

No. 44923-4-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

No. 44923-4-II

RAP 10.10 BRIEF

Steven D. Kravetz,
Appellant.

FILED
COURT OF APPEALS
DIVISION II
2014 APR -9 PM 1:24
STATE OF WASHINGTON
BY [Signature]
DEPUTY

CERTIFICATE OF SERVICE

I certify that I mailed
1 copies of SAG
to app counsel
& PROS office
4/9/14 [Signature]
Date Signed

TABLE OF CONTENTS

Assignments of Error/
Issues Pertaining to Assignments of Error ... b-c

Table of Authorities d-e

ARGUMENT

Assignment of Error #1 1-8

Assignment of Error #2 9-10

Assignment of Error #3 11-22

CONCLUSION 23

Assignment of Error #1

The trial court judge denied the defendant his constitutional right to a unanimous jury verdict by sending the trial jury back to the jury room to reconsider a unanimous acquittal that did not appear erroneous upon polling.

Issues Pertaining to Assignment of Error #1

Does a trial court deny a defendant his constitutional right of Due Process under U.S. Constitution, Amendment 14, and Washington Constitution, Article 1, § 3, and deny a defendant the right to a unanimous jury verdict under Washington Constitution, Article 1, § 3, when it sends a trial jury back to the jury room to reconsider a unanimous acquittal that did not appear erroneous upon polling?

Assignment of Error #2

The trial court judge denied the defendant his constitutional right to a unanimous jury verdict by failing to conduct a valid jury poll.

Issue Pertaining to Assignment of Error #2

In a criminal case where a jury returns multiple verdicts, does a trial court deny a defendant his

constitutional right to a unanimous jury verdict under Washington Constitution, Article 1, § 3, when it fails to conduct a jury poll in such a way as to allow each juror to individually state their verdicts separately for each criminal charge that they consider?

Assignment of Error #3

The first verdict returned for the charge of Assault in the First Degree of Count 2 (Guilty) was inconsistent with the first verdict returned for the charge of Assault in the Second Degree of Count 2 (Not Guilty).

Issue Pertaining to Assignment of Error #3

Does a jury's acquittal on a lesser included charge imply an acquittal on a greater charge of the same count when a guilty verdict on the greater charge was also returned by the jury, and the charges are of two different degrees of the same type of alleged crime?

Table of Authorities

State Cases

State v. Jaime, 168 Wn.2d 857, 233 P.3d 554 (2010)	3
State v. Knutz, 161 Wn.App. 395, 257 P.3d 437 (2011)	3-4
State v. Holland, 77 Wn.App. 420, 891 P.2d 49 (1995)	4
Rice Fisheries Co. et al. v. Pacific Realty Co. et al., 35 Wash. 535, 77 P. 839 (1904)	4
Smith v. S & F Construction Co., 62 Wash.2d 479 (1963)	4-5
State v. Barnett, 104 Wn.App. 191, 16 P.3d 74 (2001)	5
State v. Pockert, 49 Wn.App. 859, 746 P.2d 839 (1987)	9
State v. Johnson, 172 Wn.App. 112, 297 P.3d 710 (2012)	11, 19
State v. Kimball, 14 Wn.App. 951, 546 P.2d 1217 (1976)	13, 21
State v. Reynoldson, 168 Wn.App. 543, 277 P.3d 700 (2012)	16

Statutes

RCW 4.44.390	2
RCW 10.61.060	3
RCW 4.44.410	7

Court Rules

CrR 6.15(f) 16

Pattern Jury Instructions

WPIC 180.05 Verdict Form B --
Lesser Degree/Lesser Included/Attempt 12

WPIC 151.000 Basic Concluding Instruction 16

Constitutional Provisions

U.S. Const., Amd. 14 3

WA Const., Art. 1, § 3 3

ARGUMENT

THE TRIAL COURT JUDGE DENIED THE DEFENDANT HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT BY SENDING THE TRIAL JURY BACK TO THE JURY ROOM TO RECONSIDER A UNANIMOUS ACQUITTAL THAT DID NOT APPEAR ERRONEOUS UPON POLLING.

