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No. 33678-2-II

81626-3

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

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STATE OF WASHINGTON,  
Respondent,

v.

GUY DANIEL TURNER,  
Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY CAE  
DEPUTY

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APPELLANT'S BRIEF

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pm 1-17-06

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## **A. ASSIGNMENTS OF ERROR**

### **Assignments of Error**

1. The trial court erred in submitting the issue of first degree robbery to the jury when there was insufficient evidence to prove the offense as charged in the jury instructions.

2. The trial court erred in permitting the defendant to be tried in violation of his constitutional rights to the effective assistance of counsel.

3. The trial court erred in failing to simply vacate the conviction for Assault in the Second Degree when it held that the crime merged with Robbery in the First Degree. See CP at 16-17.

### **Issues Pertaining to Assignments of Error**

1. When the "to convict" jury instruction for the first degree robbery charge required the jury to find the defendant took property "from the person or in the presence of the owner or a person entrusted by the owner with dominion and control over the property," did the State fail to prove its case when the evidence

showed that the taking of the property was completed before the defendant was in the presence of any store representatives? This issue pertains to Assignment of Error Number 1.

2. After deliberating for approximately seventy percent of the time spent hearing the case, the jury informed the court that it was done deliberating and could not agree on the first degree robbery count. Was trial counsel ineffective when he prevented the court from inquiring as to an actual deadlock, instead requesting an instruction directing the jury to continue deliberating, which in effect directed the jury to reach agreement? This issue pertains to Assignment of Error Number 2.

3. At sentencing, the trial court merged defendant's conviction for Assault in the Second Degree with his conviction for Robbery in the First Degree; the merger doctrine is a part of the double jeopardy analysis; and the remedy for double jeopardy is vacation of the lesser crime. Under these circumstances, did the court err in not simply vacating

the lesser crime? This issue pertains to Assignment of Error Number 3.

**Standards of Review**

*Issue 1:* The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citation omitted).

*Issue 2:* Appellate courts review a claim of ineffective assistance of counsel *de novo*. *In re Personal Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001) (citations omitted).

*Issue 3:* Appellate courts review questions of law on a *de novo* basis. See *State v. Bright*, 129 Wn.2d 257, 265, 916 P.2d 922 (1996) (citation omitted) (question of law subject to *de novo* review).

## B. STATEMENT OF THE CASE

### Procedural History

In a two-count information arising from acts occurring on December 31, 2004, the State charged the defendant in this case, Guy Daniel Turner, with Assault in the First Degree in violation of RCW 9A.36.011(a), while armed with a deadly weapon other than a firearm; and Robbery in the First Degree in violation of RCW 9A.56.190 and RCW 9A.56.200, also while armed with a deadly weapon other than a firearm. Both charges provided notice of intent to seek a deadly-weapon sentence enhancement. CP at 1.

Mr. Turner exercised his right to a jury trial, the Honorable Brian Tollefson presiding. See RP. After trial, Mr. Turner was convicted of the lesser-included offense of assault in the second degree on Count I. He was convicted as charged on Count II, the robbery count. Special verdicts regarding a deadly weapon were entered as to both counts. CP at 10-13.

At sentencing, held on July 29, 2005, the court deemed the assault to have merged with the robbery

conviction. See CP at 16-17. Under the Sentencing Reform Act (SRA), Mr. Turner's offender score was determined to be 3. CP at 14-15. Count II had a seriousness level of IX; providing a standard sentencing range of 46-61 months. RCW 9.94A.515; RCW 9.94A.510. A twenty-four month sentence enhancement was required for the deadly weapon, making Mr. Turner's sentencing range 70-85 months.

The court sentenced Mr. Turner to 85 months in custody. CP at 18-30. It imposed 18 to 36 months' community custody. CP at 18. The court imposed a total of \$1,110 in fees. CP at 18-30.

This appeal followed.

### Substantive Facts

#### Evidence Related to Count II

Chad Baker, a loss prevention investigator for the Fircrest Home Depot store, was conducting video surveillance of the store from his loss prevention office on the date Mr. Turner attempted to shoplift two items. RP at 38-39 & 43-46. The loss prevention

office is in the right-hand back corner of the store, behind a locked door. RP at 41.

