SUPREME COURT NO. 98022-5

COA NO. 35412-1-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

DALLIN FORT,
Petitioner.

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

Spokane County Cause No. 05-1-00950-1

The Honorable Annette S. Plese, Judge

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Dallin Fort, the appellant below, asks the Court to review the decision of Division III of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Dallin Fort seeks review of the Court of Appeals unpublished opinion entered on October 29, 2019 and Order Denying Motion for Reconsideration entered on November 26, 2019. Copies of the opinion and order are attached.

III. ISSUES PRESENTED FOR REVIEW

> **ISSUE 1:** No published opinion from the Court of Appeals or Supreme Court (or rule) addresses the procedural and constitutional requirements at a hearing in the Superior Court when a case has been remanded by the Court of Appeals for additional factfinding mid-appeal. Should the Supreme Court accept review in order to provide guidance to lower courts on this critical issue affecting the right to a fair appeal?

> **ISSUE 2:** Double jeopardy bars re-trial after a declaration of a mistrial based on an allegedly deadlocked jury unless the case poses "extraordinary and striking circumstances," and even then, based only a finding of "manifest necessity." Did double jeopardy bar retrial in Mr. Fort's case after the trial court ordered a mistrial based only on "good cause"?

IV. STATEMENT OF THE CASE

A. Facts and Superior Court Proceedings

Dallin Fort's sister needed his help caring for her five children during the summer of 2003. RP 314. Mr. Fort came from Seattle to Cheney and cared for the children during that summer. RP 315.

Mr. Fort was a "fun uncle" to the children. RP 274. He took them fishing, played video games, let them eat junk food, and sometimes woke up early with them to watch the sunrise. RP 274-75.

The children's mother was a harsh disciplinarian. RP 306. She used corporal punishment that left bruises on the children, slapped the children in the face, and pulled their hair. RP 306. She did not agree with Mr. Fort's lax parenting philosophy. RP 328.

In early 2005, Mr. Fort made a report to Child Protective Services (CPS) about an injury that he had seen on one of the daughters, A.W. RP 335-36. Around that same time, Mr. Fort's sister called the police, saying that A.W. claimed to have been sexually abused by Mr. Fort. RP 319, 335-36.

Mr. Fort was charged with four counts of first-degree rape of a child. CP 2-3. One of the charges was dismissed and the jury acquitted on one more. CP 6. Mr. Fort was convicted of the two remaining charges. CP

15-63. But, in 2015, the Court of Appeals granted Mr. Fort's Personal Restraint Petition and remanded his case for a new trial. CP 15-63.

Mr. Fort was retried for the first time in 2016. *See* RP 5-244. At that trial, A.W. claimed for the first time that Mr. Fort had only penetrated her anally after claiming at the first trial that the penetration had all been vaginal. RP 49, 71, 162. She also said that she never performed oral sex on Mr. Fort despite claiming to have done so previously. RP 60, 65.

A.W. also said that she saw Mr. Fort's erect penis, which had no deformity or discoloration. RP 62. But Mr. Fort presented evidence that he suffered from Peyronie's Disease at the time of the allegations, which caused his penis to bend at a seventy- to seventy-five-degree angle when it was erect. RP 185, 189. Mr. Fort's doctor said that the bend in Mr. Fort's penis was "obvious." RP 194.

After beginning deliberations, the jury at the 2016 trial asked the court what would happen if they could not agree on a verdict. RP 239. The judge called the jury into the courtroom, where the presiding juror said that there was not a reasonable probability that the jury would be able to reach a unanimous verdict. RP 240.

According to the Verbatim Report of Proceedings, the trial court's next step was to set a date for a new trial. RP 240-41. The Report of

Proceedings does not reflect the just asking for any input from the parties or making any findings or legal conclusions. RP 240-41.

The court signed a written order stating that the judge was declaring a mistrial because: "Good cause exists. Trial was had in the matter and the jury was unable to reach a verdict." CP 66.

Mr. Fort's case proceeded to a third trial, where he was convicted. RP 246-437.

B. Proceedings following the filing of Appeal.

Mr. Fort timely appealed, arguing, *inter alia*, that the trial court had violated the constitutional prohibition on double jeopardy by declaring a mistrial based on an improper legal standard. CP 122; *See also* Appellant's Opening Brief, pp. 6-9.

In October 2018, the Court of Appeals remanded Mr. Fort's case, *sua sponte*, to the Superior Court for a reference hearing to determine how and when the jury was discharged; whether there were discussions among the parties about declaring a mistrial that were not reflected in the transcript; and where any such discussions occurred. *See* Order Transferring Appeal to Superior Court for Reference Hearing (10/29/18). The Court ordered that the hearing be held in accordance with the requirements of RAP 16.12. *Id*., p. 2.

That reference hearing was held in superior court on November 8, 2018. *See* RP (11/8/18). Mr. Fort was not represented by counsel at that reference hearing. RP (11/8/18) 14.

The judge at the hearing was the same judge who had presided over Mr. Fort's first trial. RP (11/8/18). The hearing consisted almost entirely of the judge's personal recollection of off-the-record events from the day the mistrial was declared. RP (11/8/18) 2-7. The judge said that she had attempted to corroborate her memory through discussions with her judicial assistant. RP (11/8/18) 4-5. The judge recounted what her assistant had said during their conversation, and incorporated those statements into her findings. RP (11/8/18) 4-5. No sworn testimony was presented.

Mr. Fort's recollection of the events at trial differed significantly from that of the judge. RP (11/8/18) 7-13. He said that he remembered the proceedings happening basically as they were reflected in the trial transcript. RP (11/8/18) 7.

