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A. SUMMARY OF THE CASE

Ovidio Perez was convicted of being an accomplice to a gang-related assault on Francisco Lopez. The prosecutor chose to file two charges against Perez, attempted first degree murder and first degree assault, for this one crime. Although the jury found guilt on both charges, the parties acknowledged that the two crimes were same criminal conduct. But over Perez's double jeopardy challenge, the court imposed sentences on both charges. Two sentences for one crime violates double jeopardy. Perez is entitled to remand to correct his sentence.

The court erred in another way. During the jury's second day of deliberation, it sent a question form to the court. The jury wanted to listen again to a recorded interview between Perez and a police detective that had been played for them during trial. Also, there was concern among the jurors that one of them had been dishonest in answering jury selection questions about her relationship with a gang member boyfriend. While the court responded to the jury's request and concern on the record in open court with defense counsel present, it failed to involve Perez himself even though Perez had a constitutional right to be present. The error was not harmless. Perez is entitled to a new trial.

B. ASSIGNMENTS OF ERROR

1. THE TRIAL COURT DEPRIVED DEFENDANT'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY WHEN IT SENTENCED HIM ON BOTH FIRST DEGREE ATTEMPTED MURDER AND FIRST DEGREE ASSAULT FOR A SINGLE CRIMINAL ACT.
2. THE TRIAL COURT DENIED PEREZ BOTH HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO BE PRESENT AT ALL CRITICAL STAGES OF THE PROCEEDINGS AS AGAINST HIM WHEN IT FAILED TO INCLUDE HIM IN RESPONDING TO TWO QUESTIONS FROM THE DELIBERATING JURY.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. DID THE TRIAL COURT PLACE PEREZ TWICE IN JEOPARDY BY SENTENCING HIM ON EACH OF TWO CHARGES FOR COMMITTING THE SAME CRIMINAL ACT?
2. DID THE TRIAL COURT DEPRIVE PEREZ OF HIS RIGHT TO BE PRESENT AT ALL CRITICAL STAGES OF HIS TRIAL BY NOT INVOLVING HIM IN RESPONDING TO JURY QUESTIONS?

D. STATEMENT OF THE CASE

1. Procedural overview.

Appellant, Ovidio Perez, was tried to a jury on a first amended information charging two crimes: attempted murder in

the first degree (count 1) in violation of RCW 9A.28.020(1)¹, and 9A.32.030(1)(a)²; and assault in the first degree (count 2) in violation of 9A.36.011(1)(a) and/or (c)³. CP 3-4. Both charges also included deadly weapon enhancements for committing the offenses while armed with a knife and/or a bat. CP 3-4. Francisco Lopez was the named victim in both charges. CP 3-4.

Prior to trial, the court heard a CrR 3.5 hearing. 1RP 8-95. The court found that Perez was not in custody when he participated in an audio recorded interview with Vancouver Police Detective John Ringo. 1RP 92. Moreover, the court also found that Perez was advised of his Miranda rights prior to the interview and made a knowing, intelligent, and voluntary waiver of his rights.⁴ 1RP 92-94.

At trial, Perez testified as the only defense witness. 3RP 300-17. The jury was instructed on the State's theory of the case, that Perez had acted as an accomplice in the commission of both

¹ (1) A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.

² (1) A person is guilty of murder in the first degree when: (a) With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person.

³ (1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm: (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or . . . (c) Assaults another and inflicts great bodily harm.

⁴ No written findings of fact and conclusions of law on the CrR 3.5 hearing have been entered to date.

charged crimes. 3RP 322-43. The jury was also instructed that they could find Perez guilty of the lesser crimes of second degree attempted murder and second degree assault. 3RP 322-43. The jury was into a second day of deliberations when it found him guilty on both charges including the weapon enhancements. CP 7-15; See also Supp. Designation of Clerk's Papers (sub nom. 53). Perez filed a notice of appeal challenging all portions of his judgment and sentence. CP 31-46.

2. Trial testimony.

Eighteen year-old Ovidio Perez attended Evergreen High School in Vancouver. 3RP 301. He did not live with his parents. *Id.* He lived with members of his extended family to include his slightly younger cousin, Pedro Marquez. *Id.*

Marquez had friends that Perez knew to be members of the Soreno gang. 3RP 302-03. Soreno gang members frequently wear blue. 2RP 157. The area around the Fourth Plain Albertsons had long been under the control of a rival gang, the Norteno. 2RP 161. Nortenos often wear red. 2RP 157. The Sorenos had been challenging the Nortenos for control of the area around the Fourth Plain Albertsons. 2RP 161.