Mr. Baker, watching the video monitor in the office, saw Mr. Turner enter the store, walk very quickly to the tool aisle or "corral," and make a quick selection. RP at 45-46. Determining that this behavior was suspicious, Baker left his office and went toward the tool corral. As he approached the area, he slowed down to blend in with the customers in the store. He next saw Mr. Turner as he was leaving the tool corral, moving quickly towards an exit, with two store items in his hands. RP at 47. The total value of the items stolen was about seventy dollars. RP at 88.

At that point, Mr. Baker sped up to get closer to Mr. Turner and follow him as he headed toward the door. RP at 47. However, Baker did not call attention to himself; he was "hanging back" slightly as Mr. Turner approached the exit. RP at 49. As Mr. Turner got closer to the exit, he went past a sensor, setting off an alarm designed to help prevent shoplifting. RP at

49 & 42. At that time, Baker was about ten steps behind him. RP at 265.

As Turner went through the exit door, Mr. Baker was closer, maybe five steps behind. RP at 265. Baker still had not made his presence known to Mr. Turner. See RP. As Mr. Turner exited the store, Baker followed him. "It was kind of chaotic." RP at 50. Baker "was telling him to stop," but failed to identify himself as a store employee. RP at 50.

By the time Baker got through the electric door, Mr. Turner was running alongside the store. RP at 51. As he ran, he dropped one of the items he had taken from the store, a large drill bit. RP at 54 & 51. Baker ran after him, telling him to stop. RP at 52.

Baker approached Mr. Turner along his left side. RP at 54. Initially Baker could not recall if he grabbed Mr. Turner or not. RP at 54. Later, he remembered that he grabbed Mr. Turner by the left arm. RP at 82 and RP at 266-67. He was "not positive" if he grabbed Mr. Turner's left hand. RP at 86.

Baker recalled that Mr. Turner spun around, screaming, and hit Mr. Baker in the chest two or three times. Mr. Turner told Baker he had a knife in his hand, at which point Baker pushed Turner away. Turner fled. RP at 54. Originally thinking he had just been punched, Mr. Baker then realized he had a stab wound to the chest. He never saw a knife. RP at 54-57, 82.

Mr. Turner, who was not aware of Baker until he was out of the store and in the parking lot, RP at 224, recalled the incident with Baker differently. In particular, he stated that Mr. Baker grabbed his hand from behind and squeezed it in his attempt to apprehend him. RP at 224, 226-27. He had a small knife in his hand (which he had planned to use to cut the stolen item out of its packaging) which cut his hand to the bone under the pressure of Mr. Baker's squeezing. RP at 221, 224, 226-27. Indeed, when he was arrested, his hand was severely lacerated and required medical care. RP at 183-85, 230-31.

In addition, Mr. Turner stated that he was not aware of having stabbed Mr. Baker. He merely

remembered shaking his hand to try to release the knife from where it had gotten stuck in his hand. RP at 227-28. The jury did not credit this testimony.

Mr. Turner attempted the shoplifting because he needed money to pay the over-due fee for his post office box. His post office box contained a check necessary for rent money. RP at 218-19.

Paramedics took Mr. Baker to the hospital. RP at 62-63, see RP at 157-68 (paramedic's testimony). There, Baker underwent testing and exploratory surgery. RP at 101-02 & 107. The trauma surgeon determined that the stab, while in a potentially dangerous location, did not injure any major organs. RP at 107, see RP at 97-100, 104-06 (describing dangers of stab to chest area). The wound was about seven centimeters deep by just over one centimeter wide. RP at 108, 111.

#### The Jury Instructions Regarding Robbery

The "to convict" jury instruction on the robbery count, Instruction No. 23, read as follows:

To convict the defendant of the crime of Robbery in the First Degree, as charged in Count II, each of the following elements of

the crime must be proved beyond a reasonable doubt:

(1) That on or about the 31st day of December, 2004, the defendant unlawfully took personal property from the person or in the presence of the owner or a person entrusted by the owner with dominion and control over the property;

(2) That the defendant intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person;

(4) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

(5) That in the commission of these acts or in immediate flight therefrom the defendant inflicted bodily injury; and

(6) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 65 (Instruction No. 23). It was based on *Washington Pattern Instruction - Criminal (WPIC)*, 37.02. The State did not object to the inclusion of this instruction. RP at 277 & 282.

