

FILED
January 26, 2016
Court of Appeals
Division I
State of Washington

NO. 72734-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

YUSUF SHIRE,

Appellant.

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

The Honorable Jeffrey M. Ramsdell, Judge
The Honorable William L. Downing, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>SUPPLEMENTAL ASSIGNMENTS OF ERROR</u>	1
<u>Issue Pertaining to Supplemental Assignments of Error</u>	1
B. <u>SUPPLEMENTAL STATEMENT OF THE CASE</u>	1
C. <u>SUPPLEMENTAL ARGUMENT</u>	6
DOUBLE JEOPARDY PRECLUDED RETRYING SHIRE BEFORE A DIFFERENT JURY BECAUSE SHIRE DID NOT CONSENT TO A MISTRIAL AND NO 'MANIFEST NECESSITY' EXISTED.	6
1. <u>Jeopardy Attaches</u>	8
2. <u>A 'Manifest Necessity' Did Not Exist Because the Trial Court Failed to Consider Alternatives to a Mistrial</u>	9
3. <u>A 'Manifest Necessity' Did Not Exist Because the State Contributed to the Time Constraints</u>	13
D. <u>CONCLUSION</u>	17

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Browning
38 Wn. App. 772, 689 P.2d 1108 (1984)..... 7, 12

State v. Jones
97 Wn.2d 159, 641 P.2d 708 (1982)..... 7, 8, 9

State v. Juarez
115 Wn. App. 881, 64 P.3d 83 (2003)..... 7, 8, 13, 14, 16

State v. Melton
97 Wn. App. 327, 983 P.2d 699 (1999)..... 7, 9

State v. Rich
63 Wn. App. 743, 821 P.2d 1269 (1992)..... 6, 14, 16

State v. Robinson
146 Wn. App. 471, 191 P.3d 906 (2008)..... 6, 8, 9, 11, 12

State v. Sheets
128 Wn. App. 149, 115 P.3d 1004 (2005)
rev. denied, 156 Wn.2d 1014 (2006) 12

FEDERAL CASES

Arizona v. Washington
434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978)..... 6, 7

Downum v. United States
372 U.S. 734, 83 S. Ct 1033, 10 L. Ed. 2d 100 (1963)..... 9, 13

United States v. Dinitz
424 U.S. 600, 96 S. Ct. 1075, 47 L. Ed. 2d 267 (1976)..... 7, 8

United States v. Jorn
400 U.S. 470, 91 S. Ct. 547, 558, 27 L. Ed. 2d 543 (1971)..... 7

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES

U.S. Const. amend. V	6
Const. art. I, § 9.....	6

A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The trial court erred in declaring a mistrial over appellant's objection.

2. The trial court erred in finding that "manifest necessity" warranted a mistrial.

Issue Pertaining to Supplemental Assignments of Error

Once a jury is impaneled and trial has begun in a criminal case, double jeopardy precludes retrial by a different jury, unless the defendant consents to a mistrial or a "manifest necessity" exists warranting discharge of the jury already chosen. The trial court granted a mistrial for "manifest necessity," over appellant's objection so the prosecutor could take a vacation and conduct additional investigation into a potential defense witness. Did the trial court err in granting the mistrial where it failed to consider alternative options, the State's actions contributed to the trial time constraints, and retrial prejudiced appellant?

B. SUPPLEMENTAL STATEMENT OF THE CASE

Shortly before the State intended to rest its case at the first trial, defense counsel informed the trial court they had located Berket Kebede. RP 1286, 1448, 1453. Neither party knew Kebede's true identity until he identified himself to defense counsel during trial on December 10. RP

1474-75, 1509-13, 1516, 1524; CP 43-50. Defense counsel's investigator then interviewed Kebede on December 14. RP 1448, 1508-13; CP 43-50.

Defense counsel explained that he wanted Kebede to testify but did not have him under subpoena. RP 1448. Defense counsel anticipated that Kebede would testify that he was acquainted with Mardillo Barnes and Vincent Williams and was present at the shooting. Kebede denied that Shire was involved in the shooting. RP 1449, 1478-81, 1551-52; CP 175-256.

The State moved to exclude Kebede's anticipated testimony because of defense counsel's late disclosure of him as a witness. RP 1454-56, 1460-61, 1469. The State noted it had not had a chance to interview Kebede. RP 1454. A recess was taken so the prosecutor could interview Kebede. RP 1458-59, 1466-67.