The State's theory at trial was that Perez involved himself in a gang-related assault in order to get "crimed" into the Soreno gang. 2RP 152-55. Getting "crimed" into a gang means that you can prove yourself to the gang and become one of them by participating in a violent crime with other gang members. *Id.* The testimony about being "crimed" into a gang was provided, over Perez's objection, by State's witness Vancouver Police Detective Marshall Henderson. 2RP 108, 152-55. Perez did not object to Detective Henderson's credentials as a gang expert. 2RP 108. Instead, he argued that the detective's testimony as a gang culture expert was not relevant to the case. *Id.* After listening to an offer of proof, the trial court overruled Perez's objection. 2RP 147-150. Detective Henderson told the jury all about gang culture and the allegiances between gang members and supposed "wanna-be" gang members like Perez. 2RP 152-164.

On July 20, 2007, Perez went with his cousin, Marquez, to hang out with two of Marquez's friends - Juan Alvarado Valesquez and Luis Lara Rangel. 3RP 302. Valesquez and Rangle are Sorenos. *Id.* Perez knew that. *Id.* The jury heard that Perez' was conflicted about whether he too wanted to be a gang member. At

times he said that he did, and at times he said that he did not. 3RP 303, 312. Perez did know that one of the ways to be initiated into a gang was to be involved in an act of gang violence. 3RP 313.

Later that evening, Perez got into a car with Marquez, Valesquez, and Rangle. Valesquez drove. 3RP 304. Perez knew that the two Sorenos were looking to kill a Norteno. 3RP 313. While driving around, the two Sorenos found a Norteno, Francisco Lopez, in front of the Fourth Plain Albertsons. 3RP 282-83, 304. What happened next was recorded on the Albertsons' security camera and later recovered by the police. 2RP 173. The Soreno car stopped in front of Albertsons. 3RP 241-44. Rangle and Valesquez got out of the car followed by Marquez and finally Perez. Id. Rangel had a knife. Id. Valesquez had a bottle. Id. Marquez and Perez had bats. Id. Perez had no sooner gotten out of the car than Rangle stabbed Lopez once in the chest. Id. Perez never raised the bat or tried to hit Lopez although Perez did chase Lopez and swore at him. Id. Lopez ran away. Id. Rangle, Valesquez, Marquez, and Perez got back in to the car and left. Id.

Perez felt that he had no choice but to get out of the car with the bat. 3RP 305. He felt that his life was in danger if he did not do so. Id. Perez did not want Lopez to get stabbed or to die. Id.

Lopez was found on the lawn of a nearby apartment complex with a stab wound to his chest. 2RP 116-17. He was taken to a hospital where it was discovered that the knife wound had penetrated the left ventricle of his heart causing a life threatening injury. 3RP 236-239. A surgeon operated on Lopez and repaired the damage. Id. At trial, Lopez did not remember what happened to him at Albertsons. 3RP 283. Lopez denied being a gang member at the time of the stabbing. 3RP 286. Detective Henderson, however, told the jury that Lopez had been a Norteno gang member since 2003. 2RP 163. Lopez was wearing a red belt when he was stabbed. 3RP 287.

3. Jury questions.

During the second day of its deliberation, the jury sent a question form to the court as follows:

(1) We need a device to play the audio disk.

(2) One juror stated in deliberations she had a prior boyfriend who was a gang member. She did not disclose this information during the jury selection questioning.

CP 7.

Before responding to the jury's questions, the court called the prosecutor and the defense counsel into chambers. 4RP 388. Although Perez was in custody in the nearby jail, the court did not

involve him in any discussion or have him appear in court. See Supp. Designation of CP (sub. nom. 53) Instead, the court decided that the bailiff would play the audio recording for the jury in the courtroom with no one else present. 4RP 388. The court chose to ignore the other jurors' concern about the dishonest juror by choosing not to "single her out." 4RP 389; CP 7. The court wrote on the jury question form that they should continue to deliberate. CP 7.

4. Sentencing and double jeopardy.

At sentencing, the State asked the court to find that the attempted murder and assault were same criminal conduct and to impose concurrent sentences. 5RP 399. Mr. Perez agreed that the charges were same criminal conduct but argued that double jeopardy prohibited the court from sentencing Mr. Perez on the less serious charge of first degree assault. 5RP 399, 404. The court was confused about the sentencing options and decided to follow the State's recommendation. 5RP 402-03. It sentenced each count separately but ordered the sentences to be served concurrently. 5RP 406. Mr. Perez received a total 204 month

sentence on count 1, and a 117 month sentence on count 2. CP 37, 44. Both sentences also included 24-48 months of (concurrent) community custody.

