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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

GUY TURNER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson

No. 05-1-00021-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the State adduce sufficient evidence to prove first degree robbery?

2. Has defendant failed to demonstrate that trial counsel's performance was constitutionally deficient where he agreed to allow the jury to deliberate further on Count II after the jury indicated it was deadlocked on that Count?

3. Did the trial court err when it properly merged the defendant's second degree assault conviction with his first degree robbery conviction and sentenced the defendant on his robbery conviction without dismissing the assault conviction?

B. STATEMENT OF THE CASE.

1. Procedure

On January 3, 2005, the Pierce County Prosecutor's Office charged the defendant with first degree assault ¹(Count I) and first degree robbery² (Count II). The information included deadly weapon enhancement allegations for each count. CP 1-3.

¹ RCW 9A.36.011(1)(a).

² RCW 9A.56.190 and RCW 9A.56.200(1)(iii).

Trial commenced on Tuesday, May 24, 2005, before the Honorable Brian Tollefson. RP1. The court accepted the defendant's proposed jury instructions regarding the robbery charge.³ CP 20, 23.⁴ These instructions reflected recent developments in the law after Tvedt. CP ___⁵ (Defendant's Proposed Jury Instruction Nos. 21 and 22).

At twelve minutes before noon on Friday, June 3, 2005, the jury indicated to the court that, "We the jury, are at rest, we could not agree on Count II." RP 357. The court suggested taking the verdict on Count I after the lunch hour and asking the jury whether there was a reasonable expectation that they might reach a verdict in a reasonable amount of time on Count II. RP 357. At that juncture, the Court indicated it would let the parties decide whether a mistrial should be declared. RP 357. Defendant's trial counsel did not want to take the verdict on Count I until the jury had further deliberated on Count II and requested the court instruct the jury to continue deliberating after lunch. RP 358. The State

³ The discussion regarding the jury instructions was held off the record. RP 276.

⁴ Defendant's Proposed Jury Instruction Nos. 21 and 22. Because the Respondent's request for Clerk's papers was filed contemporaneously with this brief, the page numbers have yet to be designated.

⁵ Defense counsel cited State v Tvedt, 116 Wn.App. 316, 65 P.3d 682 (2003), *aff'd* 153 Wn.2d 705, 107 P.3d 728 (2005), State v. Molina, 83 Wn.App. 144, 147, 920 P.2d 1228 (1996), and State v Larkin, 70 Wn.App. 349, 354-55, 853 P.2d 451 (1993), in support of these instructions. For clarification the complete citations are included.

agreed and the court advised the jury, "Please continue Your deliberations." CP 5, 359-60.

On Monday, June 6, 2005, the jury convicted the defendant of second degree assault and first degree robbery. CP 10, 12, RP 4 (06/06/05). By special verdict, the jury found the defendant committed each offense while armed with a deadly weapon. CP 11, 13, RP 5 (06/06/05).

On July 29, 2005, the court sentenced the defendant to 85 months incarceration on the robbery conviction, which included 24 months for the deadly weapon sentencing enhancement. CP 18-30, RP8 (07/29/05). At sentencing, the State conceded that the defendant's conviction for assault in the second degree merged with the defendant's first degree robbery conviction under State v. Freeman, 153 Wn.2d. 765, 108 P.3d 753 (2005). RP 4 (07/29/05). The court ordered that the second degree assault conviction be vacated for the purposes of sentencing, but did not dismiss the conviction finding the conviction "a valid conviction." CP 16-17.

2. Facts

On December 31, 2004, Chad Baker, was employed as a loss prevention officer with Home Depot at the Fircrest Store. RP 38-39. On

surveillance video⁶, Baker observed the defendant, GUY DANIEL TURNER, walk into the tool corral. RP 42-45. The tool corral is of particular concern for Home Depot as it contains high dollar items that are small and easy to shoplift. RP 41-42. The defendant quickly selected some items on the front aisle and started to leave. RP 43, 45-46. One of the items was a bright yellow DeWalt brand drill bit package. RP 79, 88. Baker had learned through his training that this kind of behavior was characteristic of shoplifters. RP 45.

