

28814-5-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

APR 11 2011
COURT OF APPEALS
DIVISION III
SPokane, WA

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

PIERRE DONALD WEST,

Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
HONORABLE MICHAEL P. PRICE

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying defendant West's motion to amend the Information to reflect only those counts for which re-trial would not violate double jeopardy.

2. Retrial on Counts 5, 7, 13, 14 and 15 violated West's constitutional rights to be free from double jeopardy.

3. Retrial on the original charges in Counts 3, 6 and 8 violated West's constitutional rights to be free from double jeopardy.

4. The trial court erred in instructing the jury it had to be unanimous to answer "no" to the special verdicts.

5. The trial court erred in accepting the jury's finding of acting with sexual motivation on Count 2.

6. Cumulative error deprived West of his right to a fair trial.

Issues pertaining to assignments of error.

1. Where the jury was given a full and fair opportunity to reach a verdict on Count 13 and found West guilty, did jeopardy terminate as to the first degree rape charge, barring retrial? (Assignments of Error 1, 2 and 6)

2. Did retrial of Counts 5, 7, 14 and 15 following discharge of the jury without a finding of manifest necessity for mistrial violate double jeopardy? (Assignments of Error 1, 2 and 6)

3. Did retrial following verdicts of guilty on related charges involving the same victim but silence on Counts 5 and 7 violate double jeopardy? (Assignments of Error 1, 2 and 6)

4. Did retrial of the original kidnapping charges in Counts 3, 6 and 8 violate double jeopardy where jeopardy terminated when the jury was dismissed without returning a verdict on the greater offense despite having the opportunity to do so? (Assignments of Error 1, 3 and 6)

5. Did retrial of the greater charged offenses in Counts 3, 6 and 8 violate double jeopardy where jeopardy terminated by implied acquittal? (Assignments of Error 1, 3 and 6)

6. Did RCW 10.43.020 and .050 bar the State from seeking upon retrial a conviction for a greater offense following West's conviction for the lesser offense? (Assignments of Error 1, 3 and 6)

7. Did retrial of Counts 3, 5, 6, 7, 8, 13, 14 and 15 deny West his constitutional right to a fair trial? (Assignment of Error 6)

8. In Trial No. 2, must the special verdict on Count 2 be vacated because the jury was incorrectly instructed it had to be unanimous to answer “no” to the special verdict? (Assignments of Error 4, 5 and 6)

9. Did cumulative error deprive West of a fair trial? (Assignment of Error 6)

B. STATEMENT OF THE CASE

The state charged Pierre Donald West with fifteen counts (in various degrees) of rape, kidnapping, and sexually motivated assault and harassment. CP 1–3. The charges arose from incidents in 2005 and 2007 in which the five (5) alleged victims on separate occasions agreed to accompany West to his house for sexual activity in exchange for payment. Id.; CP 4–10.

1. Verdict delivered at Trial No. 1.

Trial No. 1 concluded on May 13, 2009, with the jury delivering the following verdicts. 1 RP¹ 46–58. A summary of the verdicts is found at CP 182, and a copy of the summary is attached hereto as **Appendix A**. The jury found West not guilty of Count 13².

¹ The main proceedings are contained in 5 volumes, numbered sequentially, and will be referred to by volume number and page, e.g. “1 RP ____”. A supplemental transcript containing voir dire from the second trial will be referred to as “Suppl. RP ____”.

² CP 204.

The jury found West guilty of the lesser included “unlawful imprisonment” on Counts 3³, 6⁴ and 8⁵. The jury had been instructed as follows regarding these charged counts of first degree kidnapping:

When considering the crime of first degree kidnapping as charged in Counts 3, 6, 8 and 14, if you unanimously agree on a verdict you must fill in the words “not guilty” or “guilty” on the corresponding verdict form according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank on the corresponding verdict form.

If you find the defendant not guilty of the crime of first degree kidnapping in any of those counts, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of unlawful imprisonment. If you unanimously agree on a verdict, you must fill in the blank provided in the corresponding verdict form for the lesser offense the words “not guilty” or “guilty” according to the decision you reach.

