

NO. 72734-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

YUSUF SHIRE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY M. RAMSDELL, JUDGE
THE HONORABLE WILLIAM L. DOWNING, JUDGE

SUPPLEMENTAL BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DEBORAH A. DWYER
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

	Page
A. <u>SUPPLEMENTAL ISSUE</u>	1
B. <u>SUPPLEMENTAL STATEMENT OF THE CASE</u>	1
C. <u>SUPPLEMENTAL ARGUMENT</u>	12
1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN FINDING A MANIFEST NECESSITY FOR A MISTRIAL	12
a. The Court Considered Multiple Alternatives..	16
b. The State Did Not Create The Time Constraints	25
D. <u>CONCLUSION</u>	28

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Arizona v. Washington, 434 U.S. 497,
98 S. Ct. 824, 54 L. Ed.2d 717 (1978)..... 13, 19

Gori v. United States, 367 U.S. 364,
81 S. Ct. 1523, 6 L. Ed.2d 901 (1961)..... 15

Illinois v. Somerville, 410 U.S. 458,
93 S. Ct. 1066, 35 L. Ed.2d 425 (1973)..... 13, 14

United States v. Chapman, 524 F.3d 1073
(9th Cir. 2008) 18

United States v. Jorn, 400 U.S. 470,
91 S. Ct. 547, 27 L. Ed.2d 543 (1971)..... 15

Wade v. Hunter, 336 U.S. 684,
69 S. Ct. 834, 93 L. Ed. 974 (1949)..... 13

Washington State:

State v. Eldridge, 17 Wn. App. 270,
562 P.2d 276 (1977), *rev. denied*,
89 Wn.2d 1017 (1978)..... 14

State v. George, 160 Wn.2d 727,
158 P.3d 1169 (2007)..... 13

State v. Gocken, 127 Wn.2d 95,
896 P.2d 1267 (1995)..... 12

State v. Henderson, 114 Wn.2d 867,
792 P.2d 514 (1990)..... 22

State v. Jones, 26 Wn. App. 1,
612 P.2d 404, *rev. denied*,
94 Wn.2d 1013 (1980)..... 14, 18, 19

State v. Juarez, 115 Wn. App. 881,
64 P.3d 83 (2003)..... 27

State v. Melton, 97 Wn. App. 327,
983 P.2d 699 (1999)..... 15, 18, 19, 22

State v. Momah, 167 Wn.2d 140,
217 P.3d 321 (2009)..... 22

State v. Rich, 63 Wn. App. 743,
821 P.2d 1269 (1992)..... 27

State v. Robinson, 146 Wn. App. 471,
191 P.3d 906 (2008)..... 22, 24

State v. Turner, 169 Wn.2d 448,
238 P.3d 461 (2010)..... 12

Other Jurisdictions:

Bailes v. Jolliffe, 208 W. Va. 481,
541 S.E.2d 571 (2000) 14

Glover v. Eighth Judicial Dist. Court, 125 Nev. 691,
220 P.3d 684 (2009)..... 14

Porter v. Ferguson, 174 W. Va. 253,
324 S.E.2d 397 (1984) 14

Quinones v. State, 215 Md. App. 1,
79 A.3d 381 (2013)..... 14

Constitutional Provisions

Federal:

U.S. CONST. amend. V 12, 15

Washington State:

CONST. art. I, § 9..... 12

A. SUPPLEMENTAL ISSUE

1. A declaration of mistrial, even over a defendant's objection, does not bar retrial where there is a "manifest necessity" for the mistrial. The trial court gave all parties a full opportunity to explain their positions, considered alternatives to a mistrial, and recognized the defendants' interest in having the trial concluded in a single proceeding. The court found that the State would need more than a day or two to investigate and prepare to cross-examine a "late-disclosed defense witness." The court declined to require the prosecutor to interrupt her long-scheduled vacation for her marriage and honeymoon abroad, and concluded that a month-long recess was unworkable for several reasons. Did the trial court properly exercise its broad discretion in finding a manifest necessity for a mistrial?

B. SUPPLEMENTAL STATEMENT OF THE CASE

The identity of the third victim of this shooting was a mystery from the outset. Based on a statement that Vincent Williams gave to police, the State believed his name was "Kip" or "Barquet." CP 139-40, 297. Williams could not or would not provide any further information to help in identifying this person. CP 140. Believing that "Kip" might be a member of the Barquet family, which was

“fairly well known” to Seattle police, the State directed its efforts toward “scouring records looking for someone in the family that was either in that area or the same age.”¹ RP 1524.