After the recess, the trial court explained it would not exclude Kebede because his anticipated testimony was potentially exculpatory and not duplicative of any other witnesses. RP 1471-72, 1485, 1490-91. In response, the State requested a recess of 28 days, until January 14. RP 1486. Prosecutor, Julie Kline, explained she was leaving for a scheduled vacation the following day and would not return until January 13. RP 1483, 1489-90. Kline noted however, that she was "not going anywhere –

tomorrow.” RP 1490. The State’s co-prosecutor, Paul Sewell, did not indicate he would be unavailable to continue the trial in Kline’s absence.

Kline further stated it was “worth noting,” that she believed the State’s investigation into Kebede would take longer than 24 hours. RP 1490. Kline explained the State needed to investigate whether to bring an additional charge against Shire with Kebede as a complaining witness. Kline also noted the State would need to call rebuttal witnesses. Finally, Kline noted impeachment evidence might exist since Kebede had contacted Shire while Shire was in jail and had also appeared in court and sat through Williams’ testimony. RP 1467-69, 1482.

Defense counsel objected to the prosecutor’s month length recess proposal, noting he believed Kebede’s testimony could be completed that afternoon. RP 1476, 1487. The State proposed the trial court question the jury as to whether they could return after a month long recess. RP 1486, 1495-96. Defense counsel again objected, noting the jury could infer the reason for the delay was caused by the defense which would prejudice Shire. RP 1499.

The trial noted the State had reason to want to conduct further investigation, and “I can’t tell them that they can’t.” RP 1499. The trial court explained it was not going to poll the jury because it did not feel it was fair to require them to return after a month long recess. RP 1499-

1500. The trial court sua sponte granted a mistrial. RP 1493-94, 1500; CP 40. In granting a mistrial, the trial court noted the weaknesses in the testimony of the State's witnesses: "This is not quote, unquote a straightforward case. Everybody's hemming and hawing and telling a little bit about what they know, and I don't think they're telling the entire truth for the most part, and I don't know that anybody disagrees with me on that." RP 1500. The trial court also noted the State would benefit from a mistrial because it would be able to add an additional assault charge against Shire, naming Kebede as a complaining witness. RP 1481.

Shire's trial began anew on September 3, 2014. RP 1504. Defense counsel moved to dismiss Shire's retrial on the basis of double jeopardy. RP 1508-13; CP 43-50. Counsel for both Shire, and co-defendant Mohamed Ibrahim, noted that the trial court had several options other than declaring a mistrial. RP 1513. First, the court could have ordered a short recess for several days allowing the State to interview Kebede. RP 1511-13, 1518, 1534. Counsel noted that prosecutor Kline's wedding did not occur for two weeks after the declared mistrial. During that two week period, Kline remained in the Seattle area. Accordingly, counsel argued that the case could have continued after a short recess without interrupting Kline's scheduled vacation. RP 1518, 1528-32. Second, counsel noted that prosecutor Sewell could have continued the trial in Kline's absence.

RP 1512, 1518-19. Finally, the trial court could have polled the jury to determine whether they could return after a recess of any length. RP 1513, 1518-19.

Counsel noted that the State's case against Shire and Ibrahim would improve at the second trial. First, the mistrial allowed the prosecutor to add an additional charge of assault against Shire and Ibrahim with Kebede as a complaining witness. Second, the State would be able to present the testimony of a medical expert that was excluded from the first trial due to the State's late disclosure of him as a witness. RP 1520.

The State maintained they were unaware of Kebede's true identity until he approached defense counsel during the first trial. RP 1524; CP 135-50, 296-98. Although the State acknowledged neither party had consented to the mistrial, it argued the mistrial was not an "unreasonable remedy" under the circumstances. RP 1527.

The trial court noted the apparent lack of diligence undertaken by police to find Kabede during the first trial. RP 1523, 1536. The trial court also believed the defense could have identified Kebede sooner since Shire was in contact with him. RP 1536-37. The trial court questioned why the first trial had taken so long, especially in light of prosecutor Kline's scheduled vacation. RP 1537. The trial court noted however, that it did not believe a day recess would have allowed either party sufficient time to

present evidence. RP 1537-38. The trial court concluded the first trial court properly exercised its discretion in granting a mistrial for “manifest necessity.” RP 1536-39.

C. SUPPLEMENTAL ARGUMENT

DOUBLE JEOPARDY PRECLUDED RETRYING SHIRE BEFORE A DIFFERENT JURY BECAUSE SHIRE DID NOT CONSENT TO A MISTRIAL AND NO ‘MANIFEST NECESSITY’ EXISTED.

The Double Jeopardy Clause of Fifth Amendment provides that no person shall be “twice put in jeopardy of life or limb” for the same offense. U.S. Const. amend. V. Similarly, article 1, section 9 of the Washington Constitution provides: “No person shall be twice put in jeopardy for the same offense.”

