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COURT OF APPEALS  
DIVISION II

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NO. 37850-7-II  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

BY [Signature]  
DEPUTY

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STATE OF WASHINGTON, Respondent

v.

OVIDIO PEREZ, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
THE HONORABLE  
CLARK COUNTY SUPERIOR COURT CAUSE NO. 07-1-02106-0

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BRIEF OF RESPONDENT

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I. STATEMENT OF THE FACTS

The State accepts the statement of the facts as set forth by the defendant. Where additional information is necessary it will be provided.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that the court violated Double Jeopardy in sentencing him on both Counts 1 and 2 when it was the same criminal conduct.

The First Amended Information (CP 3) charged the defendant with Count 1 – Attempted Murder in the First Degree and Count 2 – Assault in the First Degree. Both of them named the victim, Francisco Lopez, and the behavior that lead to the charges occurred on the same date of July 20, 2007. Both counts included the enhancement of armed with a deadly weapon and both designate the same type of weapon, that is, a knife and/or a bat.

As the evidence unfolded for the jury it was obvious that these were alternatives to committing the same crime.

The jury found the defendant guilty of both and the Judge in the Felony Judgment & Sentence (CP 16) sentenced him on both counts running everything concurrent.

If the defendant's conduct constituted just one criminal act, or one "unit of prosecution" then the defendant's two convictions violate Double Jeopardy by punishing him twice for the same offense. Double Jeopardy is implicated whether or not his sentences are served concurrently or consecutively. Ball v. United States, 470 U.S. 856, 865, 105 S. Ct. 1668, 84 L. Ed.2d 740 (1985). A defendant's having two convictions creates other adverse consequences besides jail time. In State v. Read, 100 Wn. App. 776, 998 P.2d 897 (2000), Division III of the Court of Appeals found convictions for Second Degree Murder and First Degree Assault violated Double Jeopardy and the court vacated the Assault conviction. The Read court determined that the offenses were legally "the same" under the "Same Evidence Test" since proof of Second Degree Intentional Murder necessarily also proves First Degree Assault. The court found the offenses were the same in fact because the offenses were based on the same act directed toward the same victim. Read, 100 Wn. App. at 791.

In State v. Turner, 144 Wn. App. 279, 182 P.3d 478 (2008) the State had charged the defendant in the alternative with First Degree Assault and First Degree Robbery. The jury convicted Turner of Second Degree Assault and First Degree Robbery. Turner moved to have the Assault conviction merged with the Robbery conviction and the State agreed, citing State v. Freeman, 153 Wn.2d 765, 778, 108 P.3d 753

(2005). The Freeman court held that under the merger rule, Assault committed in furtherance of a robbery merges with Robbery and without contrary legislative intent or application of an exception, these crimes would merge. Freeman, 153 Wn.2d at 778. State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007). The Womac court made it clear that in order to avoid Double Jeopardy, a trial court must vacate a charge that has been reduced to judgment but chooses not to sentence.

In our situation, the Attempted Murder in the First Degree and Assault in the First Degree convictions were both reduced to judgment, with the court sentencing concurrently.

The State agrees with the defense that this is a violation of Double Jeopardy under the Womac decision. The remedy is for a resentencing to strike the lesser of the two convictions.

### III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defense is a claim that the trial court violated the defendant's constitutional right to be present at every stage of a trial by not including him in responding to jury questions during deliberations.

During the deliberation, the jury sent out one note that contained two questions. The first question was “We need a device to play the audio disc”. (RP 388). The second question was “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 or questioning”. (RP 389).

Before responding to either of these questions, the court had both attorneys meet with her in chambers where it was discussed as to how they would approach these questions from the jury. There is no indication that the defendant was present with his attorney.

The Judge and attorneys considered it appropriate to allow the jury to listen to the audio disc and were making arrangements to have that done. (RP 388).

The response to the second question was different in that the parties did not remember any type of questioning about “gang members” being asked of any of the prospective jurors. After meeting and discussing this, they felt it was best not to raise it any further and everyone agreed to that.

THE COURT: All right. The second question was:

“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 questionnaire – or

questioning”. I don’t know what word that is. But in any event, the determination was that no further action should be taken to single out that juror or to pursue it further.

I’m not sure we actually asked a ... (end of recording)

THE COURT: Are we on the record?

All right. That – I don’t recall a question that would have directly addressed that, so in any event, it was our thought to simply have the jury continue their deliberations.

Any disagreement with that summary?

MR. GOLIK (Deputy Prosecutor): None from the State.

MS. CLARK (Defense Attorney): I think that’s fine at this point, Your Honor. I would – if it becomes apparent that there’s some difficulty with the jury, I think we could address it later.

THE COURT: All right. Very good.

Then I think that’s all we need to address on the record here at this point. We will take care of the technical aspect of playing this for the jury and plan to have that done with staff only.

-(RP 389, L8 – 390, L10)

Where this entire question was left with the defense was that the defense attorney was agreeing with the procedure but indicated that if it became apparent there was some difficulty, that the issue of the gang member could be addressed at a later time. The trial court agreed with that and everyone appeared to be satisfied with this approach.

CrR6.15(f) governs jury questions submitted to the trial court during deliberations. The rule requires that the trial court notify parties of the content of such questions and provide them an opportunity to comment upon an appropriate response. CrR6.15(f)(1).