The superior court entered findings of fact – based on the judge's own recollections – that there were discussions between the court and the parties, which were not reflected in the transcript, during which a mistrial was discussed and neither party objected to declaring a mistrial. CP 133-36.

Mr. Fort moved in the Court of Appeals for a new reference hearing, to be held in compliance with RAP 16.12 and at which Mr. Fort would have the benefit of appointed counsel. Motion for Remand for New Reference Hearing and for Appointment of Counsel (11/30/18). The Court denied that motion. *See* Ruling (12/13/18).

A few months later, the Court of Appeals issued an unpublished decision affirming Mr. Fort's convictions, based on the findings of fact entered at the reference hearing at which Mr. Fort did not have an attorney. *See* Opinion (2/26/19).

Mr. Fort filed a *pro se* motion for the Court of Appeals to reconsider that decision. Mr. Fort's motion argued that he was denied his constitutional right to counsel at the reference hearing. Motion for Reconsideration (3/12/19).

The Court of Appeals granted Mr. Fort's motion to reconsider and withdrew its 2/26/19 Opinion. *See* Order Granting Motion for Reconsideration, Withdrawing Opinion Filed February 26, 2019, and Remanding for a New RAP 9.10 Hearing (5/2/19). The Court ruled that the reference hearing constituted a critical stage of the proceedings in Mr. Fort's case, and that he had a constitutional right to counsel at the hearing. *Id.*, p. 2.

The Court of Appeals ordered that a second remand hearing be conducted and that "[t]he procedures set forth in the attached prior order shall be followed" at that hearing.[1] *Id.*, p. 2.

A second reference hearing was held in superior court on 7/10/19. The judge at that hearing was different from the judge who had presided over the mistrial. Mr. Fort was afforded counsel at the hearing. *See* RP (7/10/19).

Mr. Fort presented testimony at the hearing from five witnesses – including himself – who were present in the courtroom when the mistrial was declared. *See* RP (7/10/19). Those witnesses testified either that they could not recall whether the judge had addressed whether to declare a mistrial with the parties before doing so, or that they explicitly recalled that the judge had not done so. RP (7/10/19) 8-40.

The trial judge who declared the mistrial was never called to testify and was not subject to cross-examination by Mr. Fort. RP (7/10/19). Neither was the judicial assistant who had supposedly corroborated the judge's recollection called to testify or subjected to cross-examination. RP (7/10/19).

[1] The "attached prior order" was the original remand order from October 2018, which ordered the superior court to conduct the remand hearing "within the purview of RAP 16.12." *See* Appendix to Order Granting Motion for Reconsideration, Withdrawing Opinion Filed February 26, 2019, and Remanding for a New RAP 9.10 Hearing (5/2/19), p. 2.

But the Superior Court's findings of fact following the second reference hearing relied heavily on the prior judge's findings during the first reference hearing – the hearing at which it was determined that Mr. Fort had been denied his constitutional rights. *See* CP 167-72. The order following the second remand incorporates the prior judge's findings throughout. CP 168-70.

Based on these findings from the second reference hearing, the Court of Appeals issued another unpublished opinion, affirming Mr. Fort's Convictions in October 2019. *See* Opinion (10/29/19). This Court relied, specifically, on the conclusion that Mr. Fort was given the opportunity to object to the mistrial declaration but did not raise an objection. Opinion (10/29/19) 6.

The Court of Appeals' October 2019 decision explicitly declined to address the procedure followed on the second remand. *See* Opinion (10/29/19) *generally*. The Court said in a footnote that it was declining to "discuss procedures and safeguards used to ensure that [its] questions were fairly answered on remand." Opinion (10/29/19) 5, n. 2.

Mr. Fort again moved for reconsideration in the Court of Appeals, challenging the reliance on unsworn and un-tested "testimony" by the trial court judge. *See* Motion for Reconsideration (11/15/19). The Court of

Appeals denied reconsideration. Order Denying Motion for Reconsideration (11/26/19).

Mr. Fort now timely requests review in this Court.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Supreme Court should accept review in order to determine the constitutional and procedural protections that must be afforded when the Court of Appeals remands a criminal case for additional factfinding in the trial court, mid-appeal. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court.

At Mr. Fort's first reference hearing was held without affording him the representation of counsel, the opportunity to call witnesses, or the opportunity to cross-examine the trial judge's recollection of what had happened when the mistrial was declared. *See* RP (11/8/18) *generally*.

The Court of Appeals eventually ruled that this had been improper, that the reference hearing constituted a "critical phase" of Mr. Fort's case (entitling him to the appointment of counsel), and that a new hearing should be held. Order Granting Motion for Reconsideration, Withdrawing Opinion Filed February 26, 2019, and Remanding for a New RAP 9.10 Hearing (5/2/19). This second remand order required the superior court to conduct a new reference hearing and specifically ordered that "[t]he procedures set forth in the attached prior order shall be followed." *Id.*, p. 2.

The "attached prior order" was the original remand order from October 2018, which ordered the superior court to conduct the remand hearing "within the purview of RAP 16.12." *See* Appendix to Order Granting Motion for Reconsideration, Withdrawing Opinion Filed February 26, 2019, and Remanding for a New RAP 9.10 Hearing (5/2/19), p. 2.

RAP 16.12 requires, *inter alia*, that the accused have the right to cross-examine adverse witnesses. RAP 16.12. But Mr. Fort was never given the opportunity to cross-examine the judge who oversaw the first remand hearing.