The jury was also instructed generally as to the meaning of robbery and robbery in the first degree:

A person commits the crime of robbery when he or she unlawfully and with intent to commit theft thereof takes personal property from the person or in the presence of the owner or a person entrusted by the owner with dominion and control over the property against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which cases the degree of force is immaterial.

CP at 62 (Instruction No. 20).

A person commits the crime of Robbery in the First Degree when in the commission of a robbery, or immediate flight therefrom, he or she inflicts bodily injury.

CP at 63 (Instruction No. 21); see also CP at 64 (Instruction No. 22, defining bodily injury).

The Jury's Difficulty in Reaching Agreement

The trial below was not unusually complex. Mr. Turner was charged with two counts, Assault in the First Degree and Robbery in the First Degree. CP at 1-3. The evidence was basically the same for both counts. See RP. The trial lasted about thirteen and a half hours, including midday recesses. CP at 34-40

(from 10:18 [jury sworn and seated] to 4:04 on May 25, 2005; 10:18 [jury seated] to 2:33 [jury excused] on May 26; 2:08 to 2:20 [jury excused] on May 27; and from 1:17 to 4:32 on May 31). The jury deliberated approximately nine and a half hours, including a likely midday recess, before determining that it could not reach agreement. CP at 34-40 (from about 3:31 to 4:32 on May 31, 2005; 9:47 to 3:54 on June 1, 2005; 9:42 to 10:10 on June 2; 9:57 to 11:47 on June 3).

At that point, after deliberating for a period that was seventy per cent as long as the trial itself, the jury sent a statement to the court stating that it was finished deliberating and could not agree on Count II (the robbery charge): "We, the jury, are at rest. We could not agree on Count II." CP at 5, RP at 357.

The court offered to bring the jury in to take the verdict on Count I and ask whether there was a reasonable expectation that it might reach a verdict on Count II in a reasonable time. RP at 357. Defense counsel objected to hearing a verdict on Count I if the jury intended to deliberate further. RP at 357-58.

Disagreeing with the court's suggestion, defense counsel asked the court to instruct the jury to continue deliberations. RP at 358-60. Consequently, without any inquiry at all, the court gave the jury the following instruction, "Please continue your deliberations." CP at 5.

The jury deliberated for about three more hours before reaching a guilty verdict on Count II. CP at 34-40; RP at 357-60 (from 1:30 to 4:30 on June 3, 2005 and 10:40 to 10:45 on June 6).

Before beginning deliberations, the jury received a standard instruction regarding the method of deliberations. CP at 66 (Instruction No. 24). However, this instruction was not referred to after jury deliberations began. See RP.

#### The Trial Court's Order on Merger

When Mr. Turner was convicted of both Assault in the Second Degree and Robbery in the First Degree, he moved to have the assault conviction merge with the robbery under *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005) (holding second degree assault generally

merges with first degree robbery). The court granted the motion, vacating the assault conviction for purposes of sentencing. CP at 16-17. However, it ruled that "the conviction for Assault in the Second Degree was nevertheless a valid conviction, and the defendant could be sentenced on it, if, on appeal, the conviction for Robbery in the First Degree is vacated or otherwise set aside." CP at 16-17.

### **C. SUMMARY OF THE ARGUMENT**

The State failed to prove Mr. Turner committed robbery in the first degree as charged to the jury. The alleged robbery began as a simple shoplifting: Looking for a quick way to obtain cash, Mr. Turner took two items from a Home Depot store, leaving the store with the items. After he exited the store, a store employee tried to stop him. During the struggle with the employee outside of the store, the employee was stabbed in the chest.

When the "to convict" jury instruction required the jury to find Mr. Turner committed a taking "from the person or in the presence of the owner or a person

entrusted by the owner with dominion and control over the property," and the State did not object to this instruction, the instruction became the law of the case. Under law of the case doctrine, the State must prove any elements added to a crime by unobjected-to jury instructions.

