

64801-2

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No. 64801-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

SHIRWA ABDI MUSE,

Appellant.

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

The Honorable Bruce E. Heller

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in polling the jury regarding its numerical division during discussions regarding the jury's "verdict."

2. The court's supplemental instructions to the jury were coercive and violated Mr. Muse's right to a jury trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A court is barred from inquiring of the jury its numerical division during deliberations because it has a coercive effect on those deliberations. Here, after polling the first two jurors regarding the jury's initial verdict, the court discovered the verdict was not unanimous. Nevertheless, the court went on to poll the entire jury and discovered the jury's numerical division. Did the court err in engaging in a further polling after discovering the verdict was not unanimous, requiring reversal of Mr. Muse's conviction and remand for a new trial?

2. A defendant has a right under the Sixth Amendment and article I, section 22 to a fair and impartial jury, which includes the right to an uncoerced verdict. A court's instruction which even subtly applies coercion to return a verdict violates this constitutional guarantee. After discovering the verdict returned by the jury was not unanimous, and discovering the numerical split of the jury, the

court instructed the jury to return to its deliberations. Where the court's instruction had the effect of suggesting to holdout jurors to abandon their conscientiously held opinions for the sake of reaching a verdict, was Mr. Muse's right to a fair and impartial jury violated?

C. STATEMENT OF THE CASE

Shirwa Muse was charged with two counts of second degree assault and one count of witness tampering. CP 23-24. He was also charged with being armed with a deadly weapon in the commission of the assaults. CP 23-24. At the conclusion of the trial, the jury returned to the courtroom after declaring it had reached a verdict. RP 414. The verdicts read by the court were not guilty to count I, assault in the second degree, but guilty of the lesser degree offense of fourth degree assault. RP 414. The jury also found Mr. Muse was armed with a deadly weapon in the commission of count I. RP 415. The jury verdict further stated Mr. Muse was not guilty of the other two substantive counts. RP 414-15.

Noting a significant inconsistency between a finding of fourth degree assault and being armed with a deadly weapon during the commission of that offense, the court decided to poll the jury. RP

415. The first juror polled stated the verdict of count I and the special verdict were the juror's individual verdicts and the verdict of the jury. RP 415. The second juror stated the verdict of not guilty on count one was not the juror's individual verdict; the juror had voted to find Mr. Muse guilty of assault in the second degree. RP 416. The court went on to poll the rest of the jury and discovered a numerical split of eight to four for a guilty verdict on count I, assault in the second degree, but 12 to 0 on the lesser degree of fourth degree assault and on the special verdict. RP 430-31. The court discovered the jury was split on the other two counts as well. RP 431. Based upon the jury's numerical split, the State and the defense noted the jury was hung. RP 431. The court countered, "we don't know if they are hung, . . ." RP 431. The court indicated it would tell the jury they were not unanimous and order the jury to continue to deliberate. RP 432.

The court had the jury return to the courtroom and instructed the jury:

Ladies and gentlemen, as I think must be evident to you, having gone through this process of determining what your individual verdicts were it is clear that you did not reach unanimous verdicts on any of the counts and therefore you are not done.

You need to continue deliberating until you have reached unanimous verdicts, either guilty or not guilty, on the various counts, and since you haven't done that I am going to let you go this evening, but then you are going to have to come back tomorrow and continue your deliberations.

RP 432-33. One juror immediately objected:

JUROR: There is absolutely no chance that we will come to a consensus – unanimous votes, absolutely not. I refuse, in fact, to come back tomorrow to try this. There is no –

THE COURT: Sir, you don't have a right to refuse to do anything. I will tell you what your obligations as jurors are and you will do that.

This is the first time that I have heard from any of you that there is no way that you can reach a unanimous verdict on any of the counts.

