unanimous agreement." The fact that the jury filled out the form in the manner they did, rather than simply placing an "X" next to "no unanimous agreement," does not change the clear answer they gave. They probably filled out the form in the manner they did based on the desire of the eleven jurors voting "yes" to make their voices heard. They were probably angry with the holdout, and, indeed, their second note reflects the obvious tension that was mounting in the jury room. CP 27. The way they memorialized their answer was probably a form of protest of the eleven in the majority against the one holdout.

No matter what the reason the jury filled out the form in the manner they did, the holding in *Goldberg* is clear: Unanimity was only required if they intended to answer "yes." The answer in this case was "no" irrespective of how it was memorialized. Like the court in *Goldberg*, the court erred in forcing the jury to continue its deliberations. Unlike

*Goldberg*, the error here was even more egregious because: (1) The court knew that there was only one holdout; and (2) the court erroneously instructed the jury that they must reach an agreement, contrary to CrR 6.15 (f) (2) and the Supreme Court's holding in *Goldberg*. The special verdict in this case must be vacated and Mr. Doane must be resentenced.

**III. MR. DOANE'S RIGHT TO A JURY TRIAL WAS VIOLATED WHEN THE COURT INCLUDED A POINT ON HIS OFFENDER SCORE BASED ON ITS DETERMINATION THAT HE WAS ON COMMUNITY CUSTODY AT THE TIME OF THE CURRENT OFFENSE.**

The court included a point in Mr. Doane's offender score because it found he was on community custody at the time he committed his current offenses. Division I ruled in *State v. Jones*, 126 Wn.App. 136, 109 P.3d 755 (2005), *review granted*, 155 Wn.2d 1017, 124 P.3d 659 (2005) that the determination of whether an offender was on community custody at the time he committed his current offense was a factual determination to be made by a jury. In that case, the State relied on the argument that the community custody finding fell within the prior conviction exception in *Blakely* because it fell within the broader issue of recidivism. *Jones* at 144. Although Division I correctly disagreed, it is worth noting that since the *Jones* decision was announced, the Supreme Court has ruled that

recidivism findings are for a jury rather than a judge. *Hughes* at 141. The

*Jones* court stated:

More importantly, whether one convicted of an offense is on community placement or community custody at the time of the current offense cannot be determined from the fact of a prior conviction. Too many variables are involved...Mr. Jones' case illustrates the point we make here. At sentencing, both the State and the sentencing judge relied on DOC records, not the judgment and sentence for the prior offense, to determine whether he was on community placement at the time of his current offense.

*Jones* at 144-45. The Supreme Court has granted review of this decision at 155 Wn.2d 1017.

Division III, in *State v. Brown*, 128 Wn.App. 307, 116 P.3d 400 (2005) and *State v. Hunt*, 128 Wn.App. 535, 116 P.3d 450 (2005), disagreed with this holding and found that since the fact of community supervision *arose out of a prior conviction*, the rule announced in *Blakely* was not implicated. The petition for review filed in *State v. Brown* has been deferred by the Supreme Court pending its decision in *State v. Jones*. Division II is currently split on this issue. In *State v. Hochhalter*, 131 Wn.App. 506, 521, 128 P.3d 104 (2006), a Division II panel followed Division I's holding in *State v. Jones*. In *State v. Giles*, 132 Wn.App. 738, 132 P.3d 1151 (2006) a different panel reached the opposite result and followed Division III's holdings in *Brown* and *Hunt*.

Division III's position is untenable because whether an offender is on community supervision at the time he committed his current offense cannot be determined from the fact of a prior conviction. Although a judgment and sentence from a prior conviction can state a range of community supervision, it cannot establish beyond a reasonable doubt that an offender was actually still on community supervision at the time of his current offense. This can only be done by looking beyond the face of the judgment and sentence and inquiring of the Department of Corrections. This, therefore, is a factual determination which does not flow automatically from the existence of a prior conviction. This court should decline to follow the decisions in *Brown*, *Hunt*, and *Giles*, and adopt the rule announced in the holdings of *Jones* and *Hochhalter*, and hold the determination of whether an offender was on community supervision at the time he committed his current offense is a factual determination which must be made by a jury. The point which was added onto Mr. Doane's offender score based on the court's factual determination that he was on community custody at the time of his current offenses should be deleted and he should be resentenced.