Vincent Williams testified at the first trial that someone named Berket (whom Williams also referred to as “Ket”) was present at the time of the shooting. RP 467, 471. Williams said that Berket was standing right next to himself and Mardillo Barnes when “Louie” [Shire] started firing at the group. RP 478-79. Barnes also acknowledged knowing someone named Berket or Kip or Kit (whom Barnes called “Ket”), but insisted that he had “no idea” what the man’s real name was. RP 946-47.

Despite his best efforts, Detective Janes was unable to locate this person. Mardillo Arnold did not know who Berket was. RP 1206. Mardillo Barnes refused to give police any information. RP 1206. Vincent Williams told Janes that he knew the man only as Berket, and didn’t know where he could be found. RP 1206. Janes was left with little to go on.² RP 1206-07.

¹ The mistake is understandable. Brief research reveals criminal cases against a number of members of the Barquet family over the years. See 2008 WL 434879 (Gregory Barquet); 2003 WL 23019949 (Michael Barquet); 1995 WL 917004 (Robert Barquet); 1995 WL 1054133 (Derrick Barquet); 1993 WL 13142319 (Christopher Barquet); 1993 WL 13142320 (Ronald Barquet).

² Like the prosecutors, Janes was apparently under the impression that he was looking for a member of the Barquet family. RP 1206.

Nearing the end of the first trial, at the close of the trial day on December 16, 2013, the State announced that it had one more witness, whose testimony would be brief. RP 1390. The court informed jurors that they would hear closing arguments the following morning. RP 1392. The next morning, the State announced that its final witness was present. RP 1431. The court and the parties then spent a few moments finalizing the jury instructions. RP 1431-47.

Shire's attorney then abruptly informed the court that he had interviewed Berket Kebede. RP 1448. Counsel elaborated that "Berket Kebede will testify that he knows all the parties in the case, that he was present at the shooting, that he did see the shooters, and that the shooters are not Mr. Shire or Mr. Ibrahim." RP 1449. Counsel represented that Kebede was present in the hallway outside the courtroom.³ RP 1452.

The State scrambled to interview Kebede, which was accomplished by detectives with all counsel present. CP 175, 183-84. Kebede admitted that Shire had called him from jail on multiple occasions, that he had visited Shire in jail four or five times,

³ Not surprisingly, the court's response was, "Who is Mr. Kebede again?" followed by, "I thought he was Kip Berket." RP 1452.

and that Shire had given him mail to pass on to someone else. CP 211, 235-36, 245, 247. Kebede gave police his phone number.⁴ CP 217-18, 236.

Kebede also revealed that he had been present in court for a portion of Vincent Williams's testimony.⁵ CP 227. Kebede said that he had encountered Shire's attorney, Ned Jursek, on the day after Williams's testimony. CP 227. Kebede and Jursek had talked for about ten minutes on a bench outside the courtroom. CP 229. Kebede had told Jursek that he was a witness to the events in question, and had given Jursek his phone number. CP 228-29.

Jursek told the court that he first had contact with Kebede on December 10th, in the hallway outside the courtroom during an afternoon break. RP 1474. Jursek had used the intervening week to investigate Kebede's potential testimony, discuss it with his client and with colleagues, and weigh how to proceed. RP 1474-75. Jursek nevertheless insisted that Kebede should be allowed to

⁴ Prosecutors subsequently reviewed more than 220 jail calls made by the defendants, and discovered multiple calls to Kebede's number from both defendants. The first call from Shire to Kebede was made on May 31, 2013, only two weeks after the shooting; the first call from Ibrahim to Kebede came a week later, on June 8th. These calls were made more than six months before Shire's disclosure of Kebede as a witness for the defense. CP 1, 143, 297; RP 1431, 1448.

⁵ Vincent Williams testified on December 5, 2013. RP 431, 457-611.

testify that very day (December 17th), leaving the State no time to prepare cross-examination or gather rebuttal evidence. RP 1476.