Baker immediately left the surveillance room and walked onto the main floor. RP 45-46. The defendant was leaving the tool corral as Baker rounded the corner of one of the aisles. RP 47. The defendant moved quickly to the returns door. RP 47. Baker noticed the defendant was still carrying both items the defendant had removed from the aisle as it was a big package and easy to identify. RP 47. The defendant proceeded to walk past the return desks and the cashiers before exiting through the Sensoramatic security system, which set off the alarm. RP 49. After the defendant set off the alarm, Baker rushed out the door behind the defendant. RP 50. Baker could see the defendant had a Milwaukee brand drill bit, a package of DeWalt bits, and a black day planner in his hands. RP 51. As the defendant ran from the Store, Baker observed the

⁶ The Surveillance video was played for the jury. RP 66, State's Exhibit 17.

defendant was holding a Milwaukee drill bit in one hand and a day planner and DeWalt bits in the other hand. RP 51. The defendant dropped the Milwaukee after he bumped the door on his way out. RP 50-51.

Eventually, defendant slowed down and Baker caught up to him. RP 54. As Baker approached the defendant's left side, the defendant spun around and began screaming. RP 54, 84. Baker thought the defendant hit him twice in the chest. RP 54-55. At that point the defendant told Baker that the defendant had a knife. RP 54. Baker pushed the defendant away before noticing a stab wound in Baker's chest.⁷ RP 54. Baker never saw the knife. RP55, 81-82. The defendant fled with the DeWalt bits. RP 54, 56.

Paramedics quickly arrived and treated Baker's knife wound. RP 62. The paramedics were unable to determine the depth of the knife wound and took Baker to the Tacoma General hospital. RP 62-63, 163. Though his vital signs were stable, the paramedics were cautious with Baker because of the nature of the chest wound and notified the trauma unit at the hospital while en route. RP 161-63, 167. The emergency room doctor could not determine the depth of the knife wound and contacted a trauma surgeon. RP 69.

Dr. Thomas Ferrer was the trauma surgeon who treated Baker. RP 96. According to Dr. Ferrer, the knife wound was in the precordial region of the chest near the where the belly and the chest meet. RP 98. Dr. Ferrier told the jury that a knife wound in that region is potentially life threatening depending on the angle and depth of the penetration. RP 98. Dr. Ferrier testified that Baker was very lucky because the knife did not penetrate Baker's heart, lungs, or belly. RP 107. Dr. Ferrier advised the jury that the wound was approximately three inches deep and less than two inches from Baker's heart. RP 108.

Gregory Bugg, an assistant manager for Home Depot, was employed at the Fircrest Home Depot on New Year's Eve of 2004. RP 117-118. Bugg has worked for Home Depot for four and a half years including five months at the Fircrest store. RP 117, 124. Bugg testified that Home Depot uses a Sensormatic tag that helps track items in the store. RP 120. Bugg explained that the Sensormatic tag can be attached by the manufacturer or manually attached by store personnel. RP 121. If not deactivated, the tag will sound an alarm as the store item is passed through a sensor at the door. RP 121. Bugg identified a Sensormatic tag on the Milwaukee drill that was recovered from the scene. RP 121, State's Exhibit 20. DeWalt embeds Sensormatic tags into their tool packages. RP

⁷ The stabbing was not caught on video. RP 68.

124. Bugg indicated that the sensors for the Sensormatic are within six to eight feet of the door. After the incident, Bugg witnessed Baker holding a compress to his abdomen and saw blood around Baker's hand. RP 119. No one found a DeWalt item in the parking lot after the incident. RP 124.

On New Year's Eve, Donald Ellingson witnessed a man chasing another man from Home Depot. RP 126-27. Ellingson testified that the man being chased stopped and turned before "they were kind of grabbing or swinging at each other. And following one of these swings, when, the one that had been doing the chasing grabbed his chest and backed away." RP 127. Ellingson observed the other man run into the shed display area, get into a car, and leave. RP 127-29. RP 130. Ellingson got the car's license plate number and gave it to store personnel. RP 130, 132. Ellingson identified the defendant's car on the surveillance video. RP 131. After the incident, Ellingson observed the man who had grabbed his chest inside the store with bloody paper towels on his chest. RP 132.