**E. CONCLUSION**

Mr. Doane was denied effective assistance of counsel and is entitled to a new trial. Alternatively, the special verdict in this case must

be vacated. Mr. Doane is entitled to be resentenced on an offender score which does not include a point for community custody, where his right to have a jury determine this question was violated.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of October, 2006.

  
\_\_\_\_\_  
ANNE M. CRUSER, WSBA #27944  
Attorney for Mr. Doane

## APPENDIX

### 1. Rule 6.15. Instructions and argument.

(a) Proposed instructions. Proposed jury instructions shall be served and filed when a case is called for trial by serving one copy upon counsel for each party, by filing one copy with the clerk, and by delivering the original and one additional copy for each party to the trial judge. Additional instructions, which could not be reasonably anticipated, shall be served and filed at any time before the court has instructed the jury.

Not less than 10 days before the date of trial, the court may order counsel to serve and file proposed instructions not less than 3 days before the trial date.

Each proposed instruction shall be on a separate sheet of paper. The original shall not be numbered nor include citations of authority.

Any superior court may adopt special rules permitting certain instructions to be requested by number from any published book of instructions.

(b) [Reserved.]

(c) Objection to instructions. Before instructing the jury, the court shall supply counsel with copies of the proposed numbered instructions, verdict and special finding forms. The court shall afford to counsel an opportunity in the absence of the jury to object to the giving of any instructions and the refusal to give a requested instruction or submission of a verdict or special finding form. The party objecting shall state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused. The court shall provide counsel for each party with a copy of the instructions in their final form.

(d) Instructing the jury and argument of counsel. The court shall read the instructions to the jury. The prosecution may then address the jury after which the defense may address the jury followed by the prosecution's rebuttal.

(e) Deliberation. After argument, the jury shall retire to consider the verdict. The jury shall take with it the instructions given, all exhibits received in evidence and a verdict form or forms.

(f) Questions from jury during deliberations.

(1) The jury shall be instructed that any question it wishes to ask the court about the instructions or evidence should be signed, dated and submitted in writing to the bailiff. The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court's response and any objections thereto shall be made a part of the record. The court shall respond to all questions from a deliberating jury in open court or in writing. In its discretion, the court may grant a jury's request to rehear or replay evidence, but should do so in a way that is least likely to be seen as a comment on the evidence, in a way that is not unfairly prejudicial and in a way that minimizes the possibility that jurors will give undue weight to such evidence. Any additional instruction upon any point of law shall be given in writing.

(2) After jury deliberations have begun, the court shall 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 deliberate.

(g) Several offenses. The verdict forms for an offense charged or necessarily included in the offense charged or an attempt to commit either the offense charged or any offense necessarily included therein may be submitted to the jury.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

06 NOV -1 PM 1:35  
COURT OF APPEALS  
DIVISION II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,	)	Court of Appeals No. 34945-1-II
	)	Cowlitz County No. 05-1-01478-1
Respondent,	)	
	)	AFFIDAVIT OF MAILING
vs.	)	
	)	
GREGORY A. DOANE,	)	
	)	
Appellant.	)	

---

ANNE M. CRUSER, being sworn on oath, states that on the 30<sup>th</sup> day of October 2006 affiant placed a properly stamped envelope into the mails of the United States directed to:

Susan I. Baur  
Cowlitz County Prosecuting Attorney  
312 S.W. 1<sup>st</sup> Avenue  
Kelso, WA 98626

AND

David C. Ponzoha, Clerk  
Court of Appeals, Division II  
950 Broadway, Suite 300

AND

**Anne M. Cruser**  
*Attorney at Law*  
P.O. Box 1670  
Kalama, WA 98625  
Telephone (360) 673-4941  
Facsimile (360) 673-4942  
anne-cruser@kalama.com

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Mr. Gregory Doane  
DOC# 799187  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

and that said envelope contained the following

- (1) BRIEF OF APPELLANT
- (2) VERBATIM REPORT OF PROCEEDINGS (TO MS. BAUR)
- (3) R.A.P. 10.10 (TO MR. DOANE)
- (4) AFFIDAVIT OF MAILING

Dated this 30<sup>th</sup> day of October 2006

  
 ANNE M. CRUSER, WSBA #27944  
 Attorney for Appellant

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

Date and Place: October 30<sup>th</sup>, 2006, Kalama, Washington

Signature: Anne M. Cruser