The court expressed considerable skepticism about Kebede's belated revelations. The court pointed out "the fact that [Kebede] was sitting in the courtroom for part of the testimony. And apparently both of the Defendants know him, and would have been aware that he's in the courtroom, and apparently if they think he's helpful to their defense, would have told somebody that that's the guy we need, and on and on it goes." RP 1472. The court added: "But [Kebede] knows this substantial injustice is being perpetrated on these two gentlemen for months on end, and he was there, and he knows that they didn't have any involvement. And yet he goes and visits them, but he doesn't do anything to lend a hand in getting these gentlemen vindicated, or out of custody, or the right guys arrested?" RP 1478.

The court also expressed frustration. "Well I know the defense doesn't have an obligation to put on evidence. But it always rankles me when I know that it's fairly obvious that people have continuing contact with other individuals who are supposedly helpful to them, and then it doesn't happen until you're talking about jury instructions. All of a sudden a miracle happens." RP 1476.

The court nevertheless concluded that it could not exclude Kebede's testimony. RP 1472, 1485, 1490.

The question became how best to proceed. The State proposed that the court inquire of jurors whether they could return on January 14th to finish the trial. RP 1486. The lead prosecutor, Julie Kline, had given significant advance notice of her upcoming vacation, scheduled for December 17, 2013 through January 13, 2014. CP 296. During this time, Kline was to get married and travel out of the country on a honeymoon. CP 296.

The State pointed out that it could not realistically be prepared to cross-examine Kebede on a day's notice. RP 1490. Rebuttal witnesses would need to be gathered. RP 1481, 1490. In addition, the State would have to identify and listen to numerous jail phone calls to determine when the defendants had been in contact with Kebede and what had been said. RP 1482; CP 297 (State ultimately combed through more than 220 jail phone calls), 143 (both defendants had been in contact with Kebede since shortly after being charged with these crimes).

Both defendants objected to the proposal to recess trial until January 14th. RP 1487-89. The court ultimately rejected that alternative, citing concerns that jurors would feel coerced, that they

would ultimately blame the defense for the delay, and that their notes would be inadequate to refresh their memories on the nuances of testimony after such a long delay. RP 1463, 1496, 1500.

The court also refused to require the State to proceed on such short notice, observing that, in light of the substance of Kebede's proposed testimony, the State would need time to do the extensive background investigation necessary to effectively cross-examine him. RP 1491, 1499. "I wouldn't do it to the defense. I don't think it's appropriate for me to do it to the State either." RP 1499.

After considerable deliberation, the court *sua sponte* declared a mistrial. RP 1494. "And I don't think jeopardy attaches because, in essence, it was a late disclosed defense witness that necessitated the mistrial. And I will find manifest necessity for all the reasons I've said already." RP 1500.

While Ibrahim's attorney objected to the mistrial, Shire's did not. After the trial court explained its reasons for adhering to its decision to declare a mistrial in spite of the State's opposition to that course of action (RP 1496-98), Ibrahim's attorney objected "[f]or the record." RP 1498. Shire's attorney, however, noted only

that his concerns were similar to those expressed by the court, specifically that reconvening with the same jury after a lengthy recess would reflect negatively on Shire because the jury would infer the reason for the delay, regardless of any instruction from the court.⁶ RP 1499. The court adhered to its decision. RP 1500.

The case proceeded to a second trial on September 3, 2014, before the Honorable William Downing.⁷ RP 1504. Shire moved to dismiss based on double jeopardy. CP 43-50. The State responded. CP 135-256. After reading the written submissions, Judge Downing heard oral argument on this issue. RP 1508-36.

Shire's attorney detailed the investigation he had conducted during the week between the day that Kebede first contacted him (December 10, 2013)⁸ and the day on which he revealed this contact and announced his intention to call Kebede as a witness (December 17, 2013). Counsel had felt the need to have Kebede

⁶ In light of counsel's response, Shire's claim that the court declared a mistrial over Shire's objection appears to be inaccurate. See Supplemental Brief of Appellant at 11.

⁷ The Honorable Jeffrey Ramsdell had presided over the first trial. RP 1. At the second trial, DPA Julie Kline was replaced by DPA Stephen Herschkowitz; DPA Paul Sewell served as second chair at both trials. RP 1, 1504.

⁸ The transcript mistakenly lists the date on which defense was first contacted by Kebede as "Tuesday, December 13th." RP 1509. This is contradicted by counsel's earlier statement that Kebede first approached him on Tuesday, December 10th (RP 1474); counsel's subsequent statement that the "following day" was Wednesday, December 11th (RP 1509); counsel's reference to "Friday, December 13th" (RP 1510); and the calendar, which shows that December 10th fell on a Tuesday in 2013.

interviewed by an investigator, listen to numerous jail phone calls, discuss the issue with his client, staff the issue with several other attorneys, and weigh the pros and cons of calling Kebede as a witness. RP 1510. Counsel asserted that "it was important for me to do that due diligence." RP 1510.