E. ARGUMENT

1. THE TRIAL COURT PLACED PEREZ IN JEOPARDY WHEN IT IMPOSED TWO CONVICTIONS FOR COMMITTING JUST ONE CRIME.

The Fifth Amendment to the United States Constitution provides “[n]o person shall ... be subject for the same offense to be twice put in jeopardy of life or limb” Article I, Section 9 of the Washington Constitution mirrors the federal constitution stating “[n]o person shall be ... twice put in jeopardy for the same offense.” “Washington's double jeopardy clause offers the same scope of protection as the federal double jeopardy clause. ” In re Pers. Restraint of Percer, 150 Wn.2d 41, 49, 75 P.3d 488 (2003) (citing State v. Glocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995)). Both prohibit “(1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense

imposed in the same proceeding.” Percer, 150 Wn.2d at 48-49. (citing State v. Bobic, 140 Wn.2d 250, 260, 996 P.2d 610 (2000); Glocken, 127 Wn.2d at 100.). RCW 10.43.050 also affords defendants protections against double jeopardy, providing in part:

Whenever a defendant shall be acquitted or convicted upon an indictment or information charging a crime consisting of different degrees, he cannot be proceeded against or tried for the same crime in another degree, nor for an attempt to commit such crime, or any degree thereof.

Ovidio Perez was found to have committed a single offense against a single victim yet two separate convictions remain on his record. “That it is unjust and oppressive to multiply punishments for a single offense is a concept which has gained recognition in the courts of this state.” State v. Johnson, 92 Wn.2d 671, 678, 600 P.2d 1249 (1979) (citing State v. Maloney, 78 Wn.2d 922, 481 P.2d 1971)); see also State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995) (courts may not exceed legislative authority by imposing multiple punishments for the same offense) (citing Albernaz v. United States, 450 U.S. 333, 334, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981) (citing Brown v. Ohio, 432 U.S. 161, 165, 97 S. Ct. 221, 53 L. Ed. 2d 187 (1977))).

In resolving double jeopardy issues, Washington follows the “same evidence” rule adopted by our state supreme court in

1896. Calle, 125 Wn.2d at 777. “[T]he defendant's double jeopardy rights are violated if he or she is convicted of offenses that are identical both in fact and in law.” *Id.* at 777. The “same evidence” rule is sometimes referred to as the “same elements test.” See Gocken, 127 Wn.2d at 101. “Washington's ‘same evidence’ test is very similar to the ‘rule set forth in Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed 306 (1932).” Calle, 125 Wn.2d at 777. The same evidence rule controls “unless there is a clear indication that the legislature did not intend to impose multiple punishment.” State v. Gohl, 109 Wn. App. 817, 821, 37 P.3d 293 (2001).

“[O]ffenses are not constitutionally the same if there is any element in one offense not included in the other and proof of one offense would not necessarily prove the other.” State v. Trujillo, 112 Wn. App. 390, 410, 49 P.3d 935 (2002). Washington courts, however, have found a violation of double jeopardy despite a determination that the offenses involved clearly contained different legal elements. See State v. Johnson, 92 Wn.2d 671, 679-80, 600 P.2d 1249 (1979) (examining convictions for first degree rape, first degree kidnapping, and first degree assault and striking the kidnapping and assault convictions even though the

offenses involve different legal elements because the kidnapping and assault were incidental to, and elements of, the first degree rape); State v. Potter, 31 Wn. App. 883, 887-88, 645 P.2d 60 (1982) (concluding that convictions for reckless endangerment and reckless driving violated double jeopardy despite differing legal elements where the reckless endangerment conviction arose out of an act of reckless driving”). See also In re Pers. Restraint of Burchfield, 111 Wn. App. 892, 899, 46 P.3d 840 (2002) (“Although the offenses do not contain identical legal elements, we conclude that the Legislature did not intend to punish shooting a victim both as an assault and as a homicide.”)

In Gohl, Division One of the Court of Appeals held convictions for both assault and attempted murder violated double jeopardy even though incarceration was imposed for attempted murder only. The court concluded double jeopardy was implicated because attempted first degree murder and first degree assault convictions are the “same in law and in fact.” 109 Wn. App. at 822. Accordingly, the court vacated the assault convictions. Id.

