

NO. 72753-2-I

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

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STATE OF WASHINGTON

Respondent,

v.

MOHAMED IBRAHIM

Appellant.

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2016 APR 28 AM 9:57

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

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REPLY  
BRIEF OF APPELLANT

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**REPLY BRIEF**

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A. DOUBLE JEOPARDY

1. **Once jeopardy attaches an accused has a fundamental constitutional right to have his case decided by the jury he chooses, unless he freely consents to a mistrial, or a “manifest necessity” exists to justify a mistrial.**

**a. Factual background.**

In this case, Mr. Ibrahim did not consent to the mistrial and the trial court failed to reasonably consider other options to declaring a mistrial. Both the prosecution and defense urged the judge to grant a continuance instead of declaring a mistrial. RP (12/17/13) at 50, 60.

The prosecutors had been aware since May 18, 2013 that a witness named Berket Kabede (AKA Ket, Barquet, Kebede) existed, had been present at the time of the shooting, was a close friend of the victims, Mr. Williams and Mr. Barnes, and was a potential witness at trial. RP (12/17/13) at 28 and 50. As counsel for Mr. Shire explained to the court: “He should not be a surprise witness. The State lists him in their trial brief as a potential State witness. I think they’ve been aware of him and they’ve been aware that he’s been an eyewitness.” RP (12/17/13) at 28, RP (11/27/13) at 60. The State contends that the detectives were uncertain of his name and could not locate him during the 7 months that separated the date of the shooting from the date of the trial. This is despite the fact that Ms. Barnes, Mardillo Barnes’ mother, had told the detectives that Mr. Kabede frequently visited their house and live just up the street. RP (12/17/13) at 29. When Mr. Kabede appeared on December 17, 2013 as a defense witness, the prosecutors

declared that they were unprepared and could not immediately cross examine him. The judge then recessed the trial to give the prosecution time to interview Mr. Kabede. Detective Don Waters and Detective Wade Jones, together with prosecutors Kline and Sewell, conducted the interview. CP 108 – 189. They established that Mr. Kabede was a friend of Mr. Williams, Mr. Barnes, and the defendant, Mr. Shire. He had been present at the time of the shooting and witnessed the shooting on May 18<sup>th</sup>. He knew both defendants. (CP 138) He declared that neither defendant did the shooting. (CP 137)

Counsel for defendant Shire told the court that Mr. Kabede “was present at the shooting, that he did see the shooters and that the shooters are not Mr. Shire or Mr. Ibrahim”. RP (12/17/13) at 22.

On December 17, 2013 Mr. Kabede was present at the courthouse and prepared to testify. One of the prosecutors, Ms. Kline, told the judge that she hoped to go on a month long vacation starting that day and asked for the trial to be continued. RP (12/17/13) at 64, 65. She told the judge that the prosecution would need more than one day to prepare for cross examination of Mr. Kabede. RP (12/17/13) at 65. Although scheduled for a vacation, she would remain in Seattle during the next 14 days, until January 1, 2014. CP 59. Ms. Kline asked for the continuance of approximately one month so that she could start her vacation that day. She would be prepared to continue with the trial and presumably cross examine Mr. Kabede on the day she returned, January 14<sup>th</sup>. RP (12/17/13) at 60, 65.

The other prosecutor, Mr. Sewell, was prepared to finish the trial. Mr. Sewell had been an active participant in the trial. He had given the opening statement , RP (12/4/13) at 30, argued pretrial motions, (12/2/13) at 3, examined and cross examined at least 10

witnesses RP (12/4/13) at 32, 53, RP (12/9/13) at 3, 7, 115, 158, 185, RP (12/10/13) at 40, 56, 168 , argued jury instructions, RP (12/17/13) at 4, and would give closing argument if Ms. Kline was unavailable. He was available to cross examine Mr. Kabede, do closing argument, and had no vacation plans.

