

No. 35549-3-II



COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Justen William DeFrang,

Appellant.

Clallam County Superior Court

Cause No. 06-1-00160-4

The Honorable Judge Ken Williams

Appellant's Reply Brief

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ARGUMENT

I. MR. DEFANG'S BURGLARY CONVICTION VIOLATED HIS CONSTITUTIONAL RIGHT NOT TO BE TWICE PUT IN JEOPARDY FOR THE SAME OFFENSE.

When a jury is discharged prior to verdict without the express consent of the accused, a second trial is ordinarily prohibited. *State v. Kirk*, 64 Wn. App. 788 at 793, 828 P.2d 1128 (1992). In this case, a substitute judge—who had not presided over the trial—discharged the jury without Mr. DeFrang's consent. The judge did not seek input from either party on the appropriateness of discharging the jury, did not provide an opportunity for Mr. DeFrang to object, did not make any findings (either orally or in writing), and did not declare a mistrial. RP (8/11/06) 2-5. Under these circumstances, Mr. DeFrang should not have been subjected to a second trial.

While it is true that a hung jury does not terminate jeopardy, a mistrial can only be declared for a hung jury when the judge finds that “extraordinary and striking circumstances” clearly indicate that substantial justice cannot be obtained without discontinuing the trial.¹ *See United*

¹ Under the unique circumstances of this case, the substitute judge who discharged the jury is not entitled to deference: “the rationale for this deference in the ‘hung’ jury situation is that the trial court is in the best position to assess all the factors which must be considered in making a necessarily discretionary determination whether the jury will be able to reach a just verdict if it continues to deliberate.” *Arizona v. Washington*, 434 U.S. 497 at

States v. Perez, 22 U.S. 579 at 580, 6 L. Ed. 165, 9 Wheat. 579 (1824) (“[T]he power [to discharge the jury] ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes.”) There are degrees of necessity, and only a high degree of necessity can justify a mistrial. *United States v. Bates*, 917 F.2d 388 at 394 (9th Cir. 1990).

The first step is to determine that the jurors unanimously agree that they are hopelessly deadlocked. *State v. Jones*, 97 Wn.2d 159 at 164, 641 P.2d 708 (1982); see also *United States ex rel. Webb v. Court of Common Pleas*, 516 F.2d 1034 at 1043-1044 (3d Cir. 1975) (Where “the foreman, alone, indicated a response” to the judge’s questions, “unanimous consent cannot be inferred from a silent record” as to the other juror’s beliefs.) The substitute judge here did not even take this first required step. Instead, she asked only the presiding juror his opinion on the likelihood of reaching a verdict. RP (8/11/06) 2-5. Without ascertaining that the jurors were unanimous on this point, the substitute judge could not find that the jury was hopelessly deadlocked, as required to discharge the jury and declare a mistrial. *Jones, supra*.

510, 98 S.Ct. 824, 54 L. Ed. 717 (1978). Here, the substitute judge, lacking access to the transcripts, had even less insight into the need for a mistrial than does this Court.

The court must also consider the length of deliberations in light of the length of the trial and the complexity of the issues. *Jones, supra; Kirk, supra, at 793*. In this case, there is no indication that the substitute trial judge was even aware of the length of deliberations, the length of the trial, or the complexity of the issues. RP (8/11/06) 2-5.

Four other factors are helpful in determining the appropriateness of a trial judge's decision to discharge a jury prior to verdict:

Has the trial judge (1) heard the opinions of the parties about the propriety of the mistrial, (2) considered the alternatives to a mistrial and chosen the alternative least harmful to a defendant's rights, (3) acted deliberately instead of abruptly, and (4) properly determined that the defendant would benefit from the declaration of mistrial?

Bates, supra, at 395-396.

In this case, the four factors listed in *Bates* suggest discharge of the jury was inappropriate. First, the substitute judge did not allow the parties to comment or object.² RP (8/11/06) 2-5. Second, she did not consider any alternatives to discharge, such as allowing the jury to continue deliberating without further instruction, or providing supplemental instructions. *See, e.g., State v. Watkins, 99 Wn.2d 166 at 171, 660 P.2d 1117 (1983)*. RP (8/11/06) 2-5. Third, she acted abruptly, ordering the

² She did give the parties an opportunity to suggest further questions of the presiding juror. RP (8/11/06) 2-5.

discharge without having the jury first leave the room, without allowing argument or comments on her proposed course of action, and without making any findings on the record. RP (8/11/06) 2-5. Fourth, there is no indication the judge discharged the jury with an eye toward favoring the defendant. RP (8/11/06) 2-5.

Because the substitute trial judge discharged the first jury prematurely, Mr. DeFrang's burglary conviction violates double jeopardy. The conviction must be reversed and the charge dismissed with prejudice. *Kirk, supra*.