But the second remand hearing was not held in accordance with the procedures set forth at RAP 16.12. Instead, the second remand court relied heavily on that judge's original findings, which were based on her personal recollection. *See* CP 168-70. By relying on unsworn "testimony," which was never subjected to the test of cross-examination, the second remand court violated the Court of Appeals' order to conduct the hearing under the procedures laid out by RAP 16.12.

Even so, the Court of Appeals relied on the findings from that second hearing and refused to consider the procedures that the remand court had followed in its final Opinion. The Court relied, specifically, on

the conclusion that Mr. Fort was given the opportunity to object to the mistrial declaration but did not raise an objection. Opinion (10/29/19) 6.

In short, the Courts of Appeals and Superior Courts have demonstrated ambivalence and confusion regarding the proper procedures and what (if any) constitutional rights apply when an appellate court remands a case, mid-appeal, back to the trial court for additional factfinding.

This issue is vital to the guarantee of a fair procedure on appeal, as additional factfinding may be required – as in Mr. Fort's case – to determine whether critical constitutional rights have been violated during trial. But there are no published cases from either the Court of Appeals or This Court addressing the question.

This Court should accept review of Mr. Fort's case in order to provide much-needed guidance to lower courts regarding the constitutional and procedural requirements that should be applied when the Court of Appeals remands a case for additional factfinding mid-appeal. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. This Court should accept review pursuant to RAP 13.4(b)(3) and (4).

B. The Supreme Court should accept review and hold that the constitutional prohibition on double jeopardy barred Mr.

Fort's retrial because the court applied the wrong legal standard when it declared a mistrial based only on "good cause," when the constitution permitted a retrial only in cases of "extraordinary and striking circumstances." This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4(b)(3) and (4).

Both the state and federal constitutions prohibit double jeopardy. U.S. Const. Amends. V, XIV; Wash. Const. art. I, § 9.[2] The proscription on double jeopardy protects the "valued right (of the defendant) to have his trial completed by a particular tribunal." *State v. Jones*, 97 Wn.2d 159, 162, 641 P.2d 708 (1982) (*quoting Arizona v. Washington*, 434 U.S. 497, 503 n. 11, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978)).

The U.S. Supreme Court has safeguards this "valued right" because a second prosecution in a criminal case:

> …increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

Arizona, 434 U.S. at 503–05.

[2] A claim that a conviction has been entered in violation of the proscription on double jeopardy is a constitutional issue, which is reviewed *de novo* and can be raised for the first time on appeal. *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2006), *as corrected* (Feb. 14, 2007); RAP 2.5(a)(3).

In order to protect the "valued right" to have a criminal case decided by a particular tribunal, jeopardy attaches when a jury is impaneled and sworn or when the first witness has answered a question. *Jones*, 97 Wn.2d at 162 (*citing State v. Morlock*, 87 Wn.2d 767, 770, 557 P.2d 1315 (1976)). Accordingly, an accused person is protected against a second prosecution if his/her trial is terminated at any point after those events have occurred. *Id.*

There is an exception, however, for cases in which a trial is terminated because "manifest necessity" warrants declaration of a mistrial. *Id.* at 162-63; *State v. Robinson*, 146 Wn. App. 471, 479, 191 P.3d 906 (2008). A mistrial that is declared in the absence of manifest necessity functions as an acquittal for double jeopardy purposes and the constitution does not permit a retrial. *Id.* at 484.

In cases of a jury's alleged inability to reach a verdict, a mistrial is only manifestly necessary in cases posing "extraordinary and striking circumstances." *Jones*, 97 Wn.2d at 164. The judge should consider "the length of time the jury has been deliberating in light of the length of the trial and the trial and the volume and complexity of the evidence." *Id.* (*citing State v. Boogaard*, 90 Wn.2d 733, 739, 585 P.2d 789 (1978)).

The jury's own assessment that it is deadlocked, by itself, is not sufficient grounds for declaring a mistrial. *State v. Taylor*, 109 Wn.2d 438,

443, 745 P.2d 510 (1987), *disapproved of on other grounds by State v. Labanowski*, 117 Wn.2d 405, 816 P.2d 26 (1991).

When "extraordinary and striking circumstances" are present, it is within a trial judge's discretion to discharge a jury without terminating jeopardy. *Jones*, 97 Wn.2d at 163. But a court necessarily abuses its discretion by applying the incorrect legal standard.[3] *State v. Henderson*, 182 Wn.2d 734, 743, 344 P.3d 1207 (2015).

In Mr. Fort's case, the trial court did not find "manifest necessity" or "extraordinary and striking circumstances." RP 239-44; CP 66. Rather, the court ordered a mistrial after finding only that: "good cause exists." CP 66.

Because the mistrial following Mr. Fort's second trial was not based on manifest necessity or "extraordinary and striking circumstances," discharging the jury terminated jeopardy in this case and the constitutional prohibition on double jeopardy barred his retrial for the same offenses. *Jones*, 97 Wn.2d at 164; *Robinson*, 146 Wn. App. at 479. The trial court

[3] The U.S. Supreme Court has ruled that the trial court need not make an explicit finding of manifest necessity if the record otherwise provides sufficient justification for the mistrial ruling. *Arizona*, 434 U.S. at 516-17. In that case, however, the trial court ordered the mistrial only after a lengthy colloquy with and argument by the parties on two different days. *Id.* at 500-01. The judge in that case also provided detailed reasons for his ruling on the record. *Id.* Neither of those things occurred in Mr. Fort's case. RP 239-44.

abused its discretion by applying the incorrect legal standard. *Id.; Henderson*, 182 Wn.2d at 743.