Tacoma Police officer Patrick Patterson obtained license plate number 854LYG from Ellingson. RP 140. The plates were registered to a silver four-door 2000 Suzuki Esteem. Fircrest police provided Officer Patterson with the name associated with that car, Guy Turner. RP 142, 173. Officer Patterson made a photo montage containing the defendant's photo and presented it to Baker, who identified the defendant from the montage. RP 143.

Fircrest Police Officer Norling located the defendant's vehicle in Tacoma and notified Tacoma police officer Kenneth Bowers. RP 173-74. Officer Bowers impounded the defendant's car. RP 177.

On January 1, 2005, at 1:11 a.m., Tacoma police officer Kristian Nordstrom arrested the defendant. RP 182-84. Officer Nordstrom noticed a deep cut on the defendant's left palm. RP 183. Officer Nordstrom transported the defendant to the hospital to have the palm wound treated. RP 184.

Tacoma police detective Larry Andren obtained a search warrant and searched the defendant's car. RP 202. Detective Andren recovered two knives from the cars' interior. RP 203; State's Exhibits 24 and 25. One of the knives was a key-chain type folding knife. RP 204. Detective Andren sent the knives to the Tacoma Police forensics unit for trace evidence testing. RP 204-205. Forensics Officer Paul Depoister was unable to find blood or fingerprints on the knives. RP 194-95.

Defendant testified in his own defense. On December 31, 2004, defendant went to Home Depot to take an item, return it, get a gift card, and obtain "thirty bucks" to pay his overdue post office box bill. RP 218. Defendant needed to pay this bill before obtaining a thousand dollar check that was inside the post office box. RP 218. The defendant claimed that he would be evicted from his apartment the following Monday if he did not pay his rent. RP 219. The check was his only income. RP 218.

Defendant brought a key chain Buck knife into the store because he “knew there’s bar codes in the packages.” RP 219. The defendant testified that this key chain knife was not one of the knives the police recovered from the car. RP218-19.

Defendant was at Home Depot for only a few seconds before he grabbed one drill bit that was close to his target price and attempted to open it with his knife. RP 220, 244. Noticing a women watching him, defendant picked up his day planner and knife in his left hand, and the drill bit in his right before heading for the door. RP 221. Defendant ran out the door after setting off the alarm. RP 222. As he ran out the door, he “heard somebody holler stop, so I just dropped the drill bit.” RP 222. The defendant admitted that he had previous experience as a shoplifter and dropped the drill bit to avoid a more serious charge. RP 222-23.

Defendant testified that Baker grabbed the defendant’s hand with enough force to drive the knife into the Defendant’s hand. 226, 237. Defendant stated the Buck knife was very sharp with a “jagged” tip “like a saw.” RP 226, 237. Defendant denied displaying the knife or stabbing Baker. RP 229, 250. Though he saw Baker grab his chest, defendant stated he did not know Baker was injured. RP 248. Defendant told the arresting officer that he had cut his hand on speaker wire. RP 250.

Defendant acknowledged that in order to fence the gift card at thirty dollars and “make the deal sweeter”, he would have to steal more than thirty dollars worth of items to get a greater value gift card and offer it at his target price of thirty dollars. RP 253, 259. The total value of the drill bits defendant stole from Home Depot was approximately seventy dollars. RP 88.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE ELEMENTS OF FIRST DEGREE ROBBERY AND THE STATE ADDUCED SUFFICIENT EVIDENCE TO PROVE FIRST DEGREE ROBBERY.

The legislature defines robbery as follows:

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such 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...

RCW 9A.56.190.

“In order for a robbery to occur, the person from whom or from whose presence the property is taken must have an ownership, representative, or possessory interest in the property.” State v. Tvedt, 153 Wn.2d 705, 714-15, 107 P.3d 728 (2005), citing State v. Hall, 54 Wash. 142, 102 P. 888

(1909), and State v. Latham, 35 Wn. App. 862, 864-66, 670 P.2d 689 (1983), *review denied*, 100 Wn.2d 1035, 102 Wn.2d 1018 (1984). “The unit of prosecution must encompass both a taking of property and a forcible taking against the will of the person from whom or from whose presence the property is taken.” Tvedt, 153 Wn. 2d at 720.

a. The trial court properly instructed the jury.