Instruction No. 36, CP 502. The jury was additionally instructed in part:

The defendant is charged in Counts 3, 6, 8 and 14 with kidnapping in the first degree. If, after full and careful deliberation on these charges, you are not satisfied beyond a reasonable doubt that the defendant is guilty on any or all of these counts, then you will consider whether the defendant is guilty of the lesser crime of unlawful imprisonment on any of the above counts on which you find the defendant not guilty.

³ CP 188.

⁴ CP 193.

⁵ CP 197.

Instruction No. 37, CP 504. The jury left blank the verdict forms for the three charged counts of first degree kidnapping.⁶

The jury found West guilty as charged of Counts 1⁷, 2 with a finding of sexual motivation⁸, 4 with a finding of sexual motivation⁹, 9 with a finding of sexual motivation¹⁰, 10 with a finding of sexual motivation¹¹, 11¹², and 12 with a finding of sexual motivation¹³.

For each of Counts 5, 7, and 14, the jury left the verdict and special verdict forms blank. CP 190–91, 194–95, 206–07. For Count 15, the jury left the verdict form blank. CP 208. When asked by the court, the jury and its foreman said that additional time would not be of benefit in order to reach a verdict on the counts. 1 RP 51, 55.

After polling the jurors, the trial court accepted the verdicts and discharged the jury. 1 RP 51–56. The court did not declare a mistrial as to any counts.

⁶ CP 187, 192, 196.

⁷ CP 183.

⁸ CP 185, 211.

⁹ CP 189, 213.

¹⁰ CP 198, 216.

¹¹ CP 200, 217.

¹² CP 201.

¹³ CP 203, 218.

2. Post-Trial No. 1 motion for new trial based on a juror's misconduct.

The jury delivered verdicts in Trial No. 1 in mid-May 2009. RP 46–51. In July, defense counsel filed a motion for new trial, based on alleged misconduct of a juror that came to light sometime after the end of Trial No. 1. CP 221–27, 238–39. Following an evidentiary hearing in late July 2009, the court granted the motion and entered a written order. RP 59–87; CP 242–43.

3. Pre-Trial No. 2 motion by defense counsel to amend information to exclude counts barred from re-trial by double jeopardy.

In mid-December 2009, defense counsel filed a motion to amend the Information to reflect only those counts for which re-trial would not violate double jeopardy. The motion alleged a number of original charges were barred from re-trial based on prior acquittal, implied acquittal, merger and/or discharge of the jury without manifest necessity for a mistrial. CP 244–56. After a hearing (2 RP 92–104), the trial court agreed with the State's argument that the granting of defendant's motion for a new trial voided the jury's verdicts and therefore original jeopardy was still ongoing. The motion was denied.

... In this particular case, we have a jury whose determination was voided by operations of law essentially by and through the motion that Mr. West filed [and] that the Court granted for a new trial and we aren't talking about an acquittal. We're talking about a jury verdict that was essentially voided, period. Mr. West succeeded on that motion so he's not tried again on those same charges. It's a new trial.

We're still under original jeopardy if you will. I'm satisfied under that analysis a jury in this case can still hear all the same facts and allegations that were originally presented. ... I'm going to decline Mr. West's motion based upon what I see to be a very clear distinction as and by the original jury determination was voided by Mr. West's (asking for and obtaining a new trial).

2 RP 107 [bracketed material added] (material in parentheses substituted).

No written order was entered regarding denial of the motion.

4. Trial No. 2 proceedings.

The second trial took place in January 2010. 2 RP through 5 RP;

CP 452. The general instructions given the jury included the following:

Instruction No. 36: ... Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. ...

CP 334.

With respect to the special verdict forms, the jury was instructed in pertinent part:

Instruction No. 54: You will also be given special verdict forms for the following charged crimes [including Count 2 – Second Degree Assault] ... If you find the defendant guilty of any of these charged crimes, you will then use the special verdict form provided for that charged crime and fill in the blank with the answer “yes” or “no” according to the decision you reach.

Because this is a criminal case, all twelve of you must agree in order to answer any special verdict form “yes”. You must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer.

If you unanimously have a reasonable doubt as to this question, you must answer “no”. ...

CP 378 (bracketed material added).

The jury convicted West as charged of Counts 1, 2 and 11¹⁵, and found him guilty of the lesser included offense of unlawful imprisonment on Counts 3 and 8¹⁶. The jury found West not guilty of Counts 4, 5, 6, 9, 10, 12, 13, 14 and 15¹⁷. The jury also answered “yes” to the special verdict form regarding Count 2. CP 418. A summary of the verdicts from Trial No. 2 is attached hereto as **Appendix B**.