The Court of Appeals should have dismissed Mr. Fort's convictions and dismissed the charges with prejudice. *Robinson*, 146 Wn. App. at 484. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. This Court should grant review pursuant to RAP 13.4(b)(3) and (4).

VI. CONCLUSION

The issues set forth in this case are significant under the State Constitution. Furthermore, because they could impact a large number of criminal appellate cases, they are of substantial public interest. The Supreme Court should accept review pursuant to RAP 13.4(b)(3) and (4) in order to provide critical guidance to the Courts of Appeals and trial courts.

Respectfully submitted December 26, 2019.

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Dallin Fort
6104 West Sylvester
Pasco, WA 99301

and I sent an electronic copy to

Spokane County Prosecuting Attorney
SCPAappeals@spokanecounty.org

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on December 26, 2019.

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

APPENDIX:

Renee S. Townsley
Clerk/Administrator

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October 29, 2019

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CASE # 354121
State of Washington v. Dallin David Fort
SPOKANE COUNTY SUPERIOR COURT No. 051009501

Counsel:

Enclosed please find a copy of the opinion filed by the Court today. A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or, if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:pb
Enc.

c: **E-mail** Hon. Annette Plese
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FILED
OCTOBER 29, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. DALLIN D. FORT, Appellant.	)))))))))	No. 35412-1-III UNPUBLISHED OPINION

LAWRENCE-BERREY, C.J. — Dallin Fort appeals his conviction for two counts of first degree rape of a child. He argues the trial court violated the constitutional prohibition on double jeopardy when it ordered a mistrial based only on "good cause" when the Washington Constitution permits retrial only in cases of "extraordinary and striking circumstances." The State responds that Mr. Fort waived this argument by jointly moving for a mistrial. The record was unclear in this respect, so we remanded the matter to the trial court for supplementation of the record.

The facts found by the remand judge support our determination that Mr. Fort, at a minimum, authorized his attorney to jointly move for a mistrial. We generally affirm, but remand for the trial court to strike various community custody conditions and to strike the

DNA[1] collection fee and the criminal filing fee.

FACTS

Mr. Fort's first trial in 2006 resulted in his conviction on two counts of first degree rape of a child. *State v. Fort*, 190 Wn. App. 202, 213, 360 P.3d 820 (2015). Some time later, Mr. Fort filed a personal restraint petition, and this court ordered a new trial based on a public trial rights violation. *Id.* at 219.

Mr. Fort was retried in October 2016, but the jury could not reach a unanimous verdict. The judge asked the presiding juror if, given more time, was there a reasonable probability of reaching a verdict. The juror responded, "No." Report of Proceedings (RP) at 240. The judge asked the court reporter to take the jury to the jury room. The report of proceedings reflects the court then rescheduled the matter for a new trial.

A written order entered contemporaneously states, "The Parties moved the court for: an order declaring a mistrial . . . the court finds that: good cause exists. Trial was had in the matter and the jury was unable to reach a verdict. . . . IT IS ORDERED that: a mistrial is declared." Clerk's Papers (CP) at 66. The written order reflects it was presented by the State and approved by defense counsel.

[1] Deoxyribonucleic acid.

The case was set for a new trial in 2017. The State retried Mr. Fort and he was found guilty of both counts of first degree rape of a child.

At sentencing, the trial court ordered various community custody conditions and legal financial obligations (LFOs) that are challenged on appeal. For instance, the court ordered that Mr. Fort "not possess or consume alcohol or go to places where alcohol is the chief commodity for sale." CP at 107. The court also ordered that he "obtain a written substance abuse evaluation with a qualified provider approved by [his] assigned community corrections officer and complete all recommended treatment including attending AA [Alcoholics Anonymous] and/or NA [Narcotics Anonymous] support groups and obtaining a sponsor." CP at 107. The court also required him to submit to random "UA/BA" (urinalysis and blood-alcohol) monitoring. CP at 107. Finally, the court imposed various LFOs, including a $100 DNA collection fee and a $200 criminal filing fee.

Mr. Fort appeals.

ANALYSIS

A. DOUBLE JEOPARDY

Mr. Fort argues the trial court violated the constitutional prohibition on double jeopardy when it declared a mistrial based only on "'GOOD CAUSE'" when the

Washington Constitution permits a retrial only in cases of "'EXTRAORDINARY AND STRIKING CIRCUMSTANCES.'" Br. of Appellant at 6. The State, citing the October 2016 written order, argues Mr. Fort waived this argument by jointly moving for a mistrial.

The report of proceedings is inconsistent with the written order. It shows that the court reporter escorted the jury out of the courtroom, and the trial court then discussed new trial dates. The report of proceedings does not show Mr. Fort moving for a mistrial.

Because of this inconsistency, we remanded the appeal to the trial court for a hearing to answer three questions:

> 1. Precisely how and at what point was the jury discharged;
> 2. Were there discussions between the court and counsel concerning declaring a mistrial that are not reflected in the transcribed record and, if so, what does each party contend was said, and what does the court find was said;
> 3. If there were discussions off the record, who was present, and where did those discussions occur.

Order Transferring Appeal to Superior Court for Reference Hearing, *State v. Fort*, No. 35412-1-III (Wash. Ct. App. Oct. 29, 2018) at 2.