The trial court instructed the jury 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 prove 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 the 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 6: Jury Instruction No. 23.

In relevant part, robbery was defined for the jury as follows:

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, another against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person.

CP 62; Jury Instruction No. 20.

In the instant case, the defendant asserts that 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.” Appellant’s Brief at 20. The defendant is mistaken. Though this language differs from the robbery statute and the standard WPIC instruction,⁸ it fits squarely with this court’s construction of the robbery statute in State v. Tvedt, 116 Wn.App. 316, 65 P.3d 682 (2003), *aff’d*, State v. Tvedt, 153 Wn.2d 705, 107 P.3d 728 (2005). Accordingly, the trial court did not err when it instructed the jury on the definition of robbery and the elements of robbery in the “to convict” instruction.

⁸ WPIC 37.02 provides, in relevant part, To convict the defendant of the crime of robbery in the first degree each of the following six elements of the crime must be proved beyond a reasonable doubt: (1)...the defendant unlawfully took personal property from the person [or in the presence]of another.

- b. There was sufficient evidence to find the defendant committed robbery in the first degree.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); see also Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965); State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, "[c]redibility determinations are for the trier of

fact and cannot be reviewed upon appeal." State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)(citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court has said:

great deference . . . is to be given to the trial court's factual findings. In re Sego, 82 Wn.2d 736, 513 P.2d 831 (1973); Nissen v. Obde, 55 Wn.2d 527, 348 P.2d 421 (1960). It, alone, has had the opportunity to view the witnesses' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld. "In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case." State v. Dejarlais, 88 Wn. App. 297, 305, 944 P.2d 1110 (1997).

In the instant case, the defendant was charged with robbery in the first degree (Count I). The elements of robbery in the first degree are: 1) 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) with intent to commit theft of 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 or injury to that person, 4) that the defendant used the force or fear to obtain or retain possession of the property or to prevent or overcome resistance to the taking, and 5) that in the commission of these acts or in immediate flight therefrom the defendant inflicted bodily injury.

Viewing the evidence most favorably to the State, the defendant stole a package of DeWalt drill bits and a single Milwaukee drill bit from Home Depot. According to Baker, defendant held the Milwaukee bit in one hand and a day planner and the other bits in the other hand as he ran outside the store. RP 54. Though defendant dropped the Milwaukee bit soon after passing through the door, he continued to carry the DeWalt bits and never dropped them. RP 51, 54. Home Depot entrusted Baker with dominion and control over store property, including the tools in the corral. RP 40-42, 118. The defendant stabbed Baker in his attempt to retain possession of the DeWalt drill bits or to prevent or overcome Baker's attempt to stop the defendant from leaving with the drill bits. Thus, the defendant's forcible taking of the DeWalt bits occurred in Baker's presence outside the store. Accordingly, sufficient evidence supports defendant's conviction for first degree robbery.

Defendant asserts that the State failed to prove robbery because the taking was completed outside the presence of Baker. Even if this court finds the defendant's taking of the store merchandise occurred peacefully before defendant fled, the State adduced sufficient evidence to convict the defendant of first degree robbery. The Washington Supreme Court has rejected the common law view of robbery that the force used during a robbery must be contemporaneous with the taking. State v. Johnson, 155 Wn.2d 609,611 , 121 P.3d 91 (2005), citing State v. Handburgh, 119 Wn.2d 284, 830 P.2d 641 (1992). A taking can be ongoing so that the later use of force to retain the property taken renders the actions a robbery. State v. Handburgh, 119 Wn.2d 284,290, 830 P.2d 641 (1992), citing State v. Manchester, 57 Wn.App. 765, 790 P.2d 217, *review denied*, 115 Wn.2d 1019 (1990). "The transactional view of robbery as defined in Washington's robbery statute requires that the force be used to either obtain or retain property or to overcome resistance to the taking." Johnson, 155 Wn.2d. at 611.