Thus, even though the transactional view of robbery followed in this State does not require that a taking be "from the person or in the presence" of the owner of the property, the State was required to prove such a taking in this case. The State failed because the taking was completed outside the presence of a store employee. The ensuing altercation with the employee occurred outside of the store, after the shoplifting was over. That altercation concerned the retention of the property or Mr. Turner's attempt to flee. For these reasons, the evidence was insufficient to prove Mr. Turner committed the crime of first degree robbery as charged in the "to convict" jury instruction.

In addition, Mr. Turner's attorney was ineffective. After deliberating for approximately seventy percent of the time spent hearing the simple case, the jury informed the court that it was done deliberating and could not agree on the first degree robbery count. Rather than asking for a mistrial, trial counsel actively prevented the court from inquiring as to an actual deadlock. Instead, counsel requested an instruction directing the jury to continue deliberating. When, under the circumstances, the instruction effectively directed the jury to reach agreement, thereby coercing minority jurors, trial counsel was ineffective.

Finally, the trial court erred when it failed to simply vacate the lesser conviction that merged with the first degree robbery count. Vacation was required because the merger doctrine is a part of the double jeopardy analysis and the remedy for double jeopardy is vacation of the lesser crime.

#### D. ARGUMENT

**Point I: The State Failed to Prove Mr. Turner Committed the Crime of First Degree Robbery as that Crime was Charged in the "To Convict" Instruction to the Jury**

The State failed to prove the first element of first degree robbery as set forth in the jury instructions, requiring reversal of Mr. Turner's conviction. Under law of the case doctrine, to obtain a conviction, the State was required to prove the elements of robbery set forth in the unobjected-to "to convict" jury instruction. *State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998) (jury instruction added the unnecessary element of venue to crime). Here, the "to convict" instruction required the jury to find that Mr. Turner took personal property "from the person or in the presence of the owner or a person entrusted by the owner with dominion and control over the property." CP at 65. However, the evidence showed Mr. Turner committed a shoplifting while observed by store personnel from a distant location, on a video monitor. RP at 45-46. Thus, the taking was not from the person or in the presence of an owner or representative of the

owner. Accordingly, when the evidence did not conform to the crime set forth in the "to convict" jury instruction, law of the case doctrine requires that the conviction should be reversed.

The law of the case doctrine "is an established doctrine with roots reaching back to the earliest days of statehood." *Hickman*, 135 Wn.2d at 101. The doctrine holds that the State assumes the burden of proving unnecessary elements of an offense when such elements are included, without the State's objection, in the "to convict" jury instruction:

In criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the "to convict" instruction. *State v. Lee*, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995) ("Added elements become the law of the case . . . when they are included in instructions to the jury.") (citing *State v. Hobbs*, 71 Wn. App. 419, 423, 859 P.2d 73 (1993); *State v. Rivas*, 49 Wn. App. 677, 683, 746 P.2d 312 (1987)).

*Hickman*, 135 Wn.2d at 102; see *State v. Willis*, 153 Wn.2d 366, 103 P.3d 1213 (2005) (holding when jury instruction did not reference accomplice liability, law of the case doctrine required State to prove defendant

himself committed acts); *cf. State v. Teal*, 152 Wn.2d 333, 96 P.3d 974 (2004) (law of case doctrine not applicable in accomplice liability case when the "to convict" instruction did not add an unnecessary element but instead failed to refer to accomplice liability).

The State assumes the burden of proving the elements included in the "to convict" instruction even when they are not required to be proved by the relevant statute. *Hickman*, 135 Wn.2d at 102, *citing, State v. Barringer*, 32 Wn. App. 882, 887-88, 650 P.2d 1129 (1982) ("Although the charging statute . . . did not require reference to [the added element], by including that reference in the information and in the instructions, it became the law of the case and the State had the burden of proving it.').