In reaching its decision the Gohl court relied on State v. Read, 100 Wn. App. 776, 998 P.2d 897 (2000). Read held that

that second degree murder and first degree assault were the same in fact because they were based on the same act directed at the same victim, and that the offenses were the same in law for “where the harm is the same for both offenses, it would be inconceivable that the Legislature intended double punishment for both.” Gohl, 109 Wn. App. at 821. This determination was made *despite* the fact that the sentencing court did not “expressly find that the two crimes were the ‘same criminal conduct.’”⁵ Read, 100 Wn. App. at 793 n. 7.

Moreover, the analysis does not change, as under our facts, even if the trial court finds two offenses to be same criminal conduct and sentences them to be served concurrently. In Calle, the court held that double jeopardy may still be violated when a defendant receives multiple convictions for a single offense regardless of whether concurrent sentences are imposed. Calle, 125 Wn.2d at 775. As was noted in Calle, “[i]t is important to distinguish between charges and convictions - the State may properly file an information charging multiple counts under various statutory provisions where evidence supports the charges, *even*

⁵ Same criminal conduct, as used in this subsection means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a).

though convictions may not stand for all offenses where double jeopardy protections are violated.” Calle, 125 Wn.2d at 777 n.3 (emphasis added). See also Johnson, 92 Wn.2d at 679 (“Conviction in itself, even without imposition of sentence, carries an unmistakable onus which has a punitive effect ...”).

In sum, the State may bring (and a jury may consider) multiple charges arising from the same criminal conduct in a single proceeding. State v. Freeman, 153 Wn.2d 765, 770, 108 753 (2005) (citing State v. Michielli, 132 Wn.2d 229, 238-39, 937 P.2d 587 (1997)). But courts may *not* enter multiple convictions for the same offense without offending double jeopardy. Freeman, 153 Wn.2d at 771. Consequently, Perez’s case must be remanded for resentencing.

2. THE TRIAL COURT’S FAILURE TO INCLUDE PEREZ IN RESPONDING TO JURY QUESTIONS DURING DELIBERATIONS REQUIRES REVERSAL.

A defendant has a constitutional right to be present at every stage of a trial. This included the right to be present for communication between the court and the jurors after deliberations have begun. See State v. Rice, 110 Wn.2d 577, 757 P.2d 889 (1988) (constitutional right to be present for return of verdict); State v. Caliguri, 99 Wn.2d 501, 664 P.2d 466 (1983) (stating, in a case

involving replaying testimony for a deliberating jury, that “[i]t is settled in this state that there should be no communication between the court and the jury in the absence of the defendant”). State v. Shutzler, 82 Wash 365, 144 P.284 (1914); see also United States v. Treatman, 524 F.2d 320 (8th Cir. 1975) (stating that “it is settled law that communication between the judge and the jury in the absence of and without notice to defendant and his counsel are improper,” and “[t]he appellant’s right to be present is constitutionally guaranteed by both the Fifth and Sixth amendments to the federal constitution”); see also CrR 3.4(a) (“defendant shall be present . . . during every stage of the trial . . . except as otherwise provided by these rules, or as excused or excluded by the court for good cause shown”); CrRLJ 3.4(a) (same).

Two Court of Appeals opinions have held that the trial judge may answer a question from deliberating jurors without the presence of the defendant as long as defense counsel is present. State v. Jury, 19 Wn. App. 256, 576 P.2d 1302 (1978), and State v. Brown, 29 Wn. App. 11, 627 P.2d 132 (1981). These opinions, however, were based on a prior version of CrR 6.15 (the prior version stated that the judge’s answer “shall be given in the presence of, or after notice to the parties or their

counsel”(emphasis added). The rule, as amended in 2002, no longer includes the disjunctive language as to the defendant’s presence. Under the current version, “The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response.” CrR 6.15(f)(1). The current rule, leaves this issue of the defendant’s presence to answer a jury question to be governed by CrR 3.4 (quoted above). Additionally, the holdings in Jury and Brown are difficult to square with the cases described above addressing the constitutional issues in this area of the law.

Although communication between the trial court and the jury in the absence of the defendant is error, Caliguri, 99 Wn.2d at 508, reversal is required only if that error is prejudicial. Id. at 508. If the defendant demonstrates the possibility of prejudice from the trial court’s ex parte communication, it is the State’s burden to prove harmless error beyond a reasonable doubt. Id. at 509.