Ibrahim's attorney accused the State of having made no effort to locate Kebede. RP 1516. She argued that Judge Ramsdell could have forced DPA Kline to give up a few days of her vacation in order to investigate and prepare to respond to Kebede's proposed testimony. RP 1518. She argued that DPA Sewell could have finished the trial. RP 1518-19. And in spite of the fact that both defense attorneys had objected to such a course of action, she argued that Judge Ramsdell should have polled the jury to see if they could return in four weeks. RP 1487, 1488, 1519.

Judge Downing questioned the State on its efforts to locate Kebede, noting that the court was sometimes "a little shocked" at the "lack of diligence that the police department puts in to [sic] locating witnesses in this type of case." RP 1523. DPA Sewell responded that Mardillo Barnes's parents had indicated that they knew the witness only as Ket, and that he was a friend of their

son's from the area. RP 1523-24. Sewell explained that the name had misled the prosecution:

To be perfectly honest, the State was under the impression that he was a member of the Berket [Barquet] family, which is fairly well known by the Seattle Police Department. And so that was the avenue that we were going down. I personally was scouring records looking for someone in the family that was either in that area or the same age. And so that, of course, ended up fruitless because it clearly wasn't a member of that family. It was only when he came forth that we found out -- during the trial that we found out his real identity and his -- his real name.

RP 1524.

The State also responded to defense claims that a recess of a day or two would have sufficed, and that DPA Sewell could have completed the first trial. RP 1518-19. The prosecutor pointed out that it would occupy more than a day or two just to get a transcript of the interview with Kebede.⁹ RP 1531. In addition, the State had to sift through more than 220 jail phone calls, as well as jail visitation logs. RP 1526, 1531; CP 143, 297. Background information on Kebede had to be gathered. RP 1531. Material witness warrants followed by arrest would likely have been required to obtain the presence of rebuttal witnesses. RP 1535.

⁹ The transcript of this interview is 82 pages in length. CP 175-256.

As to DPA Sewell, the record is clear that he was co-trying this case solely to gain felony trial experience. CP 296-97. At the time of this trial, he had tried only one felony case to a jury. CP 149, 296-97. Sewell would never have been assigned to try a co-defendant case involving multiple class A felonies on his own, and he was obviously neither prepared nor qualified to do so. CP 149.

Judge Downing found that neither bad faith nor misconduct had precipitated the mistrial. RP 1536. The court agreed that there was a manifest necessity for the mistrial. RP 1537-39. Pointing out that defense counsel had taken about a week to do his "due diligence" on Kebede before bringing him forth as a witness, the court concluded that "the State would need at least a week as well to find out who this individual is, to get transcripts of any defense interviews, to interview him, to listen to all of the relevant phone calls, to conduct any other background investigation that was necessary, and to arrange for any potential rebuttal testimony that might be required as a result of the new witness." RP 1538.

The court concluded that a month-long recess was not a viable option. RP 1539. The court did not think that jurors could fairly process information after taking a month off from the trial over the holidays. RP 1539. Nor would it have been fair to ask them

whether they were willing to try. RP 1539. The court denied the motion to dismiss.¹⁰ RP 1539.

C. SUPPLEMENTAL ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN FINDING A MANIFEST NECESSITY FOR A MISTRIAL.

Shire contends that the trial court erred in finding a manifest necessity for a mistrial. He argues that the court failed to consider alternatives, and he claims that the State created the time constraints that contributed to the necessity for a mistrial. The record belies these claims.

Both the federal and the state constitutions protect a criminal defendant from double jeopardy. U.S. CONST. amend. V (“nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb”); WASH. CONST. art. I, § 9 (“No person shall be . . . twice put in jeopardy for the same offense.”). These protections are coextensive, and article I, section 9 is given the same interpretation that the United States Supreme Court gives to the corresponding protection under the Fifth Amendment. State v. Turner, 169 Wn.2d 448, 454, 238 P.3d 461 (2010) (citing State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995)). In a criminal

¹⁰ Shire has not assigned error to this ruling.

case, jeopardy attaches when the jury is empaneled and sworn.

