

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

STATE OF WASHINGTON,)	No. 64801-2-I
)	
Respondent,)	DIVISION ONE
)	
v.)	UNPUBLISHED OPINION
)	
SHIRWA ABDI MUSE,)	
)	
Appellant.)	FILED: September 19, 2011
)	

Appelwick, J. — A jury may consider a lesser included charge when it either acquits or is unable to agree on the greater charge. In this case, the jury performed in accordance with the law and its instructions when it returned a unanimous verdict of guilty as to the lesser charge. The jury was not required to unanimously acquit the defendant on the greater charge before doing so. Accordingly, the trial court erred in rejecting the jury's unanimous verdict and ordering continued deliberations toward unanimity on the greater charge. We reverse and remand.

FACTS

The State charged Shirwa Muse with several crimes based on allegations that he instigated a fight with an acquaintance while armed with a knife and later attempted to influence testimony. Specifically, Muse was charged with one count of second degree assault (count I), based on the assault of Adis Sali; one count of second degree assault (count II), based on the assault of a second individual who tried to intervene in the fight with Sali; and one count of witness tampering (count III), based on the allegation that Muse tried to persuade Sali not to testify. As to both counts I and II, the

State alleged that Muse was armed with a deadly weapon at the time of the commission of the crimes.

Muse was tried by a jury. As to count I, the jury was instructed on second degree assault. The instructions also informed the jury that the crime of second degree assault necessarily includes the lesser crime of assault in the fourth degree. The instructions provided that if the jury did not find Muse guilty of assault in the second degree, it could find him guilty of the lesser crime. The jury was instructed on the elements of assault in the fourth degree.

For count I, the jury was provided with three verdict forms, verdict form A for assault in the second degree, verdict form A1 for assault in the fourth degree, and a special verdict form. The special verdict form posed the question of whether Muse was “armed with a deadly weapon at the time of the commission of the crime in Count I.” There were no specific instructions on how to use the alternate forms. Nor was the jury instructed that it was to answer the special verdict form only if it convicted Muse of second degree assault.

The closing instruction provided, in relevant part:

You must fill in the blank provided in each verdict form the words “not guilty” or the word “guilty”, according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form(s) to express your decision.^[1]

¹ The trial court did not give the concluding instruction set forth in 11A Washington Practice: Washington Pattern Jury Instructions: Criminal § 155.00 (3d ed. 2008), recommended for use when the jury is instructed on a lesser included crime. This pattern instruction explains the order and manner in which to consider multiple verdict forms and instructs jurors that they may consider the lesser crime “if after full and careful consideration” they “cannot to agree” to a verdict on the greater charge. Id.

See 11A Washington Practice: Washington Pattern Jury Instructions: Criminal § 151.00 (3d ed. 2008) (WPIC) (basic concluding instruction).

The verdict form instructed the jury that it need not unanimously agree on the greater charge before proceeding to consider the lesser included charge. The verdict form for fourth degree assault provided:

We, the jury, having found the defendant SHIRWA ABDI MUSE, not guilty of the crime of Assault in the Second Degree as charged in Count 1, or being unable to come to a unanimous decision, find the defendant SHIRWA ABDI MUSE, _____ (write in “not guilty” or “guilty”) of the lesser included crime of Assault in the Fourth Degree.

See 11A WPIC § 180.05.

Neither counsel specifically discussed the verdict or the special verdict forms in closing argument. Based on Muse’s testimony, the defense argued that he was not guilty of second degree assault, but conceded that he was in fact, guilty of fourth degree assault based on the fight with Sali.

The day after the trial concluded, the jury reached a verdict. As to Count I, the jury found Muse not guilty of second degree assault, but guilty of the lesser included charge of assault in the fourth degree. The jury answered, “yes” to the special verdict form finding that Muse was armed with a deadly weapon at the time of the commission of the crime in count I. For count I, the jury filled out both verdict forms A and A1. The jury found Muse not guilty of the remaining two charges. The court read the verdict forms into the record.

Apparently referring to the fact that the jury found that Muse was armed with a

Nor was the jury provided with a concluding instruction for the special verdict forms. See 11A WPIC § 160.00.

deadly weapon during the commission of the crime in count I, but at the same time found him not guilty of second degree assault, the court remarked, "We seem to have a problem here" and decided to poll the jury. After polling two jurors, the court discovered that the jury had not unanimously agreed that Muse was not guilty of second degree assault as charged in count I. The court noted there was "disagreement" as to count I and told the jurors they would need to further "deliberate to find a unanimous verdict." But, first, the court polled the remainder of the jury individually.