Harmless error can be found when the ex parte communication with a jury is neutral, conveys no affirmative information, and merely directs the jury to refer to previous instructions. See State v. Allen, 50 Wn. App. 412, 419, 749 P.2d 702 (1988) (the trial court responded ex parte to the jury’s inquiry,

“Read your instructions and continue your deliberations.”); State v. Langdon, 42 Wn. App. 715, 717, 713 P.2d 120 (1986) (the trial court responded ex parte to the jury's inquiry, “You are bound by those instructions already given to you.”); State v. Safford, 24 Wn. App. 783, 794, 604 P.2d 980 (1979) (the trial court responded ex parte to the jury's inquiry, “Read the instructions.”).

In Perez's case, the jury sent the following note to the judge early into its second day of deliberation:

(1) We need a device to play the audio disk.

(2) One juror stated in deliberations she had a prior boyfriend who was a gang member. She did not disclose this information during the jury selection questioning.

CP 7. Under the harmless error standard, any error in not involving Perez in the court's decision about the best way to play the audio disk was likely harmless. See CrR 6.15 (“[I]n its discretion, the court may grant a jury's request to hear or replay evidence.”) The audio, Perez's pre-arrest recorded statement with Detective Ringo, was admitted as an exhibit and played in full to the jury during trial.

However, the court's decision about what to do about the second part of the question without Perez's presence is not harmless. Obviously, at least some of the jurors were concerned that a fellow juror had lied during jury selection about her

relationship to a gang via a former gang member boyfriend. Rather than questioning the juror who misrepresented her background, the court and counsel decided to continue deliberations instead of “singling the juror out.” However, it is obvious that the juror had already been singled out by her fellow jurors for admitting some gang affiliation. Perez was entitled to know that there was a juror who previously failed to disclose a gang affiliation and be involve in the discussion about how to handle that revelation. Moreover, the court had a duty to question the juror to see if she could continue as a juror.

It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

RCW 2.36.110; See also State v. Elmore, 155 Wn.2d 758, 768, 123 P.3d 72 (2005) (the determination of whether or not to dismiss a juror ought to be at the discretion of the trial judge). The court should have used its discretion and addressed the juror.

From the State’s perspective, Perez’s case had everything to do with gang culture. The State, over a defense objection as the relevance of expert testimony, offered the testimony of gang expert

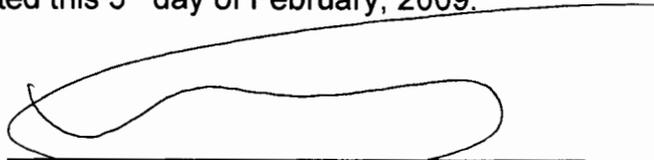
Detective Marshall Henderson to explain what the State believed the case was all about: that Perez wanted to be in a gang, he was going to be “crimed” into a gang, therefore he shared the intent of the two known gang members, Valesquez and Rangle, who intended to commit a very serious assault, if not cause the death, of Francisco Lopez.

When the court simply disregarded the jurors’ concerns that one juror had gang knowledge and gang affiliation, and wrote to the jury that they just need to continue deliberating, the jury likely concluded that the gang issue was just a foregone conclusion. But it was error to leave the jury to think that. Perez’s testimony vacillated. Did he want to be in a gang? Or didn’t he? Was he there that night with the Sorenos to be “crimed” into the gang or was he not? Or was he just in the wrong place at the wrong time and compelled to confront Lopez to save himself? The trial court’s ambivalence to the jury’s concern about a gang-affiliated fellow juror was a concern that needed to be addressed. It was error to leave Mr. Perez out of the decision about how to proceed. And the error was not harmless.

F. CONCLUSION

Mr. Perez's convictions should be reversed and his case remanded for retrial. Alternatively, his case should be remanded for resentencing to dismiss the first degree assault due to the double jeopardy violation.

Respectfully submitted this 5th day of February, 2009.

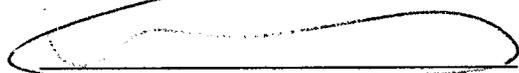
A handwritten signature in black ink, appearing to read "LISA E. TABBUTA", is written over a horizontal line. The signature is stylized and somewhat cursive.

LISA E. TABBUTA WSBA #21344
Attorney for Appellant

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

Dated this 5th day of February 2009, in Longview, Washington



Lisa E. Tabbut, WSBA No. 21344
Attorney for Appellant