

64801-2

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NO. 64801-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SHIRWA MUSE,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE HELLER

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

MAFÉ RAJUL
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

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A. ISSUES PRESENTED

1. A court only errs in instructing a deadlocked jury to resume deliberations if in doing so it pressures the jury and influences their verdict. In this case, the trial court did not set time limits or suggested there would be consequences if the jury was unable to reach an agreement. Where the trial court instructed the jury to read the instructions again and asked them to attempt to reach a verdict did the court act appropriately?

2. A defendant must establish both undue influence by the court and a reasonably substantial possibility the verdict would have been different to be entitled to a new trial. Here, the jury always maintained the defendant was guilty of an assault and armed with a deadly weapon. Can the defendant satisfy his burden?

3. A trial court can only declare a mistrial when there are extraordinary and striking circumstances to do so. In this case, at least three jurors insisted they could reach a verdict. Was the court's decision to instruct the jurors to continue deliberating the proper course of action?

B. STATEMENT OF FACTS

The defendant, Shirwa Muse, was charged with two counts of assault in the second degree and one count of witness tampering. CP 23. The State also charged the defendant with being armed with a deadly weapon in the commission of the assaults. CP 23. The jury convicted the defendant of count I and acquitted the defendant of counts II and III. 3RP 452.¹ The jury further found that the defendant was armed with a deadly weapon when he committed the crime of assault in the second degree in count I. 3RP 452.

The trial started on December 17, 2009. 1RP 10. The parties completed their closing arguments on December 28, 2009. 3RP 413. In the afternoon of December 29, 2009, the jury indicated it had reached a verdict. 3RP 414. The verdict forms indicated the jury had found the defendant not guilty of assault in the second degree as charged in count I; guilty of the lesser included offense of assault in the fourth degree; not guilty of assault in the second degree as charged in count II; and not guilty of witness tampering as charged in count III. 3RP 414-15. The jury

¹ The Verbatim Report of the Jury Trial consists of three volumes. Volume one will be referred to as 1RP (December 17, 2009); and volume three will be referred to as 3RP (December 28, 2009 – December 30, 2009).

further answered "yes" on the special verdict form by indicating the defendant was armed with a deadly weapon at the time of the commission of the crime in count I. 3RP 415.

The court polled the jury. 3RP 415. During the polling, the court learned that the jury was not unanimous on any of the counts. 3RP 430-31. The jury was split eight to four to convict on count I, but unanimous as to the lesser included offense of assault in the fourth degree, and unanimous as to the deadly weapon enhancement with respect to count I. 3RP 431. The jury was not unanimous on counts II or III. 3RP 430-31. Given the lack of unanimity, the court asked the jury to return the following day to continue deliberations. 3RP 431-32.

After the court told the jury that they had to come back the following day, one juror protested and indicated he would not come back. 3RP 433-34. That same juror said there was no way the jury could reach a unanimous verdict. 3RP 434. The court followed up and asked the rest of the panel if they agreed they could not reach a unanimous verdict. 3RP 434. Three jurors raised their hand and indicated they believed it was possible to still reach a unanimous verdict. 3RP 434. The jury was excused for the day and returned the following morning. 3RP 435-36.

On December 30, 2009, during the course of the day, the jury had a question with respect to count I. 3RP 438. Without asking the jury of their voting split, the court inquired whether or not the jury believed they had reached the point where they were truly unable to reach a unanimous verdict. 3RP 438. Three jurors raised their hands indicating they believed that with further deliberations they could reach a unanimous verdict. 3RP 438. One of the jurors took it a step further and indicated they had been working too hard to just give up like that. 3RP 439. Later in the day, the jury returned a unanimous verdict where they found the defendant guilty of count I; not guilty of counts II and III; and found that the defendant was armed with a deadly weapon during the commission of count I. 3RP 452. The jury was polled once again and all twelve jurors indicated it was their individual verdict and the verdict of the jury as a whole. 3RP 453-61.

C. ARGUMENT

1. INSTRUCTING THE JURY TO CONTINUE DELIBERATIONS WHEN THE COURT FOUND THE JURY WAS NOT UNANIMOUS AT POLLING WAS THE PROPER COURSE OF ACTION.

When a verdict or special finding is returned and before it is recorded, the jury shall be polled at the

request of any party or upon the court's own motion. If at the conclusion of the poll, all of the jurors do not concur, the jury may be directed to retire for further deliberations or may be discharged by the court.

CrR 6.16.

The trial court may make certain limited inquiries of the jury, and individual polling is not necessarily precluded. State v. Dykstra, 33 Wn. App. 648, 656 P.2d 1137 (1983). In this case, when the court polled the jury it realized the jury was not unanimous. The court's inquiry was limited to ascertain whether or not the jury was in fact not unanimous. With this information, the court exercised its discretion and directed the jury to return the next day for further deliberations.