The constitutional prohibition against double jeopardy protects defendants from running the same “gauntlet” more than once. State v. Robinson, 146 Wn. App. 471, 477-78, 191 P.3d 906 (2008). It also prohibits the State from having more than one opportunity to convict a defendant for the same crime. Id.; Arizona v. Washington, 434 U.S. 497, 505, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978). The defendant’s constitutional “right to be tried by the jury first chosen and sworn to try his case is inviolable.” State v. Rich, 63 Wn. App. 743, 749, 821 P.2d 1269 (1992). A court considering a mistrial must engage in a “scrupulous exercise of

judicial discretion' before foreclosing a defendant's 'valued right to have his trial completed by a particular tribunal.'" State v. Melton, 97 Wn. App. 327, 332, 983 P.2d 699 (1999) (quoting State v. Browning, 38 Wn. App. 772, 775, 689 P.2d 1108 (1984); United States v. Jorn, 400 U.S. 470, 485, 91 S. Ct. 547, 558, 27 L. Ed. 2d 543 (1971)).

When an initial prosecution ends in mistrial, a subsequent retrial increases the emotional and financial burden imposed on the defendant, may give the State an unfair opportunity to tailor its case based on what it learned the first time around, and may increase the chances that an innocent person will be convicted. State v. Jones, 97 Wn.2d 159, 162, 641 P.2d 708 (1982); Washington, 434 U.S. at 504, n. 14. "Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." Washington, 434 U.S. at 505.

If a jury is discharged after jeopardy attaches but before the jury reaches a verdict, a defendant may be tried again for the same crime only if: (1) he freely consents to the mistrial, or (2) the mistrial was required by a "manifest necessity." State v. Juarez, 115 Wn. App. 881, 836-87, 889, 64 P.3d 83 (2003); United States v. Dinitz, 424 U.S. 600, 606-07, 96 S. Ct. 1075, 47 L. Ed. 2d 267 (1976). To discharge the jury without the defendant's consent is tantamount to an acquittal "unless such discharge was necessary in the interest of the proper administration of public

justice.” Jones, 97 Wn.2d at 162. This means that “extraordinary and striking” circumstances must be present which clearly indicate that substantial justice cannot be obtained without discontinuing the trial. Id. at 163.

Shire did not consent to the mistrial, and the trial court failed to consider available alternatives to declaring a mistrial. The trial court’s finding that “manifest necessity” warranted a mistrial violated the constitutional prohibition against double jeopardy.

1. Jeopardy Attaches.

Jeopardy attaches once a jury has been empanelled and sworn. Robinson, 146 Wn. App. at 478. Here, the trial court declared a mistrial after the first jury was selected and sworn and after the majority of witnesses had already testified for the State. RP 1493-94, 1500; CP 40. Jeopardy therefore attached and the court was permitted to discharge the jury only upon Shire’s consent or if a “manifest necessity” clearly indicated that substantial justice would not be obtained without discontinuing the trial. Jones, 97 Wn.2d at 162; Juarez, 115 Wn. App. at 886-87; Dinitz, 424 U.S. at 606-07. Because Shire did not consent to the mistrial, the trial court’s declaration of mistrial must be properly based on “manifest necessity” in order to circumvent the double jeopardy prohibition.

2. A 'Manifest Necessity' Did Not Exist Because the Trial Court Failed to Consider Alternatives to a Mistrial.

A “manifest necessity” warranting mistrial arises only when there are “very extraordinary and striking circumstances.” Downum v. United States, 372 U.S. 734, 736, 83 S. Ct 1033, 10 L. Ed. 2d 100 (1963); Jones, 97 Wn.2d at 164. Courts examine three factors when determining whether a mistrial was properly based on “manifest necessity:” (1) whether the court acted precipitately or gave both defense counsel and the prosecutor full opportunity to explain their positions; (2) whether it accorded careful consideration to the defendant’s interest in having the trial concluded in a single proceeding; and (3) whether it considered alternatives to declaring a mistrial. Robinson, 146 Wn. App. at 479-80 (citing Melton, 97 Wn. App. at 332).

Here, the trial court did not realistically consider alternatives to a mistrial even though both the prosecutor and defense counsel presented other workable options. First, the trial court only considered two options for a recess: one day, or 28 days. The court never brought Kabede into the courtroom to learn in detail the nature of his testimony. Although the prosecutor had interviewed Kabede, the court never inquired why a lengthy continuance was necessary. It was not clear why a continuance short of 28 days would not have provided sufficient time for the State to

prepare for cross-examination of Kabede. Indeed, as defense counsel later noted, “the State is making representations that their investigation and their need to call rebuttal witnesses will take greater than 24 hours, but I certainly don’t see any evidence of – of what they’ve done in the approximately nine months since.” RP 1534.