The doctrine also holds that an appellant may assign error to elements added by law of the case doctrine. *Hickman*, 135 Wn.2d at 102. When a party challenges the sufficiency of the proof on an added element, "the sufficiency of the evidence to sustain the verdict is to be determined by the application of

the instructions." *Tonkovich v. Department of Labor & Indus.*, 31 Wn.2d 220, 225, 195 P.2d 638 (1948), quoted in *Hickman*, 135 Wn.2d at 103.

In this case, the State allowed the "to convict" Instruction No. 23 to be given without objection. RP at 277 & 282. However, the law of first degree robbery does not actually require that a forceful taking be "from the person or in the presence" of the owner of the property. CP at 65 (Instruction No. 23.) Instead, Washington follows the transactional view of first degree robbery, in which the taking can be outside of the presence of the person if force is used retain the property. See, e.g., *State v. Handburgh*, 119 Wn.2d 284, 830 P.2d 641 (1992) (defendant committed robbery when he took bike while owner was inside recreational center but used force to retain it); *State v. Manchester*, 57 Wn. App. 765, 790 P.2d 217 (1990) (defendant guilty of first degree robbery when, after attempted shoplifting during which he did not know he was observed, defendant used force to resist

apprehension or giving up the property); RCW 9A.56.200 & RCW 9A.56.190.

Accordingly, when Jury Instruction No. 23 included a requirement that the taking be "from the person or in the presence" of the owner, it added an unnecessary element to the crime. Under law of the case doctrine, the State's failure to object to the inclusion of this additional element required it to prove that element. *Hickman*, 135 Wn.2d at 102.

The State's failure to prove this additional element requires reversal. The seminal Washington case on the transactional view of first degree robbery defines "presence" to require an immediacy of contact:

The word "presence" in this context has been defined as a taking of something

"so within [the victim's] reach, inspection, observation or control, that he could, if not overcome with violence or prevented by fear, retain his possession of it."

*Manchester*, 57 Wn. App. at 768-69 (quoting 4 C. Torcia, *Wharton on Criminal Law* § 473 (14th ed. 1981)).

The immediacy of contact between the victim and the defendant required by the term "presence" simply

did not exist at the time of the taking in this case. Mr. Baker, the store's loss prevention officer, was the only store employee to witness the taking. See RP. He watched Mr. Turner take the two items on a video surveillance monitor. RP at 38-39, 43-46. He viewed the monitor from his office in the right-hand back corner of the store, behind a locked door. RP at 41.

At the time he selected the items, Mr. Turner was in a completely different area of the store, in the tool corral. RP at 45-46. No evidence suggests that any person associated with the store was present when Mr. Turner chose the two items. See RP. (While Mr. Turner testified that he had thought a woman in the tool corral might be store personnel, RP at 244-45, no evidence supported this supposition.)

Further, while Baker followed Mr. Turner as he headed out of the store, he did not make his presence known until Mr. Turner left the store without paying. Indeed, Baker intentionally made himself inconspicuous. RP at 47-50. Until Mr. Turner left the store, Baker stayed at least five to ten paces behind him. RP at

265. He did not alert Mr. Turner to his presence until Mr. Turner went through the store doors. RP at 50. Thus, Mr. Turner completed the entire taking - from choosing the items to leaving the store without paying - outside of the presence of an owner or controller of the property.

Once out of the store, when the taking was completed, Baker tried to stop Mr. Turner and Mr. Turner tried to flee. RP at 51-57, 266-67. At that point, Mr. Turner was clearly in Mr. Baker's presence. However, at that point the taking was completed. The ensuing altercation between Baker and Turner occurred over either the retention of the stolen property or Mr. Turner's attempt to flee.

Although not the decisional issue in the case, in *Manchester* the court reflected on whether the takings in that case were in the presence of another and against the person's will. *Manchester* involved two counts of first degree robbery arising from shoplifting incidents, similar to the incident in the instant case. In the first incident in *Manchester*, a store security

officer, at an unspecified distance from the defendant, observed him take several cartons of cigarettes. After the defendant exited the store, the security officer and another store employee stopped him. The defendant resisted apprehension and brandished a knife.

*Manchester*, 57 Wn. App. at 766.