When the jury returned its first set of verdicts, their verdict for the lesser included charge of Count 2 was 'not guilty'. (CP 308, RP 679). When defense counsel requested that the jury be polled and the trial court judge polled the jury on these verdicts, the judge asked each juror if the verdicts were theirs and if they were that of the jury; these questions referred to the verdicts as a cumulative whole, and not individually. (RP 680-683).

When juror #12 was asked if the verdicts were his, he answered that they were not but were that of the jury. (RP 682-683). However, he did not specify what individual verdict/s he was referring to when he gave his answers, nor did the judge inquire further of the juror as to what he meant by his answers. (RP 682-683).

Instead of determining the exact intentions of the jury by clarifying with juror #12 as to what

individual verdicts he was dissenting to, or by conducting another poll in a form that would determine each juror's individual vote on each individual charge, the trial court judge sent the jury back to the jury room to reconsider all of the verdicts they returned, including all of their acquittals. (RP 683).

When the jury returned their second set of verdicts, they were the same as the first set except for their verdict for the lesser included charge of Count 2, which read 'Redundant' (a non-acquittal); these verdicts were accepted and filed by the trial court. (CP 318, RP 686-688, 691).

RCW 4.44.390 reads:

After the verdict is announced, but before it is filed, the jury may be polled at the request of either party. Each juror may be asked whether the verdict is his or her individual verdict and whether the verdict is the jury's collective verdict. If it appears that the verdict is insufficient because the required number of jurors have not reached agreement, the jurors may be returned to the jury room for further deliberation.

RCW 4.44.390 implies the presumption that verdicts are unanimous until proven otherwise. Because polling on the first set of verdicts revealed an ambiguous dissention that was never resolved by the trial court, the jury's verdict for

the lesser included charge of Count 2 never appeared to be insufficient, therefore the presumption of unanimity remained.

RCW 10.61.060 reads:

When there is a verdict of conviction in which it appears to the court that the jury have mistaken the law, the court may explain the reason for that opinion, and direct the jury to reconsider the verdict; and if after such reconsideration they return the same verdict it must be entered, but it shall be good cause for new trial. When there is a verdict of acquittal the court cannot require the jury to reconsider it.

RCW 10.61.060 prohibits the trial court from requiring the jury to reconsider a verdict of acquittal for any reason, therefore the trial court judge erred by rejecting the acquittals (for the first set of verdicts) and requiring the jury to reconsider them.

A defendant's constitutional right to be presumed innocent until proven guilty, and to have his legal matters decided by a fair tribunal, are fundamental to his constitutional right to due process. State v. Jaime, 168 Wn.2d 857, 861, 233 P.3d 554 (2010), WA Const., Art. 1, § 3, U.S. Const., Amd. 14.

A defendant in a criminal trial has a constitutional right to a unanimous jury verdict.

State v. Knutz, 161 Wn.App. 395, 407, 257 P.3d 437 (2011). "[T]he right to a unanimous verdict is a fundamental constitutional right and may, therefore, be raised for the first time on appeal." State v. Holland, 77 Wn.App. 420, 424, 891 P.2d 49 (1995). That right also includes the right to have that verdict filed with the trial court if it does not appear to be insufficient, otherwise it is a violation of due process to disqualify it.

The trial court had the authority to clarify juror #12's ambiguous dissention. In Rice Fisheries Co. et al. v. Pacific Realty Co. et al., 35 Wash. 535, 542, 77 P. 839 (1904), when describing a polling statute very similar to RCW 4.44.390, the Washington Supreme Court stated the following:

(section 5012, Ballinger's Ann. Codes & St.) says: 'In case ten of the jurors do not answer in the affirmative, the jury shall be returned to the jury room for further deliberation.' The statute does not say they shall be immediately sent back to the jury room, and there is nothing in the statute to prohibit more than one poll if the court believes a mistake has been made, or is informed by a juror that he desires to change his vote.

In Smith v. S & F Construction Co., 62 Wn.2d 479, 481, 383 P.2d 300 (1963), the Washington Supreme Court said:

"A trial court is justified in making such inquiry of jurors as to enable it to understand their will and intention, and their answers to such inquiry will be looked upon as an aid in the rendering of a proper judgment."

...

"The trial court was therefore justified in clarifying the situation created by Mrs. Baker's inconsistent answers. The trial judge was not required to send the jury back immediately for further deliberation, [...] but properly attempted to determine the true import of Mrs. Baker's answers."