RP 434. The court asked the jury if there were members who thought that with continued deliberations a verdict could be reached:

All right, so we have three jurors who believe that with continuing deliberations you might be able to come to some resolution of these issues. That being the case, I am going to excuse you and you will come back tomorrow and continue with your deliberations.

RP 434.

In response to a juror's question about whether the jury was required to be unanimous, the court stated:

THE COURT: You need to attempt all to come to an agreement about whether he is guilty or not guilty as to each of the counts.

. . .
You're going to deliberate tomorrow morning and I'm going to want you to make a good-faith effort to discuss the issues and attempt to reach agreement, one way or the other.

It is clear to me that there are a number of you that believe that that is still possible and based on that I am 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 to reach an agreement.

So I am going to excuse you now . . .

RP 435-36.

The next day, the jury returned to the court with several questions regarding the various counts. RP 438-39. The court answered as best it could. At the conclusion of the day, the jury returned its verdict. The jury found Mr. Muse guilty of count I, second degree assault, and not guilty of the other two counts. CP 31-32, 34; RP 452. The jury also found in the special verdict that Mr. Must was armed with a deadly weapon in the commission of count I. CP 30; RP 452.

Prior to sentencing, Mr. Muse moved for a new trial based upon the irregularity in the verdict process and that the court's subsequent instructions to the jury coerced a verdict from the

holdout jurors. CP 88-91; RP 467. The court denied the motion, stating:

And having read the taped proceedings, the Court concludes that the thrust the remarks was “you need to continue the process”; granted the Court did at the beginning, when it was polling the jury, say “you haven’t reached a unanimous verdict, you need to continue,” but particularly at the end it seems clear that the Court did not convey that they had to do anything.

The only thing the Court wanted them and required them to do was continue the process, . . .

RP 478.

D. ARGUMENT

THE COURT’S ACTIONS AFTER DISCOVERING THE JURY WAS NOT UNANIMOUS VIOLATED MR. MUSE’S RIGHT TO A JURY TRIAL

1. The constitutionally protected right to a jury trial includes the right to a non-coerced verdict. A criminal defendant has a constitutionally protected right to a trial by a fair and impartial jury. U.S. Const. amends. VI, XIV § 1; Const. art. I, §§ 3, 21, 22; *Duncan v. Louisiana*, 391 U.S. 145, 177, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). The right to a fair and impartial jury trial demands that a judge refrain from exerting coercive pressure upon the jury’s deliberations. *State v. Jones*, 97 Wn.2d 159, 164, 641 P.2d 708 (1982), *citing State v. Boogaard*, 90 Wn.2d 733, 736-37, 585 P.2d

789 (1978). “After jury deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement.” CrR 6.15(f)(2); *State v. Watkins*, 99 Wn.2d 166, 175, 660 P.2d 1117 (1983). Even a subtle instruction suggesting that a juror who disagrees with the majority should abandon his or her conscientiously held opinion for the sake of reaching a verdict invades the defendant's right to have each juror reach a verdict uninfluenced by factors outside the evidence. *Boogaard*, 90 Wn.2d at 736, *citing State v. Ring*, 52 Wn.2d 423, 325 P.2d 730 (1958).

2. The trial court erred in polling the jury to inquire into its numerical division on a verdict. Questions by the judge to the jury inquiring into the extent of the jury's division and its numerical breakdown are prohibited. *Boogaard*, 90 Wn.2d at 738.

In *Boogaard*, the judge sent the bailiff to inquire of the jury how they stood numerically, and learned the split was 10-2. *Boogaard*, 90 Wn.2d at 735. Since it was 9:30 at night, the judge was faced with allowing the jury to continue to deliberate until it reached a verdict, which could have been rather late at night, recessing to the next day, a holiday for court personnel and the public generally, recessing to the next court date, or declaring a mistrial. *Id.* To better decide, the court had the jury return to the

courtroom and asked the foreperson what the history of voting had been and how long the current split had been going on. The judge asked the jury if it thought it could reach a verdict in a half hour if they continued to deliberate, and after receiving an affirmative reply, instructed the jury to continue to deliberate for a half hour. *Id.* At the end of the half hour, the jury returned with a guilty verdict. *Id.* The Supreme Court reversed the conviction, ruling that the court's instruction that the jury continue to deliberate for a prescribed length of time was inherently coercive, because it suggested "to minority jurors that they should 'give in' for the sake of the goal which the judge obviously deemed desirable namely, a verdict within a half hour." *Boogaard*, 90 Wn.2d at 736.