State v. George, 160 Wn.2d 727, 742, 158 P.3d 1169 (2007).

The prohibition on double jeopardy does not automatically bar retrial when a criminal proceeding is terminated without finally resolving the merits of the charges. Arizona v. Washington, 434 U.S. 497, 505, 98 S. Ct. 824, 54 L. Ed.2d 717 (1978). Rather, a defendant's "valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury." Id. See Wade v. Hunter, 336 U.S. 684, 689, 69 S. Ct. 834, 93 L. Ed. 974 (1949) (" a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments").

Where a mistrial is declared over defendant's objection, the State must show a "manifest necessity" in order to avoid the double jeopardy bar. Washington, 434 U.S. at 505. The "manifest necessity" standard cannot be applied mechanically, without attention to the particular problem facing the trial judge. Id. at 506. See Illinois v. Somerville, 410 U.S. 458, 462, 93 S. Ct. 1066, 35 L. Ed.2d 425 (1973) (rejecting mechanical formula "by which to judge

the propriety of declaring a mistrial in the varying and often unique situations arising during the course of a criminal trial”).

Improper conduct on the part of defense that prejudices the State’s case may give rise to manifest necessity for a mistrial. Porter v. Ferguson, 174 W. Va. 253, 256-57, 324 S.E.2d 397 (1984) (citing cases). The fact that the defendant or his counsel engaged in the misconduct that caused the mistrial does not necessarily trump the defendant’s double jeopardy rights, but it diminishes them considerably by increasing the level of deference to the trial court’s decision. Glover v. Eighth Judicial Dist. Court, 125 Nev. 691, 698-99, 220 P.3d 684 (2009). See Quinones v. State, 215 Md. App. 1, 79 A.3d 381 (2013) (improper remarks by defense counsel created manifest necessity for mistrial); Bailes v. Jolliffe, 208 W. Va. 481, 541 S.E.2d 571 (2000) (improper question by defense counsel created manifest necessity for mistrial).

The Supreme Court has consistently reaffirmed the “broad discretion reserved to the trial judge in such circumstances.”¹¹

Somerville, 410 U.S. at 462. “Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to

¹¹ Washington courts agree. See, e.g., State v. Eldridge, 17 Wn. App. 270, 276-77, 562 P.2d 276 (1977), rev. denied, 89 Wn.2d 1017 (1978); State v. Jones, 26 Wn. App. 1, 5, 612 P.2d 404, rev. denied, 94 Wn.2d 1013 (1980).

make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment." Gori v. United States, 367 U.S. 364, 368, 81 S. Ct. 1523, 6 L. Ed.2d 901 (1961). The Supreme Court has "consistently declined to scrutinize with sharp surveillance the exercise of that discretion." Id. Indeed, the Court has recognized that "a criminal trial is, even in the best of circumstances, a complicated affair to manage." United States v. Jorn, 400 U.S. 470, 479, 91 S. Ct. 547, 27 L. Ed.2d 543 (1971).

Washington courts have discerned several guiding principles to aid in determining whether a trial judge exercised sound discretion in granting a mistrial for "manifest necessity." State v. Melton, 97 Wn. App. 327, 332, 983 P.2d 699 (1999). These include: 1) whether the court gave both defense counsel and the prosecutor a full opportunity to explain their positions; 2) whether the court gave careful consideration to the defendant's interest in having his trial concluded in a single proceeding; and 3) whether the court considered alternatives to a mistrial.¹² The failure to expressly address all of these factors is not necessarily fatal. Id. at

¹² Shire focuses his argument on the third requirement – the need to consider alternatives.

333-34. “[T]he fundamental question is whether [the trial court] acted in a precipitate or unreasoning fashion.” Id. at 333.

a. The Court Considered Multiple Alternatives.

The trial court gave all counsel ample opportunity to argue their positions, focusing on the available alternatives. The issue first arose when Shire’s attorney announced that he had been in contact with Berket Kebede. RP 1448. The court heard from the parties at length as to the appropriate next step. RP 1452-99. Shire’s counsel urged the court to allow Kebede to testify that very afternoon, only hours after the State first learned that defense counsel had been in touch with Kebede. RP 1476. Failing that, both defense attorneys urged the court to allow Kebede to testify on the following day. RP 1487, 1489. As a further fallback position, Ibrahim’s attorney suggested that “a couple of days” would be sufficient to wrap up the trial. RP 1498.