Ultimately, a judge other than the trial judge conducted the remand hearing. In its August 2, 2019 ruling, the remand judge found:

> [Prior to the trial court discharging the jury,] the parties briefly discussed a mistrial based on the hung jury—even Dallin Fort testified at the July 10, 2019, [remand] hearing that his attorney asked him then if he wanted a new trial. There was no objection to declaring a mistrial.

CP at 171.[2]

Analysis of Double Jeopardy Claim

The United States Constitution and the Washington Constitution prohibit a defendant from being tried for the same offense twice. U.S. CONST. amend V; CONST. art. I, § 9; *State v. Robinson*, 146 Wn. App. 471, 477-78, 191 P.3d 906 (2008). This rule protects the defendant's rights to have his or her trial completed by a particular tribunal. *Robinson*, 146 Wn. App. at 478. The article I, section 9 double jeopardy provision has been construed to provide protection identical to that provided under the United States Constitution. *State v. Larkin*, 70 Wn. App. 349, 353, 853 P.2d 451 (1993).

"Once a jury has been empanelled and sworn, jeopardy attaches." *Robinson*, 146 Wn. App. at 478. "Once jeopardy has attached, the court must determine whether a retrial is barred." *Id.*

When the defendant requests a mistrial, double jeopardy does not bar a retrial. *Id.* at 478-79. However, when a mistrial is without the consent of the defendant, the court must find manifest necessity to avoid violating double jeopardy. *Id.* at 479.

[2] We decline to discuss the procedures and safeguards used to ensure that our questions were fairly answered on remand. These procedures and safeguards are discussed in the remand court's ruling, attached as an appendix to this opinion.

Here, the parties briefly discussed a mistrial. Mr. Fort's trial attorney asked him if he wanted a new trial. Mr. Fort could have objected to a new trial, but he did not. At a minimum, Mr. Fort impliedly authorized his attorney to sign the joint motion for mistrial. We conclude that Mr. Fort consented to a mistrial and, thus, waived the purported error. He may not now claim that his later conviction was barred by double jeopardy.

B. COMMUNITY CUSTODY CONDITIONS

Mr. Fort contends the trial court exceeded its authority by ordering various community custody conditions. The challenged conditions prohibit him from consuming alcohol, prohibit him from possessing alcohol, and prohibit him from going to places where alcohol is the chief commodity for sale. These conditions also require him to undergo urinalysis and blood alcohol testing, and require him to undergo a substance abuse evaluation and comply with any treatment recommendations.

The State first responds that Mr. Fort may not challenge the community custody conditions because he did not object to them below. We disagree. An unlawful sentence may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

The State also responds that former RCW 9.94A.713(1) (2001) grants the Sentencing Review Board (the Board) and the Department of Corrections (DOC)

authority to impose additional rehabilitative conditions of community custody. That may be so. But Mr. Fort challenges the conditions imposed on him by the court, not the Board or the DOC. We express no opinion on the propriety of conditions the Board or the DOC may impose.

The Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, governs a court's imposition of community custody conditions. *State v. Coombes*, 191 Wn. App. 241, 250, 361 P.3d 270 (2015). Any sentence imposed under the SRA must be in accordance with the law in effect when the offense was committed. *Id.*; RCW 9.94A.345. Mr. Fort's crimes were committed between June 1, 2003, and September 1, 2003, so we look to the SRA in effect during that time.

1. The prohibition on consuming alcohol is valid

Former RCW 9.94A.712(6)(a) (2001) permitted a sentencing court to enter conditions under former RCW 9.94A.700(5) (2002), which provided in pertinent part:

> As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions:
>
> . . . .
>
> (d) The offender shall not consume alcohol.

Therefore, the prohibition against consuming alcohol was lawful under the SRA at the time the offenses were committed.[3]

2. The prohibitions on possessing alcohol and going to places where alcohol is the chief commodity for sale are not crime related and, thus, are invalid

Former RCW 9.94A.700(5)(e) authorizes a court to enter crime-related prohibitions. A "crime-related prohibition" is "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." Former RCW 9.94A.030(12) (2002). A condition is not crime related if there is no evidence linking the prohibited conduct to the offense. *State v. O'Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

In *O'Cain*, the defendant was convicted of rape, and the sentencing court prohibited him from accessing the Internet without prior approval from his supervising community corrections officer. *Id.* at 774. We struck down the condition because the trial court made no finding that Internet use contributed to the defendant's crime. *Id.* at 775.

[3] In *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003), the defendant challenged the community custody condition prohibiting alcohol consumption. Applying the 1988 amendments to the SRA, the court affirmed the condition, reasoning "the 1988 legislature manifested its intent that a trial court be permitted to prohibit the consumption of alcohol regardless of whether alcohol had contributed to the offense." *Id.* at 206.

Here, the trial court did not make any finding that alcohol or any other drug contributed to Mr. Fort's crime, the risk of reoffending, or the safety of the community. Therefore, the trial court erred in prohibiting Mr. Fort from possessing alcohol and from going to places where alcohol is the chief commodity for sale. In addition, the trial court erred in requiring Mr. Fort to submit to random UA/BA monitoring, and to obtain a written substance abuse evaluation and to follow all treatment recommendations.

C. STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW (SAG)

Mr. Fort submits two arguments in his SAG. In an SAG, this court only considers arguments that are not repetitive of the party's briefing. RAP 10.10(a).

Additional Ground 1—Double Jeopardy

Mr. Fort contends the trial court erred by not considering factors discussed in *United States v. Bates*, 917 F.2d 388, 396 (9th Cir. 1990), which concerns double jeopardy. Whether Mr. Fort's retrial violated double jeopardy principles was properly raised and argued in his opening brief. We decline to revisit the issue in the SAG.