But, on equal footing with the Court's analysis of the coercive power of the court's instruction to deliberate for a specified period of time, was the Supreme Court's unequivocal ban on asking the jury to state its numerical split.

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

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

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

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

The trial judge here was on notice after the polling of the first two jurors that the “verdict” announced by the jury was not a unanimous verdict. Instead of stopping there, reinstructing the jury, and sending them back to further deliberate, the judge went on to poll all of the jurors about their individual decisions, resulting in the parties and the court becoming aware that the jury was split eight to four to convict Mr. Muse on count one. The court’s polling of the jury plainly violated the ban pronounced by *Boogaard*. Pursuant to *Boogaard*, Mr. Muse is entitled to reversal of his convictions and remand for a new trial. *Boogaard*, 90 Wn.2d at 740 (“Since we have determined that the questioning of the individual jurors tended

to and most probably did influence the minority jurors to vote with the majority, . . . a new trial must be ordered.”).

3. Alternatively, the court’s supplemental instruction following its discovery of a split in the jury resulted in a coerced verdict. To demonstrate judicial coercion a defendant must establish “a reasonably substantial possibility” that the verdict was improperly influenced by the trial court’s intervention. *Watkins*, 99 Wn.2d at 178.

CrR 6.15(f)(2) provides:

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.

“The purpose of this rule is to prevent judicial interference in the deliberative process.” *Watkins*, 99 Wn.2d at 175; *Boogaard*, 90 Wn.2d at 736.

The judge here instructed the jury on two occasions that they must return a verdict. RP 433, 435. Less subtle than the coercive questioning in *Boogaard*, the trial court plainly implied to the jurors that it would be inconvenient and difficult if the jury did not reach a verdict. And, as in *Boogaard*, the jurors may have taken the court’s statement as suggesting that they should abandon their

conscientiously held opinions for the sake of reaching a verdict as instructed, or demanded, by the court. See *Boogaard*, 90 Wn.2d at 736 (even a subtle instruction that suggests that a juror who disagrees with the majority should abandon his or her conscientiously held opinion for the sake of reaching a verdict invades the defendant's right to have each juror reach his or her verdict uninfluenced by factors outside the evidence).

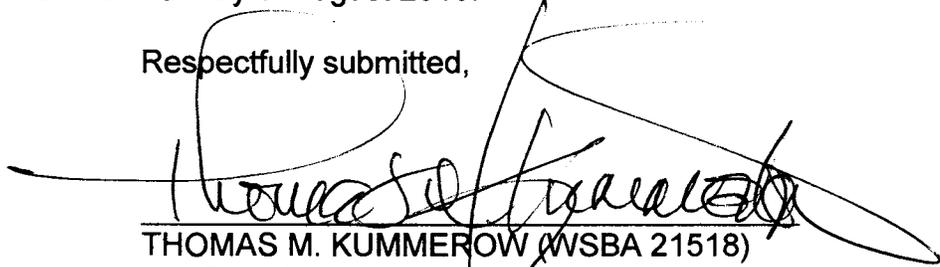
The inference that the jury was coerced into reaching a verdict is amply supported by the continued in-court discussions by the jurors with the judge. The jurors repeatedly asked about the need for unanimity, and at least one juror emphatically stated further deliberations would be futile given the unanimity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

E. CONCLUSION

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

DATED this 11th day of August 2010.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the left and a large loop on the right.

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

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

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