The State suggested that the court could exclude Kebede based on “willful non-disclosure and the other issues with this particular witness’s testimony.”¹³ RP 1469. The State’s preferred remedy was a longer recess, and the State asked the court to

¹³ “Other issues” included Kebede’s presence in court during Vincent Williams’s testimony. RP 1461. The State was not prepared to formally ask for the remedy of exclusion until further investigation could be conducted. RP 1459, 1462.

question the jurors to determine whether they could return on January 14, 2014 to complete the trial. RP 1486, 1495.

Both defendants objected to the State's proposed recess. RP 1487, 1488. Both the State and counsel for Ibrahim expressed opposition to a mistrial. RP 1463, 1495, 1498.

The trial court carefully considered the alternatives, and explicitly invited comment from counsel. See, e.g. RP 1457 ("And then maybe come back and tell me what you would like me to do about this?" [directed at counsel before recess to interview Kebede]), 1487 ("So what's your thoughts on the recess until January 14th, or whatever it was?" [asked of counsel for Shire]), 1488 ("So you don't have any quarrel with a recess of some sort, but January 14th is what, too –" [asked of counsel for Ibrahim]), 1485 ("So Ms. Kline, what would you like me to do, in light of your circumstances, in light of what I feel like I'm compelled to do with regard to this witness?" [asked of lead prosecutor]).¹⁴

The court concluded that it could not exclude Kebede's testimony. RP 1471-72, 1485. The court rejected the defense proposal for a brief recess, noting that the State needed to do "significant" additional investigation in light of Kebede's proposed

¹⁴ Counsel also had a 2 hour and 20 minute lunch recess for further research. CP 400.

testimony. RP 1491. The court also rejected the State's proposal for a more lengthy recess, concerned that asking jurors whether they could return on January 14th would be coercive, that it would not be fair to jurors based on representations already made as to the length of the trial, that jurors would likely blame the defendants when they surmised that a defense witness caused the delay,¹⁵ and that the proposed recess was too long for jurors to retain in their memories what had transpired thus far.¹⁶ RP 1463, 1492, 1496, 1500.

It was only after extensive discussion of alternatives, with full input from all counsel, that the trial court declared a mistrial. This record demonstrates a careful and thoughtful exercise of the trial court's broad discretion in this regard.

In addition, the court explicitly noted the double jeopardy concern. RP 1500. The fact that the court did not discuss at greater length the defendants' interest in having their trial concluded in a single proceeding is not dispositive. See Melton, 97

¹⁵ Counsel for Shire explicitly shared this concern. RP 1499.

¹⁶ Other courts have expressed similar concerns. See Jones, 26 Wn. App. at 6 (delay created "grave risk" that jurors would be prejudiced against defendant or prosecution; such delay and risk supported declaration of mistrial even though continuance might have been "technically possible"); United States v. Chapman, 524 F.3d 1073, 1083 (9th Cir. 2008) (in evaluating declaration of mistrial, trial court's determination that jury's attention span could not withstand potentially lengthy delay "must be given substantial deference").

Wn. App. at 334 (finding no abuse of discretion in court's decision to declare mistrial even though court did not expressly acknowledge defendant's interest in having case tried in single proceeding before empaneled jury); Washington, 434 U.S. at 516-17 (absence of explicit finding of manifest necessity for mistrial does not render decision constitutionally defective where record provides justification for ruling). Moreover, the fact that the court cited Melton, supra, and Jones, 26 Wn. App. 1, 612 P.2d 404, *rev. denied*, 94 Wn.2d 1013 (1980), indicates that the court considered the double jeopardy implications of a mistrial. RP 1493. Indeed, the very fact of the lengthy discussion, during which the court invited counsel's input and considered alternatives to a mistrial, is evidence that the court considered the importance of concluding the trial in a single proceeding. The record shows that the court carefully exercised sound discretion in this regard.

Shire nevertheless seems to argue that the trial court was required to consider *all possible alternatives* to a mistrial. First, his claim that the court did not consider extending the trial for a period short of 28 days is contradicted by the record. Defense counsel urged the court to require the prosecutor to remain on the job for a few additional days in spite of her long-scheduled time off for her

wedding and honeymoon. RP 1498. The court, observing that the State had “good reason, I think, to want to do a significant amount of background investigation,” declined this option. RP 1499.