The court shall not instruct the jury in such a way as to suggest the need for agreement, consequences of no agreement, or length of time the jury will be required to deliberate. CrR 6.15(f)(2). A trial court's inquiry during deliberations as to whether the jurors feel that further deliberations would be beneficial in reaching unanimous verdict is not coercive. State v. Lee, 77 Wn. App. 119, 125, 889 P.2d 944, 947 (1995) (overruled on different grounds).

In support for its argument, the defendant mistakenly relies on State v. Boogaard, 90 Wn.2d 733, 585 P.2d 789 (1978). The jury in Boogaard began its deliberations in midafternoon. Id. at 735. When no verdict had been reached by 9:30 p.m., the court on its own accord through its bailiff inquired as to how the deliberations were going. Id. The court learned that the vote stood at 10 to 2. Id. With that information, the court brought the jury into the courtroom and polled them as to the likelihood of reaching a verdict within 30 minutes. Id. All except one juror indicated that a verdict could be reached in that time. Id. The court instructed the jury to go back and continue deliberating for another half an hour. Id. After 30 minutes the jury returned a guilty verdict. Id.

The Washington State Supreme Court held that polling the jurors as to their ability to reach a verdict in a prescribed length of time was improperly coercive. Id. at 736. Specifically, the Court noted: "the questioning of individual jurors, with respect to each juror's opinion regarding the jury's ability to reach a verdict in a prescribed length of time, after the court was apprised of the history of the vote in the presence of the jurors, unavoidably tended to

suggest to minority jurors that they should 'give in' for the sake of that goal which the judge obviously deemed desirable-namely, a *verdict within a half hour.*" Id. (emphasis added)

The facts and the issue in Boogaard are different from the instant case. First, in Boogaard, the court on its own interrupted deliberations and learned of the split while the jury was still in the process of deliberating. By contrast, in this case the trial court did not interrupt deliberations. The court learned of the split during the polling procedure after the jury had erroneously indicated it had reached a unanimous verdict. The purpose of polling is for the court to ascertain whether or not there are irregularities in the verdict. The only way a judge can make this finding is by inquiring of each individual juror.

Secondly, and more importantly, in Boogaard the court asked whether the jury could reach a verdict in thirty minutes. Id. at 735. In this case, the trial court did not set a time limit or asked whether or not the jury could reach its verdict within a prescribed timeframe. Boogaard is not applicable.

The court's decision to send the jury to continue with deliberations after discovering the lack of unanimity was the proper course of action.

2. THE DEFENDANT CANNOT ESTABLISH THAT THE COURT'S POLLING INFLUENCED THE JURY OR THAT THE VERDICT WOULD HAVE BEEN DIFFERENT, HAD THEY NOT BEEN INSTRUCTED TO CONTINUE DELIBERATING.

It is the defendant's burden to establish a reasonably substantial possibility exists that the court influenced the jury when it instructed the jurors to continue deliberations. State v. Watkins, 99 Wn.2d 166, 177-78, 660 P.2d 1117, 1122-23 (1983); State v. Hunsaker, 74 Wn. App. 209, 873 P.2d 546 (1994). Mere speculation that the court's intervention had the effect to influence the jury's verdict is not sufficient. State v. Watkins, 99 Wn.2d at 177-78.

The defendant has failed to show that there is a reasonable possibility the jury would have voted differently, had the judge not instructed them to go back and read the instructions. The defendant can only speculate that the jury was coerced into reaching a guilty verdict because of the court's instruction to the jury to return the next day to continue deliberations. App. Brief 11. The defendant's argument ignores the fact that when the jury was polled the first time, despite the fact that the jury was not unanimous on any of the counts, all of the jurors believed the defendant was guilty of an assault and that he was armed with a

deadly weapon. 3RP 414-15. In fact, eight jurors indicated he was guilty of assault in the second degree, four indicated guilty of the assault in the fourth degree, but all twelve jurors answered yes to the special verdict by finding the defendant was armed with a deadly weapon. 3RP 430-31. This means the jury unequivocally agreed the defendant was guilty of an assault that was committed with a deadly weapon, which essentially is the crime for which the defendant was convicted, Assault in the Second Degree.²

The defendant cannot show the verdict would have been different.

3. THE COURT WOULD HAVE COMMITTED ERROR IF IT HAD DECLARED A MISTRIAL WHEN JURORS INSISTED THE JURY COULD REACH A VERDICT.

Before a judge can exercise his or her discretion to find the jury is deadlocked, the court must have extraordinary and striking circumstances to discharge the jury. State v. Jones, 97 Wn.2d 159, 164-65, 641 P.2d 708, 712-13 (1982). The jury's acknowledgment of hopeless deadlock is an extraordinary and striking circumstance. Id. at 164.