The defense suggested that a continuance of a day or two should allow the prosecutor sufficient time to prepare for cross examination. RP (12/17/13) at 74. Although both the defense and prosecution requested a continuance, the trial judge rejected both proposals and sua sponte declared a mistrial. CP 49

### **b. Legal Argument**

A defendant in a criminal case has the constitutional right to have the jury that he has chosen decide his case. 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, 331, 983 P.2d 699 (1999) Where a mistrial is declared over the defendant's objection, the State must show a "manifest necessity" in order to avoid the double jeopardy bar. Arizona v. Washington, 434 U.S. 497, 98 S.Ct. 824, 54 L. Ed. 2<sup>nd</sup> 717 (1978) A "manifest necessity" arises only when there are "very extraordinary and striking circumstances". Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed. 2d (1963) When there exist options to a mistrial, like a continuance or a recess of the trial, that would fairly cure the problem and allow the case to proceed to verdict, courts conclude that a mistrial is inappropriate. State v. Krenik, 156 Wn. App. 314, 231 P.3d 252 (2010). In this case

both the prosecutor and defense counsel urged the judge to consider options other than a mistrial, but the judge refused.

The issue, then, in this appeal is whether the trial judge scrupulously honored Mr. Ibrahim's right to have his case decided by the jury he had chosen. Did the judge fairly consider options which would have allowed the case to be concluded before the first jury? Were the circumstances so extraordinary and striking that no option, other than a mistrial, could have served justice?

In United States v. Jorn, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed. 2d 543 (1971) the trial judge in a tax case determined that some witnesses had not be fully advised of their Fifth Amendment right to remain silent. Instead of continuing the case to obtain counsel for the witnesses, the judge declared a mistrial. The United States Supreme Court found that there was no manifest necessity for the mistrial because a continuance could have cured the problem. Consequently, a second trial was barred by the double jeopardy clause. The court noted: “. . . where the judge, acting without the defendant's consent, aborts the proceeding, the defendant has been deprived of his "valued right to have his trial completed by a particular tribunal." State v. Jorn, supra, at 484. In Jorn, the court held that when a defendant objects to a mistrial arguing that a continuance would cure the problem: “. . . the *Perez* doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings.” State v. Jorn, supra, at 485.

Here, both the prosecutor and the defendant urged the court to consider a continuance of the proceedings to give the prosecutor time to prepare for the cross

examination of Mr. Kebede.

The judge refused to grant a continuance, but failed to explain his exact reasons. CP 49. The order for a mistrial simply said: “The Court, without motion from the parties, finds, for all the reasons set forth orally in the record, that a mistrial is justified in this case by manifest necessity and hereby orders a mistrial.” CP 49. The oral record also lacks specificity. Judge Ramsdell said in open court: “So I am going to grant a mistrial. I’m gonna do it sua sponte, and I’m going to find a manifest injustice. I don’t think there is any way that the State can be geared up to address this testimony overnight and handle it tomorrow. I will also say that I think the mistrial opens up the prospect of an amended information as well” RP (12/17/13) at 69.

Both Ibrahim’s counsel and the prosecutor urged the court to re-consider. The prosecutor noted that she had consulted with the appellate division of the prosecutor’s office and they believed there would be a double jeopardy problem if the court were not more careful. RP (12/17/13) at 71. Mr. Ibrahim’s lawyer also noted that the court had other options other than declaring a mistrial. She said: “For the record, the defense does object to a mistrial. We want to make it very, very clear. There is no reason. The State has plenty of opportunity for cross examination, opportunity to bring in rebuttal witnesses, and while it may be inconvenience melding into a month long vacation to take a couple of days, I think we can go forward.” She went on to say: “And I would first ask that we do that, and secondly pole the jury. But I think a mistrial is a mistake at this point and we would object.” RP (12/17/13) at 74.