An example of the way a trial court judge should conduct a jury poll in a multi-verdict case is found in State v. Barnett, 104 Wn.App. 191, 200 16 P.3d 74 (2001). In that case, after the jury returned their verdicts and was polled, the trial court judge:

"asked the jurors if anyone disagreed with the verdicts signed by the presiding juror. The judge then went through each verdict separately, asked whether it was unanimous, and whether any juror disagreed or dissented. CrR 6.16(a)(3) requires nothing more."

In the instant case, when juror #12 gave an ambiguous dissention, the trial court judge said the following:

"Well, appears to me we do not have unanimous verdicts then. Under the circumstances, ladies and gentlemen, I have no recourse but to send you back to the jury room to continue to deliberate because the jury verdicts have to be unanimous. They have to be the verdicts of all

12 jurors and it's apparent that's what we do not have. So you need to go back and continue to deliberate."

The judge had a recourse according to Rice Fisheries, Id, and Smith, Id, but abused his discretion by sending the jury back without determining what individual verdicts juror #12 dissented to, and what verdicts were still unanimous.

If, upon finding an ambiguous dissention in a jury poll, a trial court is allowed to reject all verdicts returned by a jury just because at least one of them has been dissented to by a juror when it is unknown how many verdicts were dissented to, and what ones they were, and the judge has the authority to clarify the results of the poll, but chooses not to and instead requires the jury to reconsider all of them, it opens the door for biased judges to use such discretionary freedom (under the above circumstances) to force the jury to reconsider verdicts that they already agreed upon that the judge personally disagrees with, in the hopes of using an order of reconsideration to change such verdict to meet the personal preference of the judge.

This use of reconsideration can be highly coercive without appearing conspicuous. RCWs 4.44.390 and 10.61.060 were not intended to allow such a miscarriage of justice, and they should not be construed to reflect such misuse.

If it were not for the discretionary error by the trial court judge, the next thing that would have happened would have been either:

1. Clarification of juror #12's dissent, and the filing of all unanimous general verdicts (with their special verdicts) and subsequent reconsideration of every non-unanimous verdict (that is not related to any unanimous general verdict), and/or any unanimous verdict of guilty in which the judge believes that a mistake has been made by the jury in reaching it.
2. Declaration of a mistrial and discharge of the jury.
3. Acceptance of all of the verdicts returned by the jury upon finding that no single verdict appeared to be insufficient.

If a jury decides to acquit a defendant, the defendant is entitled to receive the benefit of it; RCW 10.61.060 was enacted for this purpose. RCW 4.44.390 was intended to remedy singular verdicts; that is why the statute refers to verdicts in the singular and not in the plural. The state of Washington only recognizes two type of verdicts - general and special. (RCW 4.44.410); it does not

recognize a cumulation verdict. And the trial court judge, by his reaction to juror #12's dissention, treated all of the verdicts as a single one, which he is prohibited by RCWs 4.44.390 and 4.44.410 to do.

Washington courts are not allowed to speculate as to which verdict or verdicts a juror was dissenting to when that juror makes an unresolved ambiguous dissention; if they are allowed to decide which ones were, they would be committing the same abuse of discretion that the trial court judge made for the same reasons.

The fact that the error was that of the trial court judge, and such error prevented the defendant from benefiting from the unanimous acquittals he received, his fundamentally constitutional right to unanimous jury verdicts was violated. In this circumstance, prejudice should be presumed and automatic dismissal with prejudice of all charges (of the first set of verdicts) that resulted in an acquittal should be ordered.

**THE TRIAL COURT JUDGE DENIED THE DEFENDANT HIS
CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT BY
FAILING TO CONDUCT A VALID JURY POLL.**

(for facts relating to this argument, read pages 1
and 2)

The Court of Appeals, in State v. Pockert, 49
Wn.App. 859, 862, 746 P.2d 839 (1987) stated that:

"The right to have each juror individually
state his or her verdict in his presence is
essential to a criminal defendant's
constitutional right to a unanimous verdict."

...

"As the Pennsylvania Supreme Court in
Commonwealth v. Martin, 379 Pa. 587, 109 A.2d
325, 327 (1954) eloquently stated, the failure
to poll the jury

worked a denial of a right of the accused
so fundamental as to require a retrial even
though ... the trial was otherwise markedly
free from error and the jury's verdict was
fully warranted by the evidence. Yet, it is
better that the case be tried again than
that a precedent impairing a defendant's
right to a poll of a jury be engrafted on
our criminal procedure."