In the second incident, a store manager located 15 to 18 feet away from the defendant similarly observed him take a carton of cigarettes. The store's security guard followed him out of the store and attempted to stop him. The defendant threatened to shoot the guard, brandished an ice pick, threw the cigarettes at the guard, and left. *Id.* at 766.

In considering the defendant's arguments, the court noted that it was "debatable" that the takings were in the presence of another and against the employees' will:

It is undisputed that Manchester did not know he was being watched when he took the cigarettes. Assuming Manchester used no force or threats until the takings were complete, it is debatable whether the taking was in the presence and against the will of the employees, as required under RCW 9A.56.190.

*Manchester*, 57 Wn. App. at 768. The court did not need to resolve this issue as it found the defendant guilty of robbery whether or not the taking was "from the person or in the presence" of the owner. By contrast, in the instant case, if the taking was not "from the person or in the presence" of an owner or controller of the property, the State failed to prove its case as charged to the jury.

In this case, the victim's absence at the time of the taking is beyond debate. Here, similar to the defendant in *Manchester*, Mr. Turner was not aware that Baker observed his actions. Moreover, instead of the store employee being 10 or 15 feet away at the time of the theft, Baker was across the store in a locked room as he observed the theft. Like the defendant in *Manchester*, Mr. Turner was also unaware that Baker began following him, not learning of this until he was out of the store and the taking was complete.

While Baker was as close as five paces behind Mr. Turner as Mr. Turner went through the exit door, this is not the type of immediate presence contemplated by

the jury instruction. Walking quickly away from Baker, Mr. Turner was not "so within [the victim's] reach, inspection, observation or control" that Baker could have "retain[ed] his possession of" the items. See *Manchester*, 57 Wn. App. at 768. Thus, the taking did not occur "from the person or in the presence of the owner or a person entrusted by the owner with dominion and control over the property," as required by Jury Instruction No. 23 and Mr. Turner's conviction should be reversed.

That other jury instructions set forth the general law on robbery and robbery in the first degree does not alter this conclusion. See Jury Instructions Nos. 20, 21 & 22 (CP at 62-64). First, Instruction No. 20 actually supports the idea that the taking must be from another's person or presence. It states, in relevant part:

A person commits the crime of robbery when he or she unlawfully and with intent to commit theft thereof *takes personal property from the person or in the presence of the owner or a person entrusted by the owner with dominion and control over the property* against that person's will by the use or threatened use of

immediate force, violence, or fear of injury to that person.

CP at 62 (emphasis added). While the instruction qualifies the use of force, stating that it can be used to retain the property, it does not similarly qualify the "from the person or in the presence" requirement to also allow that to occur during the retention of the property:

The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which cases the degree of force is immaterial.

CP at 62. Instructions Nos. 21 and 22 shed no light whatsoever on the "from the person or in the presence" issue. See CP at 63 & 64.

Next, while, all the relevant law need not generally be incorporated in a single jury instruction, the jury is entitled to view the "to convict" instruction as a complete statement of the elements of the crime charged. *State v. Emmanuel*, 42 Wn.2d 799, 856-57, 259 P.2d 845 (1953). The "to convict" instruction operates as a "yardstick" against which the jury is to measure the defendant's guilt using the

listed elements. *Id.* at 857. *Cf. State v. Teal*, 152 Wn.2d 333, 339, 96 P.3d 974 (2004) (when accomplice liability was not an element of the crime, it did not need to be included in the "to convict" jury instruction). Thus, even if the other jury instructions could somehow be understood to describe the transactional view of robbery, which does not require a taking "from the person or in the presence," when the additional element was included in the jury's "yardstick" without objection by the State, the State was required to prove it.

For all of these reasons, the State failed to prove Mr. Turner "took personal property from the person or in the presence of the owner or a person entrusted by the owner with dominion and control over the property," as required by Jury Instruction No. 23, and law of the case doctrine requires Mr. Turner's conviction to be reversed.