In Johnson, the defendant stole combination television and video cassette recorder from Wal-Mart. Johnson, 155 Wn.2d at 610. Security guards followed the defendant into the parking lot, where they confronted him. Id. The defendant abandoned the stolen property before punching a guard to effectuate his escape. Id. The court reversed the defendant's conviction, concluding that the defendant's force during the escape was not related to the taking or retention of the property. Id. at 611.

In the instant case, the defendant's taking or theft does not occur until he walked out the door without paying for the drill bits. From the tool corral, Baker followed the defendant outside the store. Thus, the taking was continuous and occurred in Baker's presence. Even though the defendant dropped the Milwaukee brand bits after bumping the door, he used force against Baker to retain the DeWalt brand bits. RP 54-56. During his flight from Home Depot, the defendant stabbed Baker, inflicting bodily harm. The State adduced sufficient evidence to convict the defendant of first degree robbery.

2. DEFENDANT HAS NOT DEMONSTRATED COUNSEL WAS DEFICIENT OR THAT COUNSEL'S ACTIONS TO PERMIT THE JURY TO DELIBERATE RESULTED IN PREJUDICE.

The Sixth Amendment and article I, section 22, of the Washington Constitution require that criminal defendants have effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). To establish counsel was constitutionally deficient, a defendant bears the burden of showing that his attorney's performance fell below an objective standard of reasonableness and that the deficiency prejudiced him. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

In determining whether counsel's performance was deficient, there is a strong presumption of adequacy. McFarland, 127 Wn.2d at 335.

Competency is not measured by the result. State v. Early, 70 Wn. App. 452, 461, 853 P.2d 964 (1993)(citing State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972), *review denied*, 123 Wn.2d 1004, 868 P.2d 872 (1994)). “[T]he court must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel’s conduct constituted sound trial strategy.” In re Rice, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992)(citing Strickland, 466 U.S. at 689)). Decisions on whether to call witnesses and the determination of subjects for examination or cross-examination generally are not bases for concluding counsel’s performance was deficient. State v. Piche, 71 Wn.2d 583, 590-91, 430 P.2d 522 (1967), *cert. denied*, 390 U.S. 912, 88 S. Ct. 838, 19 L. Ed. 2d 882 (1968); State v. Wilkinson, 12 Wn. App. 522, 525-26, 530 P.2d 340, *review denied*, 85 Wn.2d 1006 (1975).

To demonstrate prejudice, a defendant must establish that “counsel’s errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable.” Strickland, 466 U.S. at 687. “This showing is made when there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different. If either part of the test is not satisfied, the inquiry need go no further.” Hendrickson, 129 Wn.2d at 78.

"Review of an ineffective assistance claim begins with a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." In re Personal Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

Defendant asserts that he was denied effective assistance of counsel where trial counsel permitted the court to instruct the jury to continue deliberating after the jury advised the court that it was unable to reach an agreement on Count II. Defendant further asserts that the court effectively told the jury "you must reach agreement." Appellant's Brief at 33. A defendant must provide more than mere speculation about how the trial court's intervention might have influenced the jury's verdict. State v. Watkins, 99 Wn.2d 166, 177-178, 660 P.2d 1117 (1983). A defendant must establish a reasonably substantial possibility that the verdict was improperly influenced by the trial court's intervention". Id. at 178. Defendant falls short of the mark here.

In the instant case, the jury had deliberated one court day plus about four hours over a two-day period before they indicated to the court that they were "at rest" and could not agree on the robbery charge. 357-359. The court proposed taking the verdict on the assault charge after the jury returned from lunch and than inquiring of the jury whether there was a reasonable expectation that they could reach a verdict in a reasonable amount of time on the robbery charge. RP 357. Defendant's counsel

indicated to the court that he wanted the jury to continue deliberating in the hope that as “they might learn something in Count II or in their further deliberation that might change their minds in Count I.” RP 358. Trial counsel further stated, “If we allow them to continue deliberating on everything and they continue deliberating on the robbery, which I believe is Count II, there might be something that they unveil that might change their verdict in Count I. But by killing Count I by already having to declare a verdict, I think we take that away from them.” RP 358. The State agreed and the court instructed the jury to continue deliberating. CP 5-9. This instruction did not suggest the need for the jury to agree, the consequences of no agreement, or the length of time the jury would be required to deliberate. This instruction was appropriate under CrR 6.15(f)(2).⁹