The court granted the State’s request to dismiss Count 7 because the jury had not been unable to reach a decision. 5 RP 682; CP 455. The offenses in Counts 1 and 11 qualify as strikes for a persistent offender status. 5 RP 680, 682. Finding West had one prior conviction for a most

¹⁵ CP 392, 394, 410.

¹⁶ CP 397, 406.

¹⁷ CP 398, 399, 402, , 407, 409, 412, 413, 415, 417.

serious offense, the court imposed a sentence of life without the possibility of parole. CP 455. This appeal followed. CP 451.

C. ARGUMENT

1. Retrial on the charges for which jeopardy had already terminated violated West's constitutional right to be free from double jeopardy and denied him a fair trial.

a. Double jeopardy.

The Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Article I, section 9 of the Washington Constitution similarly provides, "No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense." These provisions are " 'identical in thought, substance, and purpose.' " State v. Ervin, 158 Wn.2d 746, 752, 147 P.3d 567 (2006) (internal quotation marks omitted) (*quoting* In re Pers. Restraint of Davis, 142 Wn.2d 165, 171, 12 P.3d 603 (2000)). The double jeopardy clause protects individuals from three distinct governmental abuses: a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. State v. Gocken, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995)

(quoting North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989)).

Three elements must be met for a defendant's double jeopardy rights to be violated: (1) jeopardy must have previously attached, (2) jeopardy must have previously terminated, and (3) the defendant is again being put in jeopardy for the same offense. State v. Daniels, 160 Wn.2d 256, 261–62, 156 P.3d 905 (2007), *adhered to on reconsideration*, 165 Wn.2d 627, 200 P.3d 711 (2009), *citing* State v. Corrado, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996). In a jury trial, jeopardy attaches “when the jury is empaneled and sworn.” Crist v. Bretz, 437 U.S. 28, 38, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978). Jeopardy may be terminated in one of three ways:

- (1) when the defendant is acquitted, or
- (2) when the defendant is convicted and that conviction is final, or
- (3) when the court dismisses the jury without the defendant’s consent and the dismissal is not in the interest of justice.

State v. Ervin, 158 Wn.2d at 752–53.

West contends that his right to be free from double jeopardy was violated by retrial on all original charges because jeopardy had terminated at the end of Trial No. 1 for the below challenged charges¹⁸

b. Retrial on Counts 5 (second degree rape), 7 (second degree rape), 13 (first degree rape), 14 (first degree kidnapping) and 15 (harassment) violated West's constitutional right to be free from double jeopardy.

i. Double jeopardy by acquittal on Count 13.

An acquittal is an absolute bar to retrial, regardless of how erroneous. State v. Wright, 165 Wn.2d 783, 792, 203 P.3d 1027 (2009) (citations omitted). Here, the jury in Trial No. 1 found West not guilty of Count 13, first degree rape. CP 204. Since the acquittal terminated

¹⁸ In denying the defense motion to amend the Information prior to re-trial to eliminate those charges which violated double jeopardy, the trial court agreed with the State's argument that the granting of defendant's motion for a new trial due to a juror's misconduct had effectively "voided" the jury's verdicts and therefore original jeopardy was still ongoing. 2 RP 107. In support of this, the State cites only cases involving mistrials. CP 257-60.

The State's assertion that juror misconduct "nullified" the verdicts for which jeopardy had terminated is unsupported by any authority. The alternative notion that West's situation is analogous to cases involving mistrials is also without merit. West's first trial was not terminated by a declaration of a mistrial. It ended with verdicts on 8 original charges and 3 lesser included offenses, and the jury was not able to reach a decision on 4 counts. The trial court did not declare a mistrial on any of the counts. The court accepted the verdicts and discharged the jury. "[T]he protection of the Double Jeopardy Clause by its terms applies [where] there has been some event, such as an acquittal, which terminates the original jeopardy." Richardson v. United States, 468 U.S. 317, 326, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984). As argued *infra*, original jeopardy was terminated on a number of original counts, and retrial on those counts improperly subjected West to double jeopardy.

jeopardy, the subsequent retrial of this charge violated West's right to be free of double jeopardy.