**Point II: Mr. Turner Was Deprived of His Rights to Counsel When Trial Counsel Requested an Instruction to the Self-Proclaimed Deadlocked Jury That Prevented Further Inquiry into the Deadlock Issue and Directed the Jury to Reach Agreement**

Mr. Turner's State and federal constitutional rights to effective counsel were violated by his attorney's requested instruction to the jury after deliberations had begun, which prevented the court from inquiring into whether the jury was truly deadlocked and directed the jury to reach agreement. The right to counsel includes the right to effective counsel. See U.S. Const. amend. VI; Wash. Const. art. 1 § 22. To demonstrate ineffective assistance of counsel, the defendant must show both that defense counsel's representation fell below an objective standard of reasonableness and that, but for this deficient representation, there is a reasonable probability that the result of the proceeding would have been different. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citations omitted). If defense counsel's conduct can be characterized as legitimate trial strategy or tactics, then it cannot constitute

ineffective assistance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In this case, counsel's performance was both deficient and prejudicial and cannot be viewed as tactical.

Counsel's performance was deficient when he declined the court's suggestion to speak to the jury about the possibility of reaching a verdict on Count II, instead asking the court to simply direct the jury to continue deliberating. RP at 357-60. Under the circumstances, his request to the judge resulted in a coercive instruction, one that suggested the need for agreement.

After jury deliberations have begun, a court must exercise great care in providing further instruction to the jury. Among other considerations, it cannot instruct the jury in such a way "as to suggest the need for agreement." CrR 6.15(f)(2). When a jury appears deadlocked, the court must balance the goal of efficient judicial administration with the right of the defendant to have a verdict rendered free of coercion.

*State v. Watkins*, 99 Wn.2d 166, 172-73, 660 P.2d 1117 (1983). "The problem remains a difficult and delicate one." *Id.* at 173. Indeed, WPIC 4.81 states that no instruction should be given to a jury after it is deadlocked. In this case, the instruction to the jury violated both CrR 6.15(f)(2)'s direction that the court not suggest the need for agreement and the judicial rule that "the jury must be free from judicial pressure in reaching its verdict." *Watkins*, 99 Wn.2d at 176 (citation omitted).

First, under the circumstances in this case, the direction told the jury it needed to reach agreement, in violation of CrR 6.15(f)(2). The not-very complicated trial in this case lasted about thirteen and a half hours. The jury deliberated about nine and a half hours before concluding it was "at rest." In other words, it deliberated seventy per cent as long as the trial lasted before concluding it could not reach agreement. From these facts alone, the court should have concluded that the jury was deadlocked and declared a mistrial: "The principal factor to be

considered in assessing whether a nonunanimous jury is genuinely deadlocked is 'the length of time the jury had been deliberating in light of the length of the trial and the volume and complexity of the evidence.'" *State v. Taylor*, 109 Wn.2d 438, 443, 745 P.2d 510 (1987) *reversed on other grounds*, *State v. Labanowski*, 117 Wn.2d 405, 816 P.2d 26 (1991) (quoting *State v. Jones*, 97 Wn.2d 159, 164, 641 P.2d 708 (1982)).

Even if the jury were not irrevocably deadlocked at this point, it thought it was: The jury's communication to the court was not in the form of a question, such as, "We cannot agree, what should we do?" but rather was a declarative statement: "We the jury are at rest. We could not agree on Count II." *Cf. Watkins*, 99 Wn.2d at 170 (in response to jury's questions about whether it could break for the weekend and what the "normal procedure" was in the event of deadlock, jury was told to continue deliberating).

From the jury's perspective, it likely believed it had been deliberating for a considerable time. It plainly believed that it could not agree and no further

deliberations would enable it to agree. Under these circumstances, when the court, without any explanation to or examination of the jurors, told the jury to continue deliberating, it effectively told them "you must reach agreement."

Had the court made the permissible limited inquiries regarding the likelihood of the jury reaching a verdict in a reasonable amount of time, this error would not have occurred. See WPIC 4.70, *Probability of Verdict; State v. Lee*, 77 Wn. App. 119, 889 P.2d 944, reversed on other grounds, 128 Wn.2d 151, 904 P.2d 1143 (1995) (limited inquiry as to possibility of agreement was proper). Either the jury would have answered "no," in which case the court would have decided whether to declare a mistrial, or it would have answered "yes." If it answered "yes" and then continued deliberating, the process itself would have communicated the message that the jury was only being asked to try to reach agreement in a reasonable amount of time. By contrast, when, after telling the court, "we are at rest, we could not agree," the court simply told it to continue

deliberating, the only reasonable inference is that the jury was required to agree. In this way, the court's direction to the jury, invited by counsel, violated CrR 6.15(f)(2).