Additional Ground 2—Ineffective Assistance of Counsel

Mr. Fort contends he was denied effective assistance of counsel when counsel did not move to dismiss once the jury was discharged. To prevail on a claim of ineffective assistance of counsel, a defendant carries the burden of demonstrating (1) the attorney's

performance was deficient—that is, it fell below an objective standard of reasonableness, and (2) the deficiency prejudiced the accused—that is, absent the deficiency there is a reasonable probability that the result of the proceeding would have been different. *State v. Humphries*, 181 Wn.2d 708, 719-20, 336 P.3d 1121 (2014). Mr. Fort's argument presupposes that the trial transcript is a complete record and that he did not have an opportunity to object to a mistrial. We reject Mr. Fort's argument because he was given an opportunity to object to a mistrial. The remand judge found that the parties discussed a mistrial and that Mr. Fort's attorney asked him if he wanted a new trial. Mr. Fort was given an opportunity to object to a new trial, but he did not. At a minimum, Mr. Fort impliedly authorized his attorney to sign the joint motion for mistrial. Mr. Fort has not shown that his attorney's performance fell below an objective standard of reasonableness.

D. MOTION TO STRIKE DNA COLLECTION FEE AND CRIMINAL FILING FEE

Mr. Fort filed a motion to reverse two LFOs. Relying on *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), he argues we should order the trial court to strike the $100 DNA collection fee and the $200 criminal filing fee.

The *Ramirez* court held that House Bill 1783 applies prospectively to cases on direct appeal. *Id.* at 747. House Bill 1783 establishes that the DNA collection fee is no

longer mandatory if the offender's DNA has already been collected. *Id.* House Bill 1783 also prohibits imposing the $200 criminal filing fee on indigent defendants. *Id.*

Here, Mr. Fort likely had his DNA collected in 2006 after his initial conviction. He is also indigent for purposes of this appeal. We, therefore, grant Mr. Fort's motion and direct the trial court to strike the $100 DNA collection fee and the $200 criminal filing fee.

E. APPELLATE COSTS

Mr. Fort asks that the State not be awarded appellate costs in the event it substantially prevails. The State has substantially prevailed. In accordance with RAP 14.6(a), we defer the decision of appellate costs to our clerk or commissioner.

Affirm in part, remand to strike DNA collection fee, criminal filing fee, and certain community custody conditions.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, C.J.

WE CONCUR:

Fearing, J.

Pennell, J.

APPENDIX

CN: 200501009501

SN: 248

PC: 9

IN THE SUPERIOR COURT STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

State of Washington Plaintiff/ Petitioner vs. DALLIN DAVID FORT, Defendant/ Respondent	**SPOKANE COUNTY. NO.** 2005-1-00950-1 Court of Appeals Div. III No. 354121 **COURT'S RULING**

PROCEDURAL BACKGROUND

On October 29, 2018, the Court of Appeals remanded Mr. Fort's matter to the trial court that handled his retrial. Judge Plese held a reference[1] hearing on November 8, 2018, and submitted the requested findings on November 20, 2018. Division III issued an unpublished decision on February 26, 2019, that generally affirmed his conviction but remanded to vacate the criminal filing fee, DNA collection fee, and certain community supervision conditions.

[1] Division III later clarified how: "The prior RAP 16.12 order remanding for a reference hearing should have been denominated as a RAP 9.10 order correcting the record. The purpose of the order was for the trial court to enter findings in lieu of the missing recording. As reflected by the transcript, the procedure contemplated by this court was substantially followed in that everyone was given an opportunity to say what they believed occurred during the missing recording . . . . " Clerk's Ruling, *State v. Fort*, No. 35412-1-III (Wash. Ct. App. Dec. 13, 2018). Indeed, the most recent opinion remanded with direction for a new RAP 9.10 hearing. Order (May 2, 2019).

Mr. Fort moved for reconsideration, which was granted on May 2, 2019. The order vacated the February opinion and remanded for a new hearing to clarify/supplement the record. On May 14, 2019, Judge Plese sent a letter to the parties, appointed Mr. Fort counsel, and set a new hearing. A copy of the May 2nd order was attached to the letter but not separately filed. The letter was erroneously denominated as "Notice of Hearing" in the Superior Court file rather than as correspondence or a transmittal of an appellate decision.

On May 30, 2019, Mr. Fort's new counsel filed a motion to disqualify Judge Plese from presiding over the new RAP 9.10 hearing. Judge Plese recused on June 14, 2019, and the undersigned was assigned the matter on remand as Chief Criminal Presiding. On June 24, 2019, Mr. Fort's counsel obtained an agreed, off-docket continuance of the hearing to July 10, 2019, in order to conduct interviews. In response, the undersigned sent a letter to counsel, quoting extensively from the February 26, 2019, opinion as to the limited scope of the remand and clarifying what it understood the purpose of the remand hearing was. Neither counsel responded.

Until the July 10, 2019, hearing, the undersigned was unaware of the May 2, 2019, order that vacated the February 26, 2019, opinion and the expanded scope of remand. Mr. Fort testified, as well as presented testimony from his trial attorney, his parents, and a long-time family friend. The State presented its recollection of the matter. The undersigned took this matter under advisement and submits these findings on remand in accordance with the 90-day deadline set forth in the May 2, 2019, order, despite having the case assigned since June 24, 2019.