In the instant case, juror #12 was never given
the opportunity to individually state his verdicts
in the presence of the defendant as he was not
asked what his verdicts were on each of the
individual charges. Rather, he was asked to confirm
the verdicts read by the clerk. When he expressed
that he did not agree with the verdicts read, he

was not individually stating what his verdicts were but that he disagreed with what the clerk had said.

The trial court judge could then have repolled the jury as to each of the counts individually, or questioned juror #12 as to what he meant by his dissent. By failing to do this and instead sending the jury back to reconsider all of the verdicts, the judge prevented juror #12 from individually stating his verdicts in the presence of the defendant in violation of the defendant's constitutional right to an actual jury poll.

As the Pockert court had stated, the remedy for failure to conduct the procedures necessary for their definition of a jury poll is a new trial.

THE FIRST VERDICT RETURNED FOR THE CHARGE OF ASSAULT IN THE FIRST DEGREE OF COUNT 2 (GUILTY) WAS INCONSISTENT WITH THE FIRST VERDICT RETURNED FOR THE CHARGE OF ASSAULT IN THE SECOND DEGREE OF COUNT 2 (NOT GUILTY).

The fact that the jury returned a guilty verdict for a greater charge of one count, and a not guilty verdict for a lesser included charge of the same count, makes both verdicts inconsistent with each other. (CP 305, 308, RP 678-679).

Juries are presumed to follow the instructions given to them. State v. Johnson, 172 Wn.App. 112, 122-123, 297 P.3d 710 (2012). In the case of the verdicts returned for Count 2, the lesser included verdict controls due to the fact that its verdict form includes the following instruction:

We, the jury, having found the defendant, Steven Daniel Kravetz, not guilty of the crime of Assault in the First Degree, as charged in Count II, or being unable to agree after full and fair consideration, do find the defendant,

(Write in "Not Guilty" or "Guilty")
of the lesser included offense of Assault in
the Second Degree.

(CP 308).

The jury, after being given that instruction, proceeded to fill in the blank with the words "Not Guilty". (CP 308). Therefore, their written acquittal on the form implies an acquittal of the

greater charge.

This case is different in that the verdict returned for the lesser included charge was 'not guilty'. It does not seem that any Washington state appellate court had addressed this type of situation.

Any instruction on a verdict form is a valid jury instruction. WPIC 180.05 Verdict Form B -- Lesser Degree/Lesser Included/Attempt, page 1517, says in its comment:

"When jurors are being instructed on a lesser offense, the better practice is to use verdict form A for the greater offense and verdict form B for the lesser, rather than using two verdict forms that both follow the simpler format of verdict form A. The use of forms A and B more clearly emphasizes for jurors the concluding instruction's critical point that they are to fully deliberate on the greater offense before considering the lesser. See WPIC 155.00, Concluding Instruction -- Lesser Degree/Lesser Included/Attempt. Because this point is already made in the concluding instructions, repetition of this point in the verdict forms is not necessarily required by the case law. See State v. Williams, 22 Wn.App. 197, 200, 588 P.2d 1201 (1978) ("The number of instructions to be given on a subject rests within the discretion of the trial court."). The committee believes, however, that this repetition is preferable in order to reduce the possibility of juror confusion."

The jury returned a special verdict form for Count 2 specifying findings that are to be decided upon a finding of guilty as to the greater charge

of Count 2. (CP 311). However, that special verdict form is only for determining aggravators for exceptional sentences. State v. Kimball, 14 Wn.App. 951, 546 P.2d 1217 (1976) held that:

A special verdict is an expression of a jury's opinion on a legal proposition, and should not be allowed to control fact found by general verdict, or to vitiate general verdict.

State v. Kimball, 14 Wn.App. at 954.

In Kimball, the defendant was convicted of first degree murder. On appeal he claimed that the jury's special verdict (that related to the murder charge) of 'no' as to whether he was armed with a deadly weapon during the commission of the crime was controlling of the general verdict of guilty. The Court of Appeals rejected this claim, stating:

In addition, the special finding as to whether a defendant was armed with a deadly weapon adds nothing to the elements of first-degree murder and is not a special finding of fact related to the offense charged, as are special interrogatories. It has no relevancy to Kimball's guilt of the crime for which he has been convicted, but only to punishment.