For the same reasons the direction violated CrR 6.15(f)(2), it also created judicial pressure upon the verdict. While it did not compel a particular verdict, the direction compelled minority jurors to agree with the majority. After all, the jury had just told the court it was at rest and could not agree. When the court told it to continue deliberating anyway, it effectively told the minority jurors that they must change their votes and vote with the majority for the sake of agreement. *Cf. Watkins*, 99 Wn.2d at 177-79 (amended verdict forms and a supplemental instruction about the new forms did not coerce jury). Thus, the instruction also violated the directive that "the jury must be free from judicial pressure in reaching its verdict."

When counsel requested an instruction to the jury that resulted in a violation of law and an unfair trial

for his client, his performance was clearly deficient and his request cannot be seen as merely tactical. While the attorney's request not to take a verdict on Count I when the jury might not have actually been deadlocked on Count II could certainly be viewed as tactical, the court easily could have made the permissible inquiries regarding Count II without taking the verdict for Count I. Thus, the attorney's prevention of any inquiry into the jury's deadlocked status on Count II must be viewed separately from his tactical decision regarding Count I.

In addition, counsel's deficient performance prejudiced Mr. Turner. When the direction to the jury effectively told it to reach agreement, coercing the minority jurors into voting with the majority, Mr. Turner was deprived of his right to a fair and impartial trial.

In sum, defense counsel's requested direction to the jury amounted to a deficient performance and prejudiced Mr. Turner. For these reasons, this Court should reverse Mr. Turner's convictions.

**Point III: When the Remedy for a Double Jeopardy Violation is Vacation of the Lesser Crime, The Trial Court Erred in Holding that the Merged Assault Was Not Simply Vacated**

The trial court should have vacated Mr. Turner's conviction for Assault in the Second Degree when that crime merged with Robbery in the First Degree. The merger doctrine, like the *Blockberger* test and the "same evidence" test, is one part of the double jeopardy analysis. It is simply another means by which a court can determine whether multiple punishments violate the double jeopardy clause of the Fifth Amendment. *State v. Frohs*, 83 Wn. App. 803, 811, 924 P.2d 384 (1996). When convictions violate the double jeopardy prohibition, the remedy is vacation of the lesser conviction. *State v. Jones*, 117 Wn. App. 721, 727 n.1, 72 P.3d 1110 (2003) (citations omitted).

Accordingly, in this case, when the trial court properly merged the second degree assault conviction with the first degree robbery conviction, the appropriate remedy was simply vacation of the assault conviction. The trial court's order attempting to

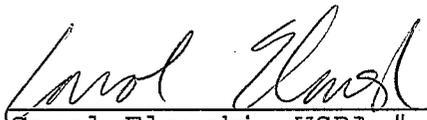
preserve the assault conviction was erroneous and should be vacated.

**E. CONCLUSION**

For all of these reasons, Guy Daniel Turner respectfully requests this Court to reverse his conviction for Robbery in the First Degree and vacate the portion of the trial court's order attempting to preserve the assault conviction.

Dated this 17th day of January, 2006.

Respectfully submitted,

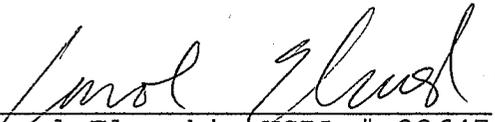
  
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**CERTIFICATE OF SERVICE**

I certify that on this 17th day of January, 2006, I mailed one copy of the attached brief, postage prepaid, to the attorney for the Respondent, Kathleen Proctor, Deputy Prosecuting Attorney, 930 Tacoma Avenue S, Tacoma, Washington, 98402-2102, and one copy of the brief, postage prepaid, to Mr. Guy Daniel Turner, DOC

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Carol Elewski, WSBA # 33647