The trial court also did not seriously explore the possibility that prosecutor Kline could return after a short recess to finish the trial. Even though Kline was scheduled to start her vacation on December 18, she was not scheduled to leave Seattle during the two-week period prior to January 1. Kline was scheduled to be in Seattle during her vacation during the period from December 17 to December 31. RP 1518, 1528-32; CP 296-98. As Kline told the trial court, “I’m not going anywhere.” RP 1490.

Similarly, the trial court never inquired whether the second prosecutor on the case, Sewell, could complete the trial for the State in Kline’s absence. Sewell had presented much of the State’s case up to that point. Indeed, Sewell did not indicate he would be unavailable to continue the trial in Kline’s absence.

Finally, the trial court declined to poll the jury to determine whether they could accommodate a lengthy continuance to January 14th. The court’s view was that it would be too much of an imposition to ask the jurors to return after a long recess, and that they would conclude that the

defense was to blame for the recess. Each of those concerns could have been cured with appropriate jury instructions.

All of the options noted above would have been preferable to declaring a mistrial over the objections of Shire and the prosecutor. Where, as here, reasonable alternatives to a mistrial existed, courts have concluded the “manifest necessity” standard is not met and the Double Jeopardy Clause bars retrial. Robinson is instructive in this regard.

In Robinson, the trial court declared a mistrial over Robinson’s objection after finding that the bailiff committed misconduct by having communication with the jury. 146 Wn. App. at 476-77. The trial court reasoned the jury did not follow the instruction to refrain discussing evidence before deliberations, and the bailiff’s comment to the jury about evidence that had not been introduced as an exhibit would affect the attorneys’ trial strategies. Id.

Robinson moved to dismiss after the court’s declaration of a mistrial because a retrial would violate the constitutional prohibition against double jeopardy. Robinson argued primarily that the trial court’s failure to question the jurors or bailiff rendered the mistrial procedurally defective. Counsel asserted that in the absence of an evidentiary inquiry, the record did not support a mistrial based on “manifest necessity” and the retrial would prejudice Robinson because the State could reformulate its

case after the mistrial and obtain the testimony of a witness who did not appear at the first trial. Id.

The Court of Appeals concluded the record did not support a mistrial on the basis of “manifest necessity.” Robinson, 146 Wn. App. at 484. The Court noted the trial court failed to consider alternatives to mistrial such as admonishing the jury or providing curative instructions. Id. at 483. Accordingly, the Court concluded constitutional prohibition against double jeopardy prohibited Robinson’s retrial and subsequent convictions. Id. at 484. See also, State v. Sheets, 128 Wn. App. 149, 158, 115 P.3d 1004 (2005), rev. denied, 156 Wn.2d 1014 (2006) (holding that retrial was barred where the trial court granted a mistrial after a witness testified the complaining witness was “flirting” with him on the night of alleged attempted rape, and where the trial court could have cured any prejudice resulting from violation of the rape shield law by providing limiting instruction); State v. Browning, 38 Wn. App. 772, 776, 689 P.2d 1108 (1986) (retrial was barred where the trial court granted a mistrial after the prosecutor said multiple times during closing argument that jury instructions were “misleading,” and there was no showing that a less precipitous action would not have solved the problem).

Like Robinson, here the trial court failed to consider a reasonable alternative to declaring a mistrial such as taking a short recess, having a

different prosecutor complete the case, or admonishing the jury or providing curative instructions following a lengthy recess. Moreover, as noted in Robinson, here the retrial prejudiced Shire because the prosecutor's case improved significantly between the first and second trial. At the first trial, the emergency room physician's testimony had been excluded. RP 1035-36, 1499, 2053. In the second trial Nicholas Vedder testified about the injuries to Barnes. RP 1520, 1540, 2055-67. In the first trial, Shire was charged with only two counts of first degree assault. CP 1-8. At the second trial, the State added an additional charge of assault against Shire with Kebede as the named victim. CP 64-66; 1519, 1521, 1540.

The trial court erred in declaring a mistrial for "manifest necessity" because it failed to consider alternative options. The prohibition against double jeopardy prohibited Shire's retrial and subsequent convictions.