State v. Kimball, 14 Wn.App. at 955.

The Kimball court ultimately concluded that special verdicts that are only used for sentencing purposes do not control the general verdict that it relates to; they therefore cannot be used to

construe possible jury determinations.

In the instant case, one possible reason why the jury voted guilty on the greater charge of Count 2 and not guilty on the lesser included charge of the same count is:

The jury agreed on guilty for the greater charge, filled in its verdict form, then chose to reconsider that decision (before notifying the bailiff). Then, being unable to agree, decided to move on to the lesser included charge, and then ultimately voted not guilty on the lesser charge, thus acquitting the defendant on all charges of Count 2. When the jury finished deliberating, the verdict form for the greater charge was submitted to the bailiff anyway because the jury might have thought that the court wanted it anyway, since the jury was not instructed to discard the filled-out verdict forms that the entire jury no longer agreed with, expecting the trial court to sort it out.

During the poll of the first set of verdicts returned, when the first 11 jurors confirmed the verdicts returned for Count 2, what they could have implied to the trial court judge is that they indeed voted guilty on the greater charge but their

vote on the lesser charge implies that they could not agree on the greater charge and subsequently moved on to the lesser charge, thus ultimately acquitting the defendant on both charges, expecting the judge to sort out the inconsistencies - especially considering that juror #12 (Dean Phillips) dissented to the verdicts cumulation and could have meant that he was dissenting to the greater charge of Count 2 and not its lesser charge.

Look at the verdict form for the lesser charge of Count 2 (CP 308); "Guilty" is crossed out at the near-center of the verdict line, then "Not Guilty" is written to the right of it. And the date is crossed out and rewritten above that cross-out. The verdict contents show the possibility that the jury had already found the defendant not guilty (or couldn't agree on the greater charge), then decided to consider the lesser charge, agreed on 'guilty', then changed their mind and then decided to acquit the defendant. The "Guilty" implies that the jury could not agree on the greater charge and moved on to consider the lesser.

No matter how the jury conducted its deliberations, the appellate court is in no position to disturb such matters. State v. Reynoldson, 168 Wn.App. 543, 277 P.3d 700, 702-705 (2012).

This matter is further complicated by the fact that the jury was never instructed by the court that it could ask the court questions about the case. CrR 6.15(f) states that "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 instruction that this court rule refers to is WPIC 151.000 Basic Concluding Instruction. Under paragraph 4 of this instruction, it states:

If, after carefully reviewing the evidence and instructions, you feel the need to ask the court a legal or procedural question that you have been unable to answer, write that question out simply and clearly. [For this purpose, use the form provided in the jury room.] In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

In the instant case, the jury was never instructed by the trial court that it could ask the

court questions. (RP 574-593, CP 275-303). This omission could have affected the jury's freedom to function in its deliberative capacity.

Ultimately, the verdict form for the lesser included charge of Count 2 (CP 308) instructed the jury (in conjunction with Instruction 25 - CP 302-303) to fill in the verdict line with their verdict for Assault in the Second Degree of Count 2 after having found the defendant not guilty of Assault in the First Degree of Count 2, in which they filled in the word "Guilty". Their vote of not guilty on this form implies that they acquitted the defendant, or was unable to agree, on the greater charge of Count 2 and subsequently finds the defendant not guilty of the lesser charge, thereby acquitting the defendant of all charges of Count 2.

The following "to convict" instructions required the jury to find that the defendant committed an assault using:

- #7(2) (CP 286) [Assault 1 of Count 2]:
 - a 'firearm'
 - or by 'force or means likely to produce great bodily harm or death' (the word "any" before "force" in RCW 9A.36.011(1)(a) is not in this instruction)
- #9(2) (CP 286) [Assault 1 of Count 4]:
 - a 'deadly weapon'
 - or by 'force or means likely to produce great bodily harm or death' (the word "any" before "force" in RCW 9A.36.011(1)(a) is not in this instruction)
- #17(1)(b) (CP 294) [lesser included Assault 2 of Count 2]: a 'deadly weapon'
- #18(1)(b) (CP 295) [lesser included Assault 2 of Count 4]: a 'deadly weapon'

Other instructions included:

- #13 (CP 290): 'deadly weapon' definition for general verdicts (includes knife and firearm)
- #25 (CP 302-303): 'deadly weapon' definition for special verdicts ('firearm' listed but not defined)
- #2 (CP 279): general definition for Assault 1 (not a 'to convict' instruction)

The instructions never included a definition of the term 'force or means likely to produce great bodily harm or death', therefore the only legal term that the instructions used to refer to a knife was 'deadly weapon'.