- ii. Double jeopardy by discharge of jury without a finding of manifest necessity for mistrial on Counts 5, 7, 14 and 15.

The state and federal constitutional proscriptions against double jeopardy not only protect a defendant from a second prosecution for the same offense after a conviction or acquittal, but also protect the valued right of the defendant to have his trial completed by a particular tribunal. State v. Jones, 97 Wn.2d 159, 162, 641 P.2d 708 (1982). A retrial may be allowed where the discharge of the first jury was necessary in the interest of the proper administration of justice. Jones, 97 Wn.2d at 162. One such situation is where the first jury is genuinely unable to agree on a verdict. Jones, 97 Wn.2d at 163.

"A defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again." Green v. United States, 355 U.S. 184, 188, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

(W)here, . . . a jury has been impaneled and sworn to try the cause, the defendant has the right to have his case determined by that jury; and a discharge of that jury, without his consent, has the same effect as an acquittal, unless such discharge was necessary in the interest of the proper administration of public justice.

State ex rel. Charles v. Bellingham Municipal Court, 26 Wn. App. 144, 148–49, 612 P.2d 427 (1980), *citing* State v. Conners, 59 Wn.2d 879, 883, 371 P.2d 541 (1962).

The factors to be considered in the exercise of a trial court’s discretion to declare a mistrial include, but are not limited to, the length of time the jury had been deliberating, the length of the overall trial, and the volume and complexity of the evidence. Jones, 97 Wn.2d at 164.

“Although the decision to abort a criminal trial lies within the sound discretion of the trial court, that discretion is not unbridled. If discretion is not exercised or is exercised improperly, a mistrial is tantamount to an acquittal and frees the defendant from further prosecution. The record must reflect the factual basis upon which the trial court exercised its discretion.” State v. Rich, 63 Wn. App. 743, 748, 821 P.2d 1269, 1272 (1992) (citations omitted).

Here, the court did not declare a mistrial when faced with the blank verdict forms on Counts 5, 7, 14 and 15. After confirming with the foreman and the jury that they could not reach a verdict, the court did not inquire further. Instead, the court simply discharged the jury from the case and indicated for the record that the verdict forms “have been filed and received”. 1 RP 55–56. The discharge of West’s first jury without a

finding of manifest necessity for mistrial—a genuine and hopeless deadlock that is supported by the record—operated as an acquittal on the counts. *See Charles*, 26 Wn. App. at 148–49. Retrial on Counts 5, 7, 14 and 15 violated double jeopardy.

iii. Double jeopardy by implied acquittal where guilty verdicts were reached on related charges involving same victim on Counts 5 and 7.

Acquittal terminates jeopardy. *Richardson v. United States*, 468 U.S. 317, 325, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984). If a jury considering multiple charges renders a verdict as to one of the charges but is silent on the other charge, such action constitutes an implied acquittal barring retrial on those charges. *See State v. Schoel*, 54 Wn.2d 388, 394, 341 P.2d 481 (1959) (finding that where the jury returned a verdict of guilty for murder in the second degree but left the verdict form blank for murder in the first degree, the jury had implicitly acquitted the defendant of the greater offense); *State v. Davis*, 190 Wn. 164, 166-67, 67 P.2d 894 (1937) (finding that where the jury rendered a verdict on one count but was silent as to the other two, and the record did not show why the jury was discharged before rendering a verdict on those counts, such action was "equivalent to acquittal" (quoting *Selvester v. United States*, 170 U.S. 262, 269, 18 S.Ct. 580, 42 L.Ed. 1029 (1898))); *see also Green v. United*

States, 355 U.S. at 190–91, 78 S.Ct. 221, 2 L.Ed.2d 199 (finding implied acquittal of first degree murder where the jury returned a verdict of guilty on the second degree murder charge but was silent on the greater offense); State v. Hescok, 98 Wn. App. 600, 611, 989 P.2d 1251 (1999) (finding implied acquittal where the finder of fact was a judge who was silent as to the alternative means of committing the offense). West argues that an implied acquittal on the greater charges occurred here.