² A person is guilty of assault in the second degree if he or she...assaults another with a deadly weapon; RCW 9A.36.021(1)(c).

In Jones, the court inquired if there was any possibility that the jury could reach a verdict by twelve o'clock midnight. Id. at 160. The foreman stated there was a possibility. Id. at 161. By midnight the jury had not reached a verdict, so the court asked again if there was a possibility the jury could reach an agreement within a reasonable amount of time. Id. At that time the foreman indicated there was no such possibility. Id. The judge then asked the jury for a show of hands of all those who agreed with the foreman, all the jurors raised their hands in agreement and the judge declared a mistrial on the ground "that the jury as a whole feels there is no possibility of arriving at a verdict within a reasonable time." Id.

The Jones court held that inquiries of the jury whether verdict would be possible within 90 minutes were insufficient to establish that jury was genuinely deadlocked, and thus the trial judge did not have sufficient grounds on which to exercise discretion to discharge jury, mistrial was improperly declared, and retrial was prohibited by double jeopardy clause of State and Federal Constitutions. Id. at 166.

This case is similar to Jones only in that the trial court asked the jurors with a show of hands whether or not they were truly deadlocked. When it was apparent some jurors believed a verdict

was still possible, the court did the only thing it could do, which was to send them back to continue deliberations. Doing otherwise would have been error.

The defendant's argument that the court instructed the jury "that they must return a verdict" is flawed. App. Brief 10. The court inquired as to whether or not the jury could reach a unanimous verdict. During the court's inquiry, the court stated:

"as long as you are in the courtroom, let me ask the rest of you, do all of you agree with the gentleman who indicated, that, at least in his opinion, the jury could not reach a unanimous verdict... is there anybody that disagrees?" 3RP 434.

Three jurors raised their hands. In response to that the court excused the jurors and told them to return the next day to continue deliberations. 3RP 434. A juror then asked a follow up question and the court answered:

"you need to *attempt* to come to an agreement about whether he is guilty or not guilty as to each of the counts." 3RP 435. (emphasis added). It is clear to me that there are a number of you that believe that it is still possible and based on that I'm not going to engage in hypotheticals with you as to what I am going to do if something happens, but at this point you need to do your best to try and reach an agreement." 3RP 435.

The next day the jury had another question and it still appeared to be deadlocked. 3RP 438. The court then asked

whether the jury was truly deadlocked by asking a show of hands. 3RP 438. Three jurors again raised their hand saying they were not deadlocked and could reach a verdict. 3RP 439. The foreman stated he believed there was a possibility they could reach a verdict, and another juror added that "in addition to there being movement, we have been working so hard, I just don't want to leave this thing open like that." 3RP 440.

It can hardly be said that the court was forcing the jury to reach a verdict. On the contrary, what the record shows is that when the court was considering declaring a mistrial on two separate occasions, the jury insisted they could reach a verdict. Had the court declared a mistrial when a few of the jurors insisted they could reach a verdict, the court would have committed error. Therefore, this Court should find the trial court's actions appropriate and necessary under the law.

D. CONCLUSION

The trial court did not coerce the jury into reaching a verdict, rather it inquired as to whether the jury was deadlocked or not. Further, the defendant cannot show the verdict would have been different as a result of the court's inquiry at polling since at that time

the jury was unequivocal that the defendant was guilty of assault and armed with a deadly weapon. Since more than one member of the jury kept insisting they could reach a verdict, it would have been error for the court to discharge the jury.

Therefore, the State respectfully requests this Court to affirm the defendant's conviction for Assault in the Second Degree with the special finding that he was armed with a deadly weapon.

DATED this 6th day of October, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

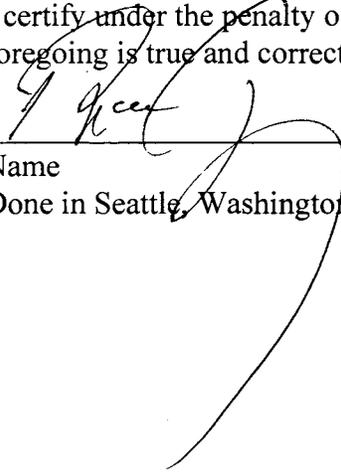
By: 

MAFÉ RAJUL, WSBA #37877
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to Thomas Michael Kummerow, of Washington Appellate Project, at the following address: 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, the attorney of record for the appellant, containing a copy of the Brief of Respondent in STATE V. SHIRWA MUSE, Cause No. 64801-2-I in the Court of Appeals of the State of Washington, Division I.

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


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