Judge Ramsdell stated that he didn’t think the prosecution could cross examine Mr. Kabede the next day, but never commented on continuing the case for two days or

three days. Ms. Kline would be in Seattle for the next 14 days. She could have come back to do the cross examination. Alternatively, Mr. Sewell, who would have finished the trial in Ms. Kline's absence, was also available to cross examine Mr. Kabede. Nothing in the record shows the judge fairly considered other options. In addition, he could have continued the trial until January 14<sup>th</sup>. He could have excluded Mr. Kabede's testimony, for willful nondisclosure, as the prosecutor advocated. RP (12/17/13) at 32 – 34, 44. Both parties wanted the case to be completed with the first jury chosen, but the court failed to reasonably consider those options. Here, a continuance of the trial for a short time would have given the prosecutor time to prepare for the cross examination of Mr. Kabede, would have served the ends of justice, and would have honored Mr. Ibrahim's right to have the jury that he chose decide the case.

At the trial, the prosecutors never told the judge how many days they would need to conduct their investigation of Mr. Kabede. Ms. Kline, the prosecutor, told the judge it would take more than 24 hours. RP (12/17/13) at 65. In the State's brief to this court there is speculation and conjecture that an investigation of Mr. Kabede would have taken a long time. Yet, the detectives had substantial information about Mr. Kabede prior to their interview on December 17, 2013. CP 108 – 188. The State argues that the prosecutors would have had to review more than 200 jail telephone calls before being prepared to cross examine Mr. Kabede. (State's brief, page 16) In fact, there were very few calls from Shire to Kabede, perhaps five in all. CP 180, The prosecutor had Kabede's phone number to quickly gain access to those calls. RP (12/17/13) at 56, CP 169. Mr. Kabede told the detectives he had never talked with Shire about the shooting on the phone. CP 178. Mr. Kabede was aware that all telephone calls were recorded. CP

144. It was very unlikely that any helpful evidence was going to be found on the telephone calls. Additionally, before the trial began, the State had already reviewed Shire's calls. RP (11/27/13) at 63. The State had produced Shire's calls in discovery several months before the trial. RP (12/17/13) at 56.

Judge Ramsdell could have continued the case and cured the problem. In commenting on that option Judge Ramsdell said:

"Well in State v. Venegas the trial court excluded the testimony. One of the things the trial court purportedly is quoted as saying is, quote, I'm not going to take the time now in the middle of the trial, end quote. The Court of Appeals says, well continuance would have remedied it. Appellate courts (don't) have to deal with juries. They don't have to deal with real people with vacations with other obligations and so forth. So it's really easy to just go, "Well, just continue it". As if we've got nothing in the queue to take (care) of and that includes all of us. It's an easy fix for them to parrot, but it doesn't work in the real world as far as I'm concerned." RP (12/17/13) at 60.

Judge Ramsdell did not scrupulously honor the defendant's right to have the first jury decide his case. He wanted to allow the prosecutor to go on her scheduled vacation and declared the mistrial to allow that to happen. This court should find that the declaration of a mistrial violated the defendant's double jeopardy rights.

## B. MATERIAL WITNESS WARRANT

### 1. **Judge Downing erred in failing to issue a material witness warrant for Barket Kabede.**

#### **a. Mr. Ibrahim should be permitted to make this argument in the Court of Appeals; there was no waiver.**

A defendant has the right to call witnesses in his defense, has the right to

compulsory process, and has the right to be confronted by the witnesses against him.

Article 1, Section 22 of the Washington State Constitution. The Sixth Amendment to the United States Constitution provides that the accused shall have the right to compulsory process and the right to confront his accusers. United States Constitution, Sixth Amendment.

The prosecutors told Judge Downing that the State was going to call Mr. Kabede as a witness at trial and would issue a material witness warrant if he failed to appear. Although those representations were made to the trial judge, RP (9/3/14) at 40, 41, the prosecutors did neither of those things. They didn't call Kabede as a witness and didn't move for a material witness warrant. When it appeared that the State was not going to call Mr. Kabede, defense counsel attempted to force his appearance at the trial. Mr. Ibrahim's counsel talked with Mr. Kabede on the phone and he promised to come to court the next day to testify. RP (9/17/14) at 4 The defense had subpoenaed Mr. Kabede. He acknowledged receiving the subpoena. RP (9/17/14) at 4. But he failed to appear for trial. At that point, the defendants moved the court for a material witness warrant, but Judge Downing denied the motion. RP (9/17/14) at 10. Judge Downing said "in light of the timing" he would deny the motion. Mr. Kabede's testimony would have been relevant in that it would have directly contradicted the testimony of Mr. Williams. Mr. Kabede would have testified that he observed the shooting and that Mr. Ibrahim was not one of the shooters. CP 53, 74.