At the time of the jury deadlock, only the jury knew what verdict it had reached on the assault charge and what circumstances prevented it from reaching a verdict on the robbery charge. Trial counsel could have thought the jury had reached a verdict of guilty on the first degree assault charge. In that case, he would not want to rush to take the jury’s verdict on that offense as first degree assault is a serious violent offense with a

⁹ CrR 6.15(f)(2) prohibits the giving of particular instructions to a deadlocked jury and provides the following: 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 a jury will be required to deliberate.

level twelve offense designation. Trial counsel could only guess whether the jury might acquit the defendant of robbery or not reach a verdict on the robbery charge. In either case, trial counsel was likely hoping the jury's indecision on the robbery charge might spill into their deliberation on the assault charge. That strategy may have worked to the defendant's benefit as the jury found him guilty of the second degree assault, not first degree assault. It is possible the jury reached a compromise where a verdict on the robbery charge was only possible if the jury could agree to the lesser assault offense. The fact that the jury ultimately reached a verdict on the robbery conviction does not change the fact that trial counsel employed a legitimate trial tactic.

Similarly, defendant has not demonstrated his counsel's performance caused him prejudice. Defendant must establish a reasonably substantial possibility that the verdict was improperly influenced by the trial court's intervention. Watkins at 178. Mere speculation about how the trial court's intervention might have influenced the jury is not enough. Id. at 177-78

Given the physical evidence that supported the defendant's infliction of substantial bodily harm, it likely defense counsel had thought the jury had convicted the defendant of first degree assault. First degree assault is a serious violent offense. RCW 9.94A.030(37) and RCW 9.94A.515. Had defendant been convicted of first degree assault alone, his base standard range sentence would be 120 to 160 months with an offender

score of three. RCW 9.94A.525(9). With the other current conviction of first degree robbery, the defendant's standard range would be 138 to 184 months. RCW 9.94A.525(9). The deadly weapon enhancement would have added 24 months flat time to these ranges. RCW 9.94A.533(4)(a). Defendant's counsel successfully obtained an assault two conviction for the defendant, who ultimately received a sentence of 85 months on the robbery conviction.

Moreover, the court gave the standard WPIC instruction for jury deliberations¹⁰. CP 66. Jury Instruction No. 24. The jury is presumed to follow the court's instructions. State v. Greiff, 141 Wn.2d 910, 923, 10 P.3d 390 (2000). Thus, defendant has not shown trial counsel was deficient in his performance or that the outcome of his trial would have been different absent his counsel's alleged errors. Accordingly, trial counsel's performance was not constitutionally deficient.

¹⁰ As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict. WPIC 1.04.

3. THE MERGER DOCTRINE DOES NOT REQUIRE
DISMISSAL OF DEFENDANT'S VALID SECOND
DEGREE ASSAULT CONVICTION.

The Double Jeopardy Clause guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Double Jeopardy Clause applies to the states through the Due Process Clause of the Fourteenth Amendment, and is coextensive with article I, sec. 9 of the Washington State Constitution. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995)(citing Benton v. Maryland, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L.Ed.2d 707 (1969)). Washington's double jeopardy clause offers the same scope of protection as the federal double jeopardy clause. State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998)(citing State v. Gocken, 127 Wn.2d at 107). The Double Jeopardy Clause encompasses three separate constitutional protections:

It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

Gocken, 127 Wn.2d at 100.