An implied acquittal of Count 5, the rape charge involving Jennifer David,¹⁹ occurred where the jury returned a verdict of guilty for the lesser included crime of unlawful imprisonment on the related Count 6²⁰ but left the verdict and special verdict forms blank for Count 5.²¹

Similarly, an implied acquittal of Count 7, the rape charge involving Carol Kivett-Cross,²² occurred where the jury returned verdicts of guilty for the related Counts 8 (lesser included), 9 and 10²³ but left the verdict and special verdict forms blank for Count 7.²⁴

The retrial on Counts 5 and 7 violated double jeopardy.

¹⁹ CP 2.

²⁰ CP 193.

²¹ CP 190–91.

²² CP 2.

²³ CP 196; 198, 216; 200, 217 respectively.

²⁴ CP 194–95.

c. Retrial on the greater offenses as charged in Counts 3, 6 and 8 violated West's constitutional right to be free from double jeopardy and denied him a fair trial.

Jeopardy terminates when the jury is dismissed without returning a verdict despite having a full opportunity to do so. Green v. United States, 355 U.S. at 184, 78 S.Ct. 221, 2 L.Ed.2d 199. In Green the Court found the Fifth Amendment prohibits a second trial on a charge where the jury fails to "return[] any express verdict on that charge." Id. at 191, 78 S.Ct. 221. The Court provided two rationales for this holding. In addition to applying the doctrine of implied acquittal, the Court enunciated a second rationale:

Yet [the jury] was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so. Therefore it seems clear, under established principles of former jeopardy, that Green's jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense.

Id. Therefore under Green jeopardy terminates either when a jury implies an acquittal by its actions *or* when a jury is dismissed without returning an express verdict on the charge.

In Price v. Georgia, 398 U.S. 323, 326, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970), the United States Supreme Court reiterated the validity of

these two methods of terminating jeopardy. The Court described Green's two methods of terminating jeopardy.

First, the Court considered the first jury's verdict of guilty on the second-degree murder charge to be an 'implicit acquittal' on the charge of first-degree murder. Second, and more broadly, the Court reasoned that petitioner's jeopardy on the greater charge had ended when the first jury 'was given a full opportunity to return a verdict' on that charge and instead reached a verdict on the lesser charge.

Price, 398 U.S. at 328-29, 90 S.Ct. 1757 (*quoting Green*, 355 U.S. at 191, 78 S.Ct. 221). By reiterating both of Green's rationales, the Supreme Court in Price firmly reaffirmed that jeopardy for an offense may terminate under either.

- i. Jeopardy terminated when the jury was dismissed without returning a verdict on the greater offense despite having the opportunity to do so.

Here the jury was given a full and fair opportunity to convict West of Counts 3, 6 and 8 (first degree kidnapping) in the first trial but failed to do so. Retrial on this Count is therefore barred by double jeopardy, absent "manifest necessity." United States v. Perez, 22 U.S. (9 Wheat.) 579, 6 L.Ed. 165 (1824). The most common example of "manifest necessity" to allow retrial is a mistrial based on a hung jury. Richardson v. United States, 468 U.S. at 324, 104 S.Ct. 3081, 82 L.Ed.2d 242 ("[W]e have constantly adhered to the rule that a retrial following a 'hung jury' does not

violate the Double Jeopardy Clause.") (citing Logan v. United States, 144 U.S. 263, 297-98, 12 S.Ct. 617, 36 L.Ed. 429 (1892)).

However, a mistrial because of a hung jury is limited to situations where the jury is "genuinely deadlocked" and requires the trial court to use its discretion to balance competing rights of the defendant before declaring such. Arizona v. Washington, 434 U.S. 497, 509, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978). In the view of the Supreme Court, the trial judge's intervention and discretion to declare a mistrial based on a hung jury is required to protect two competing rights of the defendant. Id. First, the defendant is deprived of his " 'valued right to have his trial completed by a particular tribunal' " if the jury is dismissed before reaching a genuine deadlock. Id. (quoting Wade v. Hunter, 336 U.S. 684, 689, 69 S.Ct. 834, 93 L.Ed. 974 (1949)). Second, if a jury is not discharged after "protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors." Id.