QUESTIONS PRESENTED

The May 2, 2019, order instructed the lower court to appoint Mr. Fort an attorney and hold a new hearing to clarify/supplement the record in accordance with RAP 9.10 and enter written findings that answer the following questions:

1. Precisely how and at what point the jury was discharged.

2. Were there discussions between the Court and counsel concerning declaring a mistrial that were not reflected in the transcribed record and, if so, what does each party contend was said, and what does the court find was said;
3. If there were discussions off the record, who was present, and where did those discussions occur.

In addition to answering these three questions, the trial court may make such additional findings that are reasonably necessary to provide context concerning how the declaration of mistrial was entered. If the findings involve off-the-record discussions, the court should set forth what each party contends was said and the trial court's findings as to what was said.

In making these findings of fact, this court considered the following testimony from the July 10, 2019, hearing:

- Christian Phelps, who was Mr. Fort's attorney at the time of trial;
- David Fort, the Defendant's father;
- Lila Fort, the Defendant's mother;
- Michael Hughes, the Forts' neighbor who had known the Defendant for decades;
- Dallin Fort, the Defendant;
- The trial prosecutor's statements under oath.

This court also reviewed Judge Plese's prior responsive findings, which were filed on November 20, 2018, and included the following exhibits:

- A certified copy of the transcript from the original hearing on November 8, 2018;
- A certified copy of the clerk's minutes from October 7, 2017.

FINDINGS

The October 7, 2017, transcript reflects that the jury had a question about what they needed to do if they could not agree on a verdict.[2] Judge Plese brought the attorneys back to the courtroom, explained what

[2] VRP at 239.

the jury's question was and indicated that she believed that she needed to bring the jury back in and read the colloquy about whether they could reach a verdict with more time.[3] Judge Plese had the jury brought back in, reviewed the colloquy with presiding juror, who indicated there was no reasonable probability of reaching a unanimous verdict with more time.[4] The jury was escorted to the jury room.[5] There is no dispute as to any of these facts.

It is noteworthy that the trial transcript did not reflect Dallin[6] Fort's additional recollection. He testified at the July 10, 2019, hearing how the presiding juror began speaking with the other jurors when responding to the judge's question and had to be reminded by the court not to discuss it, and then the presiding juror responded that additional time would not help. The record clearly does not support his recollection of this event, which affects the assessment of his credibility.

It is undisputed that Judge Plese's court reporter took the jury from the courtroom to the jury room, which resulted in the brief gap in the record. Judge Plese's findings clarify that the October 7, 2017 transcript reference to "all rise" related to when the jury was escorted from the courtroom after she advised them that they would be taken to the jury room to await further instructions.

Mr. Phelps, trial counsel, testified at the July 10, 2019, hearing that he could not recall whether he moved for a mistrial or the State moved for a mistrial or it was just assumed it was a mistrial because the jury was deadlocked. He also testified that if he didn't move for a mistrial, he would have agreed to one because the jury was deadlocked. He did not recall the specifics as to having a discussion with the judge about whether a mistrial was appropriate or any specific findings. On cross-examination, Mr. Phelps testified he expected there to have been some conversation, but it would have been brief because both he and the trial prosecutor were seasoned trial lawyers with significant experience and that there didn't need to be a lot of discussion about a

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[3] *Id.*, 239-40
[4] *Id.*, at 240.
[5] *Id.* at ll. 18-22.
[6] This court is using the first name to avoid confusion with his father also being Mr. Fort; no disrespect is intended.

hung jury and what to do with a hung jury. He testified that he probably would not have signed off on an order of mistrial without some discussion about a hung jury, but that discussion would not need to have been very long and that there would have been a discussion about needing new dates.

All of the defense witnesses agree that Judge Plese was on the bench in open court when they discussed dates for the new trial after the jury left the courtroom. The defense witnesses claim that Judge Plese left the bench after the jury was excused and came back with a piece of paper after about five minutes. As noted above, Judge Plese clarified that the "all rise" in the transcript reflected the jury leaving the courtroom and that she remained in the courtroom.[7] She further clarified how, after the jury was escorted out, she asked if there was any objection to declaring a mistrial and there was no objection.[8] There was no testimony from the July 10, 2019, hearing that suggested anyone objected to a mistrial. The trial court asked counsel to prepare an order, which the State prepared.

Judge Plese clarified that she asked trial counsel, with Dallin Fort present, and there was no objection to the court releasing the jury and excusing them.[9] Likewise, there was no testimony from the July 10, 2019, hearing that suggested anyone objected to releasing and excusing the jury.

The Defendant's father testified at the July 10, 2019, hearing how there was a discussion among Judge Plese, the attorneys, and Dallin Fort that he could not hear. He estimated that discussion took place took approximately one to two minutes. He didn't hear any findings about a mistrial, but assumed such when the judge began talking about rescheduling a new trial date. It is also noteworthy that the transcript from the October 7, 2017, hearing resumed with Judge Plese discussing trial dates and counsel's availability.[10] When the Forts' neighbor, who's known Dallin Fort for about 35 years, testified he didn't see anything different from Mr. David's Fort testimony. Likewise, Mrs. Fort testified that there was a conversation that she couldn't hear until the parties were discussing rescheduling.

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[7] Findings, Opinion & Order on Reference Hearing, (filed Nov. 20, 2018) at p. 3.
[8] *Id.*
[9] *Id.*
[10] VRP at 241.