Merger is a doctrine of statutory interpretation used to determine whether the legislature intended to impose multiple punishments for a single act

which violates several statutory provisions. State v. Vladovic, 99 Wn.2d 413, 419 n2, 662 P.2d 853 (1983). “The [merger] doctrine arises only when a defendant has been found guilty of multiple charges, and the court then asks if the Legislature intended only one punishment for the multiple convictions.” State v. Michielli, 132 Wn.2d 229, 238-239, 937 P.2d 587 (1997). The question of merger arises only after the State has successfully obtained guilty verdicts on the charges that allegedly merge -- if the jury acquits on one of the charges, the merger issue never arises. The court cannot use the merger doctrine to dismiss a charge prior to trial because the court cannot predict which charges on which the defendant will be convicted. State v. Michielli, 132 Wn.2d 229, 937 P.2d 587 (1997). With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended. Missouri v. Hunter, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1982). Defendant argues that because the remedy for double jeopardy violations is vacation of the lesser conviction, the court erred by not vacating the second degree assault conviction. This argument fails on two levels: first, the court properly merged the second degree assault conviction with the first degree robbery conviction and sentenced the defendant only on the

robbery conviction. Because, the court did not punish the defendant separately on each offense, the court did not violate double jeopardy.

Secondly, Washington courts have permitted multiple verdicts for a single act but limit the consequences of such convictions. The following three cases are illustrative. In State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000), a jury convicted Cronin of felony murder in the first degree, and premeditated first degree murder for the death the same victim. Id. at 577-78. Finding the court's jury instruction regarding accomplice liability defective, the court reversed Cronin's conviction for premeditated first degree murder. Id. at 586. The court concluded that this instructional error justified a *new trial* for Cronin on his first degree murder conviction. Id. at 582 (emphasis added). The court affirmed Cronin's first degree felony murder conviction, finding this conviction was unaffected by the defective accomplice liability jury instruction. Id. This case illustrates the principle that two convictions of murder are possible for the death of one person.

In State v. Molina, 83 Wn.App. 144, 920 P.2d 1228 (1996), Molina and an accomplice robbed a fast food establishment. Id. at 146. At gunpoint, the defendants ordered the manager to open a safe in the back office. Id. The defendants then ordered a cook to open cash registers and empty the contents. Id. Because the cook did not have access to the registers, the manager opened the registers with his keys. Id. Molina was

convicted of three counts of three first degree robbery. Id. Two of these convictions stemmed from Molina's taking of money from a single cash register in the presence of both victims. Id.

On Appeal, the court found the defendant committed one act of robbery where the victims exercised joint control over the property taken. Id. at 147. Therefore, the court held these two convictions violated the constitutional prohibition against double jeopardy. Id. at 146-47. The court reversed these two convictions and remanded these convictions to the trial court "to strike the extra count." Id. at 147.

In State v. Hinz, 22 Wn.App. 906, 594 P.2d 1350 (1979), a jury convicted Hinz of assault in the second degree and attempted rape in the second degree under RCW 9A.28.020 and former RCW 9.79.180(1)(a). Id. at 907. After examining the evidence for each conviction, the court concluded that only one offense was committed, not two. Id. at 912. Holding that double jeopardy protection applied, the court reversed and set aside the rape conviction and affirmed the assault conviction. Id. at 906-07, 917. The court concluded that "[s]ince attempted rape in the second degree is a class C felony¹¹ ...whereas assault in the second degree is a class B felony ... it is the conviction of the lesser offense of attempted rape in the second degree which will be set aside." Id. at 912-13.

¹¹ Attempted rape in the second degree was a class C felony under former RCW 9.79.180(2), RCW 9A.20.020(b), and RCW 9A.28.020(3)(c). Id. at 912. This crime is now a class A felony. RCW 9A.44.050 and RCW 9A.28.020(3)(a).

In the instant case, the trial court vacated the assault conviction for the purposes of sentencing. CP 16-17. Though the court did not use the language "set aside", it was clearly the court's intent as it determined that the assault conviction was "nevertheless a valid conviction." CP 16-17. The defendant is seeking dismissal of his assault conviction. He has not provided authority to support this position. This court should find that the trial court did not violate the defendant's constitutional protections against double jeopardy.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the defendant's judgment and sentence for first degree robbery and affirm the trial court's order regarding the second degree assault conviction.

DATED: April 26, 2006.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

STATE OF WASHINGTON

Chm
DEPUTY

Elewski

4/20/06 *Theresa K*
Date Signature