Shire also contends that the court should have considered calling a short recess, after which the prosecutor would be required to return and finish the trial. Because this alternative was never suggested to the trial court, it is not clear how long a recess Shire is belatedly suggesting. In any event, given the planning and the events that ordinarily occupy someone who is about to be married, the court could properly have refused to require the prosecutor to accept this solution.

Shire’s argument that the court should have inquired whether co-counsel Paul Sewell could have completed the case for the prosecution should also be rejected. This alternative was never suggested to Judge Ramsdell by any of the parties. This is likely because defense counsel and the court understood that Sewell did not have the necessary experience to continue on the case alone. Sewell had tried only a single felony case to a jury up to that point, and was not in a position to take over this trial. CP 149, 296-97. The trial court would not likely have forced Sewell to finish the case alone, nor should it have been required to do so.

Finally, Shire complains that the court should have polled the jury to determine whether they could come back after a nearly month-long recess. This alternative was repeatedly urged by the prosecutor. RP 1462-63, 1486, 1495, 1497. But both defendants objected to this option. RP 1487, 1488-89. The court considered this alternative at length before ultimately rejecting it based on multiple valid reasons. RP 1463, 1491, 1492, 1496, 1500.

In light of the fact that he urged the trial court to reject this option, Shire should not now be allowed to reverse course and claim that the court erred by not polling the jury concerning a lengthy recess. The court posed the question directly to Shire's attorney: "So what's your thoughts on the recess until January 14th, or whatever it was?" RP 1487. Counsel responded, "I – I think I'm left in a position to object" RP 1487.

Even more puzzling is Shire's argument on appeal that the trial court's concern that the jury would likely blame the defense for a lengthy delay "could have been cured with appropriate jury instructions." Supp. Brf. App. at 11. That is not what Shire's attorney told the trial court. In fact, counsel explicitly joined in the court's concern: "And my concern with keeping that jury is that they're going to infer the reason for the delay and that it will reflect

negatively on Mr. Shire, *regardless of an instruction.*” RP 1499 (italics added).

In light of Shire’s position in the trial court, where he explicitly endorsed the court’s decision not to poll the jury, his reversal of position on appeal should be rejected. See State v. Momah, 167 Wn.2d 140, 153, 217 P.3d 321 (2009) (“The basic premise of the invited error doctrine is that a party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial. The doctrine was designed in part to prevent parties from misleading trial courts and receiving a windfall by doing so.”) (citing State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990)).

Ultimately, a trial court is not required to consider every imaginable alternative to mistrial that an appellate lawyer may conceive of years after the fact. The “fundamental question” is whether the court acted “in a precipitate or unreasoning fashion.” Melton, 97 Wn. App. at 333. Judge Ramsdell’s consideration of the alternatives to a mistrial was neither.

Shire’s reliance on State v. Robinson, 146 Wn. App. 471, 191 P.3d 906 (2008) is misplaced. In that case, several days into the trial, the bailiff reported that the jury wished to see a piece of evidence that had not been admitted as an exhibit. Id. at 474-75.

Concluding that the jury may have disregarded the court's order not to discuss the case, the State moved for a mistrial. Id. at 474-76. The defendant objected. Id. at 476. After hearing only nine minutes of "unprepared oral argument" from the parties, without clarifying exactly what had happened, without considering *any* alternatives, and without determining whether there was a "manifest necessity," the trial court declared a mistrial. Id. at 476, 480-84. Robinson was convicted at a second trial. Id. at 477.

The Court of Appeals found that the trial court had acted "precipitately" by failing to inquire of the bailiff and jurors what had happened and who had been involved. Id. at 480-82. The appellate court further found that the trial court had failed to consider Robinson's interest in having his trial concluded in a single proceeding, and had failed to consider alternatives such as a curative instruction or seating an alternate juror. Id. at 483-84. It was under these circumstances that the Court of Appeals reversed Robinson's convictions and remanded for dismissal of the charges with prejudice. Id. at 484.

As set out above, the trial court in Shire's case gave the attorneys a full opportunity to clarify what had happened and to argue their positions; the attorneys also had a lengthy recess

during which they could research the issue. The court heard suggestions for, and considered at length, a number of alternatives to declaring a mistrial. The court fully explained its reasons for rejecting these alternatives, and explicitly found a manifest necessity for a mistrial. Unlike in Robinson, the trial court's actions here evidence a careful exercise of its broad discretion.