The State argues that Mr. Ibrahim waived his objection, by not specifically joining in the motion for a material witness warrant, and therefore this court should not consider the issue. However, it is clear from the context that Ibrahim's lawyer was

joining Mr. Jursek's motion for a material witness warrant. Ms. St. Clair had explained to the judge that she had talked with Mr. Kabede and he promised to appear at the trial to testify. Mr. Jursek made the motion, but each of them were asking the court to issue a material witness warrant. It was clear from the context that each was joining in the motion. It was also clear that if Ms. St. Clair had specifically said "I join", her motion would have also been denied.

Second, RAP 2.5 provides "A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court". Here, the co-defendant's counsel moved for a material witness warrant so that the defendants would be able to call or cross examine Mr. Kabede.

Third, RAP 2.5 also provides that a party may raise certain claimed errors for the first time in the appellate court, including "manifest error affecting a constitutional right." Here, Mr. Ibrahim's constitutional rights to confrontation, his right to call witnesses, and his right to compulsory process were implicated by the court's refusal to issue a material witness warrant. He should be permitted to raise the issue in this appeal.

**b. Mr. Ibrahim was prejudiced by the trial court's failure to issue a material witness warrant.**

When Mr. Kabede failed to appear as a witness at trial, defense counsel asked the court to provide compulsory process as guaranteed by the constitution. The defense asked the court to issue a material witness warrant. The trial court refused. RP (9/17/14)

at 10

The State argues in its brief that the defendant has failed to show that Mr. Ibrahim was prejudiced and failed to show that Mr. Kabede's testimony was material. (State's brief, pages 38 and 39)

It is instructive to look at the prior trial where Judge Ramsdell spoke to this issue. He concluded that Mr. Kabede's testimony would be material and uniquely helpful to the defense. In denying the State's motion to exclude Mr. Kabede at the first trial the judge stated: "I gather the intent of the defense is to call him (Mr. Kabede) as an exculpatory witness who will testify that these gentlemen had nothing to do with the shooting. RP (12/17/13) at 44. Judge Ramsdell found the impact of exclusion of Mr. Kabede's testimony would be significant because no one else was available to testify to what Kabede would say. Judge Ramsdell: "In this case, it is really clear to me that nobody else is going to be offering the evidence that this other, Mr. Kip, (Mr. Kabede) apparently has available. RP (12/17/13) at 45.

Judge Downing, in failing to issue a material witness warrant effectively excluded Mr. Kabede's testimony. That testimony was critical to the defense. Exclusion of Kabede's testimony clearly prejudiced Mr. Ibrahim's defense. Judge Downing's ruling violated the defendant's constitutional right to call witnesses for the defense and his right to compulsory process.

The court's ruling also violated the defendant's right to be confronted with the witnesses against him. The Sixth Amendment to the U.S. Constitution provides in part: In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him". The Fourth Amended Information, in this case, alleged in Count 3 that Mr. Ibrahim assaulted Mr. Kabede. CP 235, 236. If Mr. Ibrahim is to be

convicted of assaulting Mr. Kabede, then he has the constitutional right to confront Mr. Kabede. In Mattox v. United States, 156 U.S. 237 (1895), the Supreme Court noted the purpose of the right of confrontation:

“The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.”

In this case, that right of confrontation was particularly acute given that Mr. Kabede had told the lawyers, including the prosecutors, that Mr. Ibrahim did not shoot the gun and had not aimed it at him. Judge Downing erred in denying the motion of a material witness warrant. The ruling denied the Mr. Ibrahim the constitutional right to call and confront witnesses and the right to compulsory process.