Judge Plese clarified that she asked the attorneys if they wished to speak to the jury after she excused them.[11] Both said that they wanted to.[12] Judge Plese said that she then went to the jury room to release them from the case, thanked them for their service, and invited them to remain if they wished to voluntarily speak with the attorneys.[13] After she left the jury room, the attorneys were invited to come speak with any jurors who wanted to stay.[14]

Dallin Fort testified at the July 10, 2019, hearing that his attorney asked him if he wanted a new trial, that the judge wasn't on the bench much longer after the jury was escorted out, and that there was a break afterwards. She returned to the bench with the court reporter and they started talking about rescheduling the trial. When the trial prosecutor handed over the order of mistrial, Mr. Fort testified that Mr. Phelps asked him if he wanted a new trial. Dallin Fort testified that he didn't know whether the jury was discharged before or after the break.

The trial prosecutor stated under oath that there was a brief discussion about the mistrial. Consistent with the defense witnesses who referenced a brief discussion that they could not hear, both trial attorneys – while they couldn't recall the specific words used referenced a brief conversation and that after the jury was excused, Judge Plese stated that because the jury was hung and could not reach a verdict, a mistrial would have to be declared and a new trial date reset.

Dallin Fort testified at the same hearing that there was no discussion about whether it was appropriate to declare a mistrial and no discussion whether there was any kind of manifest necessity in declaring a mistrial. He testified that the only discussion after the judge returned to the bench surrounded scheduling a new trial.

The trial prosecutor stated under oath that while the jury was excused but not yet dismissed, Judge Plese declared a mistrial. While he couldn't recall the specific words, he testified that there was a discussion that there would be a mistrial because of the hung jury and they drafted an order and that this did not occur on

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[11] Findings, Opinion & Order on Reference Hearing, (filed Nov. 20, 2018) at p. 3.
[12] *Id.*
[13] Findings, Opinion & Order on Reference Hearing, (filed Nov. 20, 2018) at p. 3.
[14] *Id.*

the record because the court reporter left to escort the jury to the jury room. [N.B., The jury rooms are down a short hallway adjacent to the courtrooms.] The record from October 7, 2017, resumes with the parties discussing potential trial dates.

RESPONSES TO QUESTIONS PRESENTED

1. **Precisely how and at what point the jury was discharged.**

Judge Plese excused the jury after the presiding juror stated that additional time would not assist them in coming to a unanimous verdict. Her court reporter escorted them from the courtroom to the jury room in the adjacent hallway a short distance away. After a brief discussion with the attorneys and Dallin Fort regarding the mistrial as set forth above and whether the attorneys wished to speak to the jury after she discharged them, Judge Plese discharged the jury in the jury room. After they were discharged and the judge exited the jury room, the attorneys spoke with the jurors.

2. **Were there discussions between the court and counsel concerning declaring a mistrial that were not reflected in the transcribed record and, if so, what does each party contend was said, and what does the court find was said.**

Yes. This court finds that there was a brief conversation that occurred while Judge Plese remained on the bench for a short time period after the court reporter escorted the jury to the jury room. Each party's contention as to what was said is reflected above and attributed to the respective party. The October 7, 2017, transcript resumes with the parties discussing the new trial date.

This court finds that the parties briefly discussed a mistrial based on the hung jury - even Dallin Fort testified at the July 10, 2019, hearing that his attorney asked him then if he wanted a new trial. There was no objection to declaring a mistrial. The remaining defense witnesses the Defendant's parents and long-time family neighbor testified that there was a brief conversation that they couldn't hear. As noted earlier,

aside from potential bias, this court also has accuracy and credibility concerns with Dallin Fort's recollections after he testified on July 10, 2019, as to something that was clearly contrary to the original trial transcript.

3. If there were discussions off the record, who was present and where did those discussions occur.

The brief discussion occurred in open court but was inadvertently not on the record because of the unusual circumstance of the court reporter escorting the jury to the jury room. Those known to be present were Judge Plese, the trial prosecutor (John Love), Dallin Fort's trial attorney (Christian Phelps), Dallin Fort, the court clerk (Jennifer Gage), Mr. and Mrs. Fort (Dallin's parents), and Michael Hughes (the Forts' neighbor).

Dated: August 2, 2019

Michelle D. Szambelan

MICHELLE D. SZAMBELAN
SUPERIOR COURT JUDGE

Renee S. Townsley
Clerk/Administrator

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CASE # 354121
State of Washington v. Dallin David Fort
SPOKANE COUNTY SUPERIOR COURT No. 051009501

Counsel:

Enclosed is a copy of the Order Denying Motion for Reconsideration. A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a Petition for Review electronically through the court's e-filing portal or, if in paper format, only the original motion need be filed in this court within 30 days after the Order Denying Motion for Reconsideration is filed. RAP 13.4(a). The Petition for Review will then be forwarded to the Supreme Court.

If the party opposing the petition wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service.

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:pb
Enc.

FILED
NOVEMBER 26, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 35412-1-III**
	)	
Respondent,	)	
	)	
v.	)	**ORDER DENYING**
	)	**MOTION FOR**
DALLIN D. FORT,	)	**RECONSIDERATION**
	)	
Appellant.	)	

The court has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED the motion for reconsideration of this court's decision of October 29, 2019, is denied.

PANEL: Judges Lawrence-Berrey, Fearing, and Pennell

FOR THE COURT:

Lawrence-Berrey, C.J.

ROBERT LAWRENCE-BERREY
CHIEF JUDGE

LAW OFFICE OF SKYLAR BRETT

December 26, 2019 - 1:33 PM

Transmittal Information

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Appellate Court Case Title:	State of Washington v. Dallin David Fort
Superior Court Case Number:	05-1-00950-1

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