Here, the jury was partially instructed on the kidnapping counts that "[i]f you cannot agree on a verdict, do not fill in the blank on the corresponding verdict form." Instruction No. 36, CP 502. When the jury delivered verdicts only on the lesser offenses of unlawful imprisonment,

the trial court neither declared a mistrial nor made a finding of genuine jury deadlock on the greater offenses. A hung jury does not result simply from an implied statement of disagreement by the jury short of "genuine deadlock." Arizona, 434 U.S. at 509. Dismissal of the jury short of genuine deadlock deprives the defendant of his "valued right to have his trial completed by a particular tribunal." Id. A simple jury instruction informing the jury it need not return a verdict on a Count does not create a "manifest necessity" sufficient to overcome the constitutional prohibition against retrying a defendant.

The Ninth Circuit in Brazzel v. Washington, 491 F.3d 976 (9th Cir.2007) considered this exact instruction and reasoned the "unable to agree" instruction is not the equivalent of a hung jury and therefore does not require treatment as a mistrial. Brazzel, 491 F.3d at 984. The discharge of West's first jury without a finding of manifest necessity for mistrial on the greater offenses charged in Counts 3, 6 and 8—a genuine and hopeless deadlock that is supported by the record—operated as an acquittal on the counts. Jeopardy on these counts terminated when the jury was dismissed without returning a verdict on the charges. Double jeopardy barred retrying West on the more serious original charges in Counts 3, 6 and 8.

ii. As instructed in this case, jeopardy terminated by implied acquittal of the greater charged offense.

In State v. Daniels, *supra*, the court held that jeopardy was not terminated as to a greater offense where “unable to agree” instructions were given and the jury left the verdict form for the greater offense blank. In Daniels, the jury was given two verdict forms. The jury was instructed to fill in not guilty or guilty on form A if it unanimously agreed on a verdict as to the homicide by abuse charge, otherwise it should leave it blank. If the jury either found Daniels not guilty of homicide by abuse or could not agree as to that charge, the jury was then instructed to consider the second degree felony murder charge. The jury left form A blank and found Daniels guilty of murder in the second degree. Daniels, 160 Wn.2d at 260.

The Washington Supreme Court held an “unable to agree” jury instruction prevented a presumption of acquittal on the greater included offense. Daniels, 160 Wn.2d at 264. The court claimed that the “unable to agree” instruction implicitly operated as a statement of disagreement by the jury as to Daniels’ guilt or innocence and concluded that the disagreement prevented an acquittal from being implied. Id. Because there was no acquittal, jeopardy did not terminate. Id. at 264-65.

The jury in this case received a similar “unable to agree” instruction.

When considering the crime of first degree kidnapping as charged in Counts 3, 6, 8 and 14, if you unanimously agree on a verdict you must fill in the words “not guilty” or “guilty” on the corresponding verdict form according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank on the corresponding verdict form.

If you find the defendant not guilty of the crime of first degree kidnapping in any of those counts, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of unlawful imprisonment. If you unanimously agree on a verdict, you must fill in the blank provided in the corresponding verdict form for the lesser offense the words “not guilty” or “guilty” according to the decision you reach.

Instruction No. 36, CP 502.

However, the jury was additionally instructed as follows:

The defendant is charged in Counts 3, 6, 8 and 14 with kidnapping in the first degree. *If, after full and careful deliberation on these charges, you are not satisfied beyond a reasonable doubt that the defendant is guilty on any or all of these counts, then you will consider whether the defendant is guilty of the lesser crime of unlawful imprisonment on any of the above counts on which you find the defendant not guilty.*

Instruction No. 37, CP 504 (emphasis added). Here, the jury left blank the verdict forms for the three charged counts of first degree kidnapping. But these two instructions are inconsistent and the inconsistency must be resolved in West’s favor.

Under Instruction No. 36, the jury was told to leave the verdict form blank if they could not agree on “guilty” or “not guilty”, and then they should proceed to consider the lesser offense. Under Daniels, leaving the form blank arguably meant the jury found West neither “guilty” nor “not guilty”, and thus there was no implied acquittal of the charge. Daniels, 160 Wn.2d at 264.

However, under Instruction No. 37 the jury was instructed that if they could not agree on “guilty”, they should proceed to consideration of the lesser offense *only if* they found West *not guilty* of the charged crime. Given this additional instruction, the jurors could not have found West guilty of the lesser offense unless they first agreed that West was not guilty of the kidnapping charges. Therefore, the rationale of Daniels, 160 Wn.2d 256, does not apply to prevent an implied acquittal.