At the end of this process, it was apparent that the jurors were split, eight voting guilty and four voting not guilty, on the question of whether Muse was guilty of second degree assault. The jury was not unanimous as to counts II or III either. However, the jury unanimously agreed that Muse was guilty of assault in the fourth degree and that he was armed with a deadly weapon when he committed the crime in count I.

The court directed the jury:

Ladies and gentlemen, as I think it 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 a unanimous verdict, either guilty or not guilty, on the various counts, and since you haven't done that I am going to let you go for this evening, but then you are going to have to come back tomorrow and continue your deliberations.

The jury eventually returned verdicts a second time. This time, the jury found Muse guilty of second degree assault as charged in count I and not guilty on counts II and III.² The jury also again found that Muse was armed with a deadly weapon at the

time of the commission of the crime in count I. The trial court imposed an 18-month sentence, comprised of a base sentence of six months and a consecutive 12-month deadly weapon enhancement. Muse appeals his conviction.

ANALYSIS

Muse initially argued on appeal that after the jury returned its initial verdict, the trial court erred by continuing to poll the entire jury to ascertain the numerical division once it was apparent after polling two jurors that the jury was not unanimous. He further claimed that the trial court improperly and coercively influenced deliberations by telling the jury it had to reach agreement. The parties focused on caselaw discussing the circumstances under which a trial court improperly coerces a jury toward a unanimous verdict when one is required. See State v. Boogaard, 90 Wn.2d 733, 736, 585 P.2d 789 (1978); State v. Jones, 97 Wn.2d 159, 164, 641 P.2d 708 (1982).

We requested supplemental briefing on the issue of whether the trial court erred when it rejected the jury's initial unanimous guilty verdict on fourth degree assault and ordered continued deliberations on count I. If that is the case, it is unnecessary for us to reach the issue of alleged improper coercion of the jury.

² During the first round of deliberations, the jury specifically asked whether it could convict on fourth degree assault and still find answer "yes" on the special verdict form. The court referred the jury to its instructions. During the second round of deliberations, the jury inquired:

Procedural Question: Form A1 states that if we are unable to come to a unanimous decision on Form A that we can find the defendant guilty or not guilty of assault to the 4th degree. If [that is] the case, what do we write on Form A?

The court declined to answer this question on the ground that "it assumes a deadlock."

Muse argues that the trial court should have accepted the jury's unanimous verdict on fourth degree assault. We agree. Our courts have adopted the "unable to agree" jury instruction as the correct form when the jury is instructed on both a charged offense and lesser-included offenses or lesser degrees of the charged offense. State v. Labanowski, 117 Wn.2d 405, 414-15, 816 P.2d 26 (1991). Therefore, verdict form A1 properly reflects the law in Washington.

Labanowski involved a choice as to the procedure to be followed by juries considering lesser included or lesser degrees of charged crimes and whether a jury should be able to proceed to the lesser charge when unable after due deliberation to agree on a verdict for the greater offense. Id. at 418. The court considered two predominant forms of instruction given in other jurisdictions. Id. at 418-20. The "acquittal first" instruction requires the jury to reach unanimous agreement on the charged crime before considering a lesser crime as an alternative. Id. The "unable to agree" instruction, allows a jury, after full and careful consideration, to quit deliberating toward unanimity on the charged crime and proceed to agreement on the lesser offense. Id. The court ultimately rejected the "acquittal first" instruction, in favor of the "unable to agree" type of instruction. Id. at 423. The court concluded that giving an instruction that "arguably requires unanimity" on the charged offense before the jury may consider the lesser-included offense was not reversible error in that case. Id. at 414-15. Nevertheless, the court held that "[a]fter the date of this opinion, however, the proper instruction to the jury will allow it to render a verdict on a lesser crime if it is unable to agree on the charged crime." Id.

When a jury is deadlocked on a general verdict, the trial court has the authority, within limits, to instruct the jury to continue deliberations. CrR 6.16(a)(3). But, here, the verdict form correctly instructed the jury that if it acquitted Muse of second degree assault or was “unable to agree” on that charge, it could render a verdict on fourth degree assault. The jury performed in accordance with the law and its instructions when it returned a unanimous verdict of guilty on fourth degree assault. The jury did not need to unanimously acquit Muse of second degree assault before considering the charge of fourth degree assault. See Labanowski, 117 Wn.2d at 414-15.