II. THE TRIAL COURT'S INSTRUCTIONS ERRONEOUSLY ALLOWED CONVICTION IF MR. DEFANG WERE PRESENT AND APPROVED OF THE CRIME EVEN IF HE WERE NOT "READY TO ASSIST."

The trial court's accomplice instruction misstated the law and allowed conviction in the absence of proof that Mr. DeFrang was an accomplice. Respondent points out that WPIC 10.51 has not yet been determined unconstitutional;³ however this should not carry weight, since pattern instructions often endure for years before they are found to be incorrect. *See, e.g., State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000) (pattern instruction on accomplice liability erroneous); *State v. Studd*, 137

³ Brief of Respondent, p. 12.

Wn.2d 533, 973 P.2d 1049 (1999) (WPIC 16.02 “clearly erroneous,” *Studd*, at 545); *State v. Anderson*, 141 Wn.2d 357, 5 P.3d 1247 (2000) (knowledge is an element of Unlawful Possession of a Firearm; standard instruction omitting that instruction erroneous); *State v. Warfield*, 103 Wn. App. 152, 5 P.3d 1280 (2000) (although not before the court, validity of WPIC 39.16 is doubtful).

Respondent claims that the instruction is a correct statement of the law because it “expressly states that ‘more than mere presence and knowledge’ must be shown...” Brief of Respondent, p. 12. But the problem with the instruction is its failure to exclude noncriminal activity from its reach: the instruction improperly allows conviction where the accused is present (with knowledge that such presence will assist the perpetrator) and silently approves of the criminal activity, but is not “ready to assist.”

For example, a newspaper journalist who is personally opposed to the war in Iraq may be sent by an editor to cover antiwar protestors trespassing at the Port of Olympia. The protestors want coverage of their actions, and are encouraged by the reporter’s presence. The reporter knows this, and silently approves of their criminal activity, but gives no overt sign of her approval. Under the instruction, this journalist is guilty of trespass as an accomplice. First, she knows her presence “will promote

or facilitate” the trespass. Instruction No. 15, CP 43. Second, she “aids” the trespassers, given that “[t]he word ‘aid’ means all assistance whether given by words, acts, encouragement, support, or presence.” Instruction No. 15, CP 43. Third, she is “assist[ing] by her presence,” given that media attention is the protesters’ main object. Instruction No. 15, CP 43. Fourth, she is guilty of “more than mere presence and knowledge of the criminal activity,” since she personally approves of and silently supports their aims and methods. Instruction No. 15, CP 43. By the same token, a colleague from a rival newspaper who is opposed to the war would not be guilty. Under the same circumstances, such a colleague’s disapproval and lack of support for the protesters’ aims and methods would not amount to “more than mere presence and knowledge.” Instruction No. 15, CP 43.

Finally, Respondent’s suggestion that “the evidence of defendant’s participation in the crime was clear and compelling” is misplaced. Brief of Respondent, p. 13. Instructional error of this sort is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330 at 341, 58 P.3d 889 (2002). Respondent has not even attempted to meet this standard. Because the court’s instruction allowed conviction without proof that Mr. DeFrang was an accomplice, the conviction must be reversed and the case remanded for a new trial.

III. THE TRIAL COURT'S ACCOMPLICE INSTRUCTION WAS INTERNALLY INCONSISTENT.

Without citation to authority, Respondent claims that any inconsistency in the accomplice instruction "is merely an error of law," and thus not subject to review absent objection in the trial court. Brief of Respondent, p. 13. Where no authority is cited, this Court may presume that counsel, after diligent search, has found none. *Oregon Mut. Ins. Co. v. Barton*, 109 Wn.App. 405 at 418, 36 P.3d 1065 (2001).

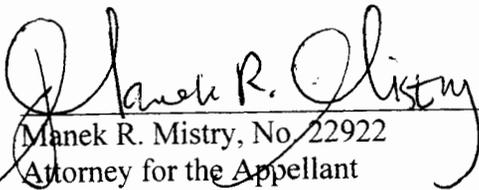
If the inconsistency misled the jury and permitted conviction without proof of all essential elements, then the error is clearly reviewable under RAP 2.5(a). *See, e.g., State v. Stein*, 144 Wn.2d 236, 27 P. 3d 184 (2001). This court should therefore review the error raised by the internal inconsistency found in Instruction No. 15. CP 43.

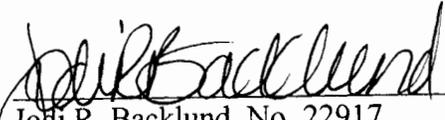
CONCLUSION

For the foregoing reasons, Count II must be vacated and dismissed with prejudice. In the alternative, Count II must be remanded to the trial court for a new trial with proper instructions on accomplice liability.

Respectfully submitted on July 18, 2007.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on December 17, 2007.

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

Signed at Olympia, Washington on July 18, 2007.



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