### C. AMENDED INFORMATION

#### 1. **It was improper for the State to add a count of Assault 1 after a mistrial.**

In the Appellant’s brief, Mr. Ibrahim argued that it was improper to allow the State at the second trial to amend the Information adding a count related to Mr. Kabede. The State had failed to join that count in the first trial and they should not have been able to add it in the second trial.

In the Respondent’s brief, the State argued that the prosecutors could not have amended the Information at the first trial because they did not even know Mr. Kabede’s

name at the first trial. (State's brief, page 42) However, the State not only knew Mr. Kabede's name, but discussed with Judge Ramsdell whether to amend the information to add a count related to Mr. Kabede. Judge Ramsdell pointed out that the State had not yet rested their case so there was still time to add a count related to Kabede. He said: "You haven't rested, there's still time for amendment." RP (12/17/13) at 61. The prosecutor acknowledge that she could add a count at that time: "Sure. No, that's correct". RP (12/17/13) at 61. In another exchange Judge Ramsdell said: "So now you know who this guy is and where to locate him, you could actually add a count." RP (12/17/13) at 55. The prosecutor agreed: "We could add a count of Assault 1, that's correct." RP (12/17/13) at 56. But the prosecutor did not add another count.

Defense counsel argued to Judge Downing at the second trial that the prosecutor should not be permitted to add a charge related to Berket Kabede because of prosecutor misconduct. At the first trial, although the prosecutor was aware of Mr. Kabede, the prosecutor made a decision not to proceed with the charge related to Kabede. Ms. St. Clair explained: "I guess it is more a fundamental fairness issue. It's to me it comes under 803 (Criminal Rule 8.3). It should not be allowed. They made no effort to locate this witness. They specifically indicated to the Court on October 31 they did not intend to go forward with charges (related to Kabede). They were specifically ordered that that count would not be added . . ." RP (9/3/14) at 43.

In State v. Russell, 101 Wn 2d 349, 678 P.2d 332(1984) the court held: "Failure to join second degree felony murder in the original information precludes its inclusion for the first time by way of amendment in the second trial. To this extent the Court of Appeals is reversed." Judge Downing should not have permitted the State to add the

third count of Assault 1 related to Mr. Kabede. The State failed to add that count in the first trial and they should have been precluded from including it in the second trial.

#### D. SUFFICIENCY OF THE EVIDENCE

##### **1. The prosecutor failed to call Mr. Kabede as a witness and failed to prove that Mr. Kabede was assaulted.**

Count 3 of the amended information alleged that Mr. Ibrahim assaulted Mr. Kabede. CP 236. The term “assault” was defined in instruction number 6. CP 246. The instruction stated that an assault could be a touching that is harmful or offensive. But the state failed to call Mr. Kabede to testify. Mr. Kabede did not testify that he was touched. He did not testify that the actions of Mr. Ibrahim were harmful or offensive to him. He did not testify that he was placed in fear. The State’s evidence failed to prove an assault against Mr. Kabede. Further, the prosecutor knew that Mr. Kabede would have testified that Mr. Ibrahim did not fire a weapon and did not assault him. The prosecutor failed to disclose those facts to the jury and should be precluded from arguing that the evidence was sufficient on Count 3.

#### E. OTHER ISSUES ON APPEAL

Mr. Ibrahim re-affirms his arguments on the other issues presented in the brief of the appellant and the pro se brief of the appellant, but chooses not to make additional arguments related to those issues at this time.

Dated this \_\_\_\_ day of April, 2016.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Jon Zulauf', written over a horizontal line.

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**DECLARATION OF FILING AND MAILING OR DELIVERY**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the Reply Brief of the Appellant and one copy of the brief was filed in the Court of Appeals, Division 1, under cause number 72753-2-1, and a true copy was delivered to the Respondent King County Prosecuting Attorney and a copy was mailed with first class postage prepaid to the appellant, Mr. Ibrahim.

Dated April 28, 2016



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2016 APR 28 AM 9:58  
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