This issue was addressed by Division II in State v. Jury, 19 Wn. App. 256, 576 P.2d 1302 (1978). The appellate court indicated as follows:

Defendant also claims that it was error for the trial court to give the supplemental instruction without his personal presence in court. We disagree. CrR 3.4 states that "[t]he defendant shall be present at the arraignment, at every stage of the trial . . . except as otherwise provided by these rules . . ." CrR 6.15(f) provides:

**(f) Additional or Subsequent Instructions.**

(1) After retirement for deliberation, if the jury desires to be informed on any point of law, the judge may require the officer having them in charge to conduct them into court. Upon the jury being brought into court, the information requested, if given, shall be given in the presence of, or after notice to the parties *or their counsel*. Any additional instruction upon any point of law shall be given in writing.

(Italics ours.) The court in this case complied with CrR 6.15(f) and defense counsel was present. No oral communication was made to the jury, as in State v. Wroth, 15 Wash. 621, 47 P. 106 (1896), or Linbeck v. State, 1 Wash. 336, 25 P. 452 (1890).

As applied to the particular circumstances of this case, CrR 6.15(f)(1) does not violate the due process considerations raised in Hopt v. People, 110 U.S. 574, 28 L. Ed. 262, 4 S. Ct. 202 (1884). The defendant's presence is required only when it bears a reasonably substantial relation to the fullness of his opportunity to defend against the charge. Snyder v. Massachusetts, 291 U.S. 97, 78 L. Ed. 674, 54 S.

Ct. 330, 90 A.L.R. 575 (1934). There is no suggestion that defendant's presence would have advanced his defense. His counsel's presence was sufficient under these particular circumstances.

-(State v. Jury, 19 Wn. App. 256, 270, 576 P.2d 1302  
(1978))

The defense attorney in the appellate brief argues that State v. Jury is no longer applicable because CrR6.15 has been changed since the date of that decision. However, the defense does not supply any examples of any difference from this approach.

The current CrR6.15(f)(1) reads as follows:

**(f) Questions from jury during deliberations**

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

The State submits that State v. Jury still is good case law. Defense counsel was present in our situation and protected her client's interests. Moreover, due process requires a defendant's presence only when a defendant shows that his presence "bears a reasonably substantial relation to the fullness of his opportunity to defend against the charge". State v. Jury, 19 Wn. App. at 270. The State submits that there has been no showing here of any violation of the defendant's rights. Further, the parties agreed that the best way to approach this was not to raise it any further. This is not a situation, as the defense in the appellate brief wants to argue, that the juror lied during jury selection. It's obvious from the comments by the court and agreement of the parties that this issue was never raised during the voir dire of the jury.

Under the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment, a criminal defendant has a constitutional right to be present during all "critical stages" of the criminal proceedings. United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985); State v. Berrysmith, 87 Wn. App. 268, 273, 944 P.2d 397 (1997). A defendant has the right to be present at any stage of the criminal proceeding that is critical to the outcome if his presence would contribute to the fairness of the procedure. Kentucky v. Stincer, 482 U.S. 730, 745, 107 S. Ct. 2658, 2667, 96 L. Ed. 2d 631

(1987); Berrysmith, 87 Wn. App. at 273. But due process does not require the defendant's presence when it "would be useless." Id. (citing Snyder v. Massachusetts, 291 U.S. 97, 106-07, 54 S. Ct. 330, 78 L. Ed. 674 (1934)). When the right to confrontation is not implicated, the Court must address two questions in determining whether the hearing was a critical stage in the proceedings. First, whether the subject of the hearing related to a purely legal matter; and second, if so, whether the absence of the defendant affected the opportunity to defend against the charge, "or whether a fair and just hearing was thwarted by his absence." Berrysmith, 87 Wn. App. at 273-74.

However, both court rules and case law permit a trial judge to give the jury requested information on a point of law in the presence of, or after notice to, the parties or their counsel. CrR 6.15(f)(1); State v. Safford, 24 Wn. App. 783, 794, 604 P.2d 980 (1979), review denied, 93 Wn.2d 1026 (1980); State v. Jury, 19 Wn. App. 256, 270, 576 P.2d 1302 (1978).

The State submits that there is no fundamental difference between the wordings in CrR6.15(f)(1). The earlier version indicated "shall be given in the presence of, or after notice to the parties or their counsel". The new version of the rule indicates "the court shall notify the parties of the contents of the questions and provide them an opportunity to comment

upon an appropriate response". The State submits that these are fundamentally the same. The State would further submit that that was exactly how our Judge approached the issue. Both attorneys were present, had an opportunity to meet with the court, and all of them agreed on an approach and procedure. Further, the defense left it open in case there were problems for further discussion. There was no further discussion nor complaint by the defense concerning the procedures that everyone agreed to. With that in mind, the trial court appropriately followed the rules and case law.

IV. CONCLUSION

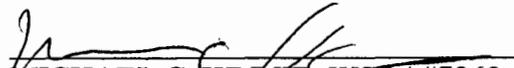
The case should not be reversed, but it should be remanded to the trial court for purposes of resentencing.

DATED this 17 day of March, 2009.

Respectfully submitted:

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