The State concedes that accepting the jury’s initial verdict on the lesser charge would have been the proper course, but for the fact that, in addition to the guilty verdict on fourth degree assault, the jury also answered “yes” on the deadly weapon special verdict form. The State contends that, because the jury rendered unanimous but “legally incompatible” verdicts, Labanowski does not control and the trial court could not have accepted the initial verdict. According to the State, the jury’s verdict was erroneous, because it was supposed to use the deadly weapon special verdict form for count I only if it convicted Muse of second degree assault. The problem with this argument is that nowhere in its instructions was the jury informed that it was to answer the special verdict form only if it convicted Muse of second degree assault. It is true that the deadly weapon special verdict carried no sentencing consequence with respect to the misdemeanor fourth degree assault charge. See RCW 9.94A.533(4) (deadly weapon enhancement applies to sentencing ranges for felony crimes). Nonetheless, the jury’s verdict on fourth degree assault and its affirmative answer on the special

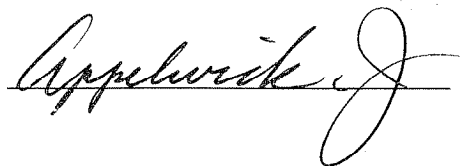
verdict form were entirely consistent with its instructions.

No authority supports the State's position that the jury's answer to the legally insignificant question on the special verdict form calls into question the validity of its verdict. While courts generally give effect to jury verdicts, jury statements, or verdicts that are irrelevant and contradictory may be disregarded. State v. Eggleston, 164 Wn.2d 61, 73, 187 P.3d 233 (2008), United States v. Ailsworth, 138 F.3d 843, 846 (10th Cir.1998). For example, in Eggleston, the jury acquitted the defendant of first degree murder. 164 Wn.2d at 73. Although it was instructed to answer the question posed in the special verdict form only if it found Eggleston guilty of that charge, the jury answered the question anyway. Id. The trial judge observed that the special verdict form had no legal significance and disregarded it, while accepting the jury's guilty verdict on second degree murder. Id. Likewise on review, the Washington Supreme Court observed that the jury's answer in the special verdict was "unnecessary," "irrelevant," and was properly disregarded by the trial court. Id.

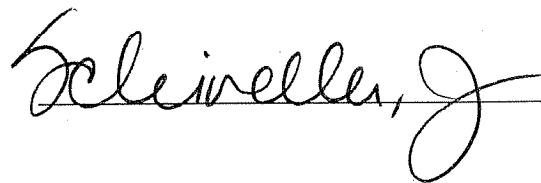
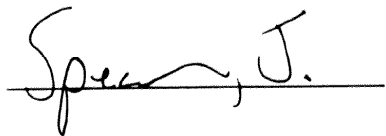
The State also maintains that the court had the authority to direct further deliberations to correct the jury's verdict, because its finding that Muse was guilty of fourth degree assault in conjunction with its finding that he was armed with a deadly weapon was "per se" a finding that he was guilty of assault with a deadly weapon. RCW 9A.36.021(1)(c). According to the instructions, the jury could find that Muse was "armed with a deadly weapon" for purposes of the deadly weapon enhancement if, at the time of the commission of the crime, the weapon was "easily accessible and readily available for offensive or defensive use." But, to find assault in the second degree, it

had to find that Muse assaulted the victim “with a deadly weapon.” It is not legally or factually impossible to find that Muse was armed with a deadly weapon that was easily accessible and readily available, but did not use the weapon to assault the victim. In other words, the jury could find that Muse was armed with a deadly weapon without necessarily concluding that he used that weapon to assault the victim.

We are not persuaded by the State’s assertion that the jury’s answer on the special verdict form prevented the court from accepting its verdict on fourth degree assault.³ Accordingly, we reverse the conviction for second degree assault and remand for the court to impose judgment for fourth degree assault.⁴



WE CONCUR:



³ We do not suggest however, that the trial court erred by directing the jury to continue deliberating on counts II and III. There were no lesser-included charges on those counts and unanimity was required. But, Muse was acquitted of those charges and they are not at issue in this appeal.

⁴ Muse also argues in supplemental briefing that retrial on the second degree assault charge would violate double jeopardy. The State does not respond to this argument. Therefore, it is unknown whether the State will seek retrial on that charge. Muse’s double jeopardy argument is premature and we decline to address it.