Instructions #7 and #9 are the 'to convict' instructions for the Assault 1 charges of counts 2 and 4; they are identical except for two things: the identity of the alleged victim, and the means by which the alleged assaults were committed.

When comparing these means, the jury was precluded from considering any alleged acts committed with a knife as it relates to the greater charge of Count 2 due to Instruction #7's lack of the term 'deadly weapon'.

The jury is presumed to follow the court's instructions. State v. Johnson, 172 Wn.App. 112, 122-123, 297 P.3d 710 (2012). Analyzing the jury's first set of verdicts returned for Count 2, possible constructions for this are:

By finding the defendant not guilty on the lesser included charge, the jury is saying that the defendant did not assault Pauline Davin with a firearm, and did not assault her with a knife ('deadly weapon'), and did not inflict substantial bodily harm (CP 294(1)(a), CP 308). Comparing these determinations with the jury's vote of guilty on the greater charge of Count 2, the only realistic construction would be that the defendant,

with the intent to inflict great bodily harm, assaulted Davin with 'force or means likely to produce great bodily harm or death' that did not amount to substantial bodily harm. (CP 294(1)(a) and (1)(b)).

The jury's negative findings can be attributed to the evidence of the defendant's mental illness affecting his actions. (RP 444-473, 471-472). However, the record does not show sufficient evidence that the defendant's alleged acts against Davin without a knife and firearm amounts to the intent to inflict (or actual infliction of) great bodily harm. The only medical professional that treated Davin, Marcus Dubrow, testified only as to the effect of the bullet wound and knife wounds to Davin. (RP 341-358).

Theoretically, if the special verdict for Count 2 is to be considered in determining a construction of the verdicts of Count 2: Then the jury could have found that the defendant committed Assault 1 with a firearm, but the jury's acquittal on Assault 2 shows that the jury did not find that the defendant committed an assault using a knife ('deadly weapon' term in CP 294).

However, the special verdict form only allows the jury to determine if the defendant was "armed" with a firearm during the commission of the act; it does not allow them to find that the defendant committed an assault with a firearm.

But the courts of this state have held that special verdicts (returned by a jury) that are only for determining aggravators for extended sentences are not controlling of general verdicts in criminal cases. State v. Kimball, 14 Wn.App. 951, 954, 955, 546 P.2d 1217 (1976).

Additionally, the lack of the word "any" from the term 'any force or means likely to produce great bodily harm or death' in Instruction #7 limits what force or means used to commit an act a jury must find in order to return a verdict of guilty. The plaintiff never elected what force or means aside from a 'deadly weapon' it was referring to when the court instructed the jury on Assault 1 of Count 2, therefore the instruction is not a valid jury instruction, and the jury was not legally allowed to consider it to determine if the defendant committed Assault 1 of Count 2.

Regardless of the construction, when the jury voted to acquit the defendant of the lesser included charge of Count 2, it did so on a form that instructed them to do so only after finding the defendant not guilty of the greater charge (or being unable to agree on a verdict for it), thus allowing the verdict for the lesser charge to control the verdict returned for the greater charge. The subsequent jury poll revealed no appearance of insufficiency for any single verdict, therefore the jury's verdicts for the charges of Count 2 were final and should have been filed with the trial court.

CONCLUSION

The defendant's verdicts for both charges of Count 2 should be reversed, and the trial court should be ordered to dismiss both charges of Count 2 with prejudice, based upon the trial court's failure to accept the jury's acquittal of Count 2's lesser included charge when polling did not show the individual verdict not to be unanimous.

And the defendant's remaining guilty verdicts should be reversed and his case remanded for a new trial based upon the trial court's failure to poll the jury validly.

4/7/14

Respectfully submitted,


Steven D. Kravetz,
Appellant.