Finally, Shire claims that "the prosecutor's case improved significantly between the first and second trial." Supp. Brf. App. at 13. This claim is overstated. It is true that the testimony of Dr. Vedder, the emergency room surgeon who treated Barnes's injured hand, was excluded at the first trial and admitted at the second. RP 1029-36 (discussion at first trial of late disclosure of witness), 2054-69 (Dr. Vedder's testimony at second trial). However, given that Shire was no longer charged with inflicting great bodily harm on Barnes (*compare* CP 13 *with* CP 64), Dr. Vedder's brief testimony about the nature of the injury was of little significance.

Shire also claims prejudice from the amendment before the second trial, which added a third count of first degree assault with Berket Kebede as the victim. CP 65. But the very act of bringing forth Kebede as a witness made it virtually inevitable that Shire

would face a third count – Shire’s attorney weighed this very concern in deciding whether to reveal his contact with Kebede.¹⁷ RP 1511, 1514. In fact, Shire’s attorney explicitly recognized the very real possibility that the court would allow the State to amend the information prior to the State resting its case in the first trial. RP 1514. And Judge Downing pointed out that the “ordinary response” to a motion to amend at that point in the first trial would have been “to ask for a mistrial, and to go back to square one and start over the trial with the three First Degree Assault counts.” RP 1515. Thus, the mistrial and resulting second trial was not the cause of the third count of first degree assault – Shire’s own attorney’s carefully calculated decision to reveal Kebede as a witness virtually ensured that outcome.

b. The State Did Not Create The Time Constraints.

Shire next accuses the State of creating the circumstances that necessitated a mistrial because the prosecutors were in other trials for several weeks starting on October 28, 2013. He argues that this pushed the start of trial back to November 26, 2013, thus

¹⁷ “We also knew, and understood at the time, that it was likely that Mr. Kebede would be added as a third victim to the shooting. So it would expose my client to additional criminal liability.” RP 1511.

leaving insufficient time before the prosecutor's scheduled time off for her wedding and honeymoon.

Putting aside the fact that being engaged in other trials is a circumstance over which the prosecutors had little or no control, Shire ignores a more significant cause of delay. Trial had been set for September 16, 2013. CP 373. On August 23, 2013, the trial court continued the trial, pursuant to a *defense* motion, for almost six weeks, to October 28, 2013. CP 373. The reasons given for the continuance were that codefendant Ibrahim had retained new counsel, that Shire's attorney was going on vacation, and that plea negotiations were ongoing. Id.

Shire further alleges that the State caused delay by failing to make witnesses available for defense interviews and failing to have witnesses ready to testify. But as Shire's attorney candidly explained to the court, the three primary eyewitnesses (Mardillo Barnes, Vincent Williams, Thomas English) were problematic from the start, and the State did what it could to make them available to the defense for interviews. RP 246-49. Moreover, problems arise at every trial with regard to witness scheduling; in this case, such

problems were minimal and caused little delay. See, e.g., RP 72-74 (officers unavailable for CrR 3.5 hearing, but court uses time for other matters).

The cases on which Shire relies are easily distinguished. In State v. Juarez, 115 Wn. App. 881, 884-86, 64 P.3d 83 (2003), it was the State's revelation of "new and highly incriminating evidence" on the day before trial that ultimately precipitated a mistrial. In State v. Rich, 63 Wn. App. 743, 745-46, 821 P.2d 1269 (1992), it was the State's decision to try the defendant *in absentia*, and the State's resulting failure to prove identity, that led to a mistrial. In Shire's case, the trial court was clear as to the cause of the mistrial -- it was a "late disclosed defense witness." RP 1500.

In sum, the trial court was faced with a late-disclosed defense witness who had been in court during the testimony of the State's key witness, Vincent Williams, and who proposed to testify that the defendants were not the shooters. After carefully considering reasonably available alternatives, the trial court did not abuse its discretion in finding a manifest necessity for a mistrial.

D. CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the Brief of Respondent, the State respectfully asks this Court to affirm Shire's convictions.

DATED this 2nd day of May, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: Deborah A. Dwyer
DEBORAH A. DWYER, WSBA #18887
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, **Jared Steed** at steedj@nwattorney.net containing a copy of the **Supplemental Brief of Respondent**, in **STATE V. YUSUF SHIRE**, Cause No. **72734-6-I**, in the Court of Appeals for the State of Washington, Division I.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.


Name

Done in Seattle, Washington

05-02-16
Date