3. A 'Manifest Necessity' Did Not Exist Because the State Contributed to the Time Constraints.

When the State causes the circumstance that creates a difficulty in proceeding with a trial, "the State assumes the risk of failing to set the stage before placing a criminal defendant in jeopardy." Juarez, 115 Wn. App. at 889 (citing Downum, 372 U.S. at 737). Here, the prosecutor's planned 28-day vacation created a problem that could not be blamed on

Shire. The prosecutor's scheduled vacation was not the kind of emergency or necessity which should have given the State another opportunity to prove its case. The case was set for trial on October 28. The prosecutors requested, and were granted, a total of nine continuances because they were in trial on other matters. CP 136. Due to those continuances, Shire's first trial did not start until November 26, 2013. RP 1. When the trial did start, the State was not ready to proceed. It had not made witnesses available for defense interviews and failed to have witnesses ready to testify. RP 7, 13, 176-77, 246-53. It was the State that created the time constraints between the start of the trial and the date set for the prosecutor's vacation.

Juarez and Rich are instructive. The day before Juarez's trial the State disclosed for the first time tapes recordings of alleged controlled buys of cocaine involving Juarez. Juarez, 115 Wn. App. at 884. Transcripts of the new tapes included incriminating statements previously labeled "inaudible." The trial court provisionally granted defense counsel's motion to exclude the tapes. Id. The next day, the State moved for reconsideration of the trial court's ruling excluding the tapes. Id. at 885. In response, Juarez moved to dismiss the case because the State's failure to provide timely discovery had prevented Juarez from obtaining his own expert analysis of the tapes. The court denied the motion to

dismiss. Id.

The State conceded that the latest transcripts contained new and highly incriminating evidence. The court calculated that the State had retained the tapes for 78 to 79 days before providing the transcript. The court thought this inexcusably tardy and prejudicial to the defendant. But the court found that the State had not acted in bad faith. It therefore decided to continue the trial on the continuing availability of the jury. Id. Juarez again unsuccessfully moved to dismiss. Id. at 886.

The court then announced it would not continue the trial unless Juarez formally moved for a continuance. Defense counsel did so under protest, citing his inability to defend against the newly produced evidence. Id. The State objected to any continuance past April 24, the last speedy trial date. But, in light of the highly damaging nature of the most recent transcripts and the defense's need for more time to address it, the court ordered the trial continued until May 23. The court then declared a mistrial and dismissed the jury. Id.

On appeal, the Court concluded the prosecutor had created the problem and as a result, Juarez did not freely "consent" to the discharge of the jury. Id. at 890. The Court noted that the trial court proceeded with jury selection before deciding crucial matters necessary to determine whether the case was ready to be tried. The "manifest necessity" was,

then, of the trial court's making. Id. at 889. Retrial was therefore prohibited by the Double Jeopardy Clause. Id. at 890.

Similarly, in Rich, the trial judge declared a mistrial over the defendant's objection. 63 Wn. App. at 746. The prosecutor had failed to prove the identity element of the offense, and defense counsel moved to dismiss. The prosecutor tried to re-open his case, but the trial judge denied that motion, and declared a mistrial. The defendant was subsequently tried and convicted. Id. The Court of Appeals concluded the State's failure to identify Rich was not a problem that could be blamed on Rich. Rich, 63 Wn. App. at 748-49.

Like Juarez and Rich, here the delayed start to trial, unavailability of State witnesses, and the prosecutor's planned 28-day vacation created a problem that cannot be blamed on Shire. The prosecutor's scheduled vacation was not the kind of emergency or necessity which should have given the State another opportunity to prove its case.

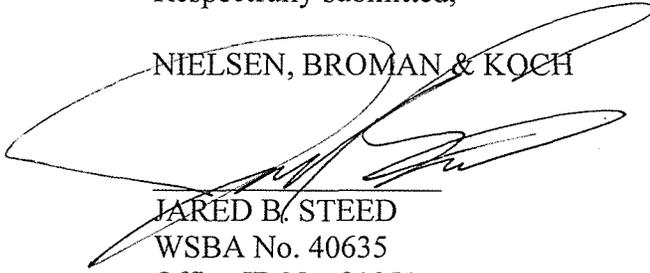
D. CONCLUSION

For the reasons stated above, and in the opening brief, this Court should reverse Shire's convictions.

DATED this 26th day of January, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A large, stylized handwritten signature in black ink, appearing to read 'Jared B. Steed', is written over the printed name and extends upwards into the 'Respectfully submitted' line.

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

STATE OF WASHINGTON)	
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Respondent,)	
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v.)	COA NO. 72734-6-I
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YUSUF SHIRE,)	
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Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 26TH DAY OF JANUARY, 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] YUSUF SHIRE
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SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF JANUARY, 2016.

X *Patrick Mayovsky*