A jury is presumed to read the trial court's instructions as a whole, in light of all other instructions. State v. Hutchinson, 135 Wn.2d 863, 885, 959 P.2d 1061 (1998), *cert. denied*, 525 U.S. 1157, 119 S.Ct. 1065, 143 L.Ed.2d 69 (1999). As instructed here, where West’s jury was silent on the greater charge the rule of lenity requires that between assuming acquittal or a divided jury, the court must presume acquittal. *See State v. Daniels*, 124 Wn. App. 830, 844, 103 P.3d 249 (2004). Jeopardy on these

counts terminated by implied acquittal of the more serious charge. Double jeopardy barred retrying West on the more serious original charges in Counts 3, 6 and 8.

iii. RCW 10.43.020 and .050 barred the State from seeking a conviction for the greater charged offense following West's conviction for a lesser offense.

The Double Jeopardy Clause bars prosecution of a defendant for a greater offense after his conviction on the inferior degree. RCW 10.43.020, .050;²⁵ State v. Ahluwalia, 143 Wn.2d 527, 539, 22 P.3d 1254 (2001); State v. Padilla, 84 Wn. App. 523, 526, 928 P.2d 1141, *rev. denied*, 132 Wn.2d 1002 (1997). *See also* Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977) (conviction for a greater offense and lesser included offense violated double jeopardy).

Here, unlawful imprisonment was a lesser offense of first degree kidnapping. RCW 10.43.020 and RCW 10.43.050 barred the State from

²⁵ RCW 10.43.020 states:

When the defendant has been convicted or acquitted upon an indictment or information of an offense consisting of different degrees, the conviction or acquittal shall be a bar to another indictment or information for the offense charged in the former, or for any lower degree of that offense, or for an offense necessarily included therein.

RCW 10.43.050 states in relevant part:

... Whenever a defendant shall be acquitted or convicted upon an indictment or information charging a crime consisting of different degrees, he or she cannot be proceeded against or tried for the same crime in another degree, nor for an attempt to commit such crime, or any degree thereof.

seeking on retrial a conviction for the greater charged offense after West had been convicted of the lesser degree offense. Double jeopardy barred retrying West on the more serious original charges in Counts 3, 6 and 8.

2. In Trial No. 2, the special verdict regarding Count 2 must be vacated because the jury was improperly instructed it had to be unanimous to answer “no” to the special verdict.

Manifest Constitutional Error. As a threshold matter, it should be noted that this issue was not raised at the court below by excepting to the special verdict instruction. However, an error may be raised for the first time on appeal if it is a manifest error involving a constitutional right.

RAP 2.5(a)(3); State v. Roberts, 142 Wn.2d 471, 500, 14 P.3d 713 (2000). An error is "manifest" if it had " 'practical and identifiable consequences in the trial of the case.' " Id. (citing State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999) (quoting State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992))).

Extensive authority supports the proposition that instructional error of the nature alleged here is of sufficient constitutional magnitude to be raised for the first time on appeal. Id. (citing State v. Peterson, 73 Wn.2d 303, 306, 438 P.2d 183 (1968)); State v. Scott, 110 Wn.2d 682, 688 n. 5, 757 P.2d 492 (1988); Martinez v. Borg, 937 F.2d 422, 423 (9th Cir.1991).

This is not a case where a jury instruction merely failed to define a term, or where a trial court did not instruct on a lesser included offense that was never requested. See Scott, 110 Wn.2d at 688 n. 5, 757 P.2d 492. Instead, the instruction herein misstates the requirement of unanimity for the jury to answer “no” to the special verdict.

In State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), *reconsideration denied*, ___ Wn.2d ___ (December 15, 2010), the most recent case addressing this issue regarding the special verdict instruction, the Court did not engage in a manifest constitutional error analysis for the instructional error. Bashaw, 169 Wn.2d at 145-48. However, since no exception to the instruction was made at the trial court, and since the Bashaw Court *did* engage in a constitutional harmless error analysis, the Court must have deemed the instructional error to be one of manifest constitutional error. Bashaw, 169 Wn.2d at 147-48. As such, it may be considered for the first time on appeal. RAP 2.5(a)(3).

Improper Special Verdict Instruction. Washington requires unanimous jury verdicts in criminal cases. Wash. Const. art. I, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). As for aggravating factors, jurors must be unanimous to find the State has proved the existence of the special verdict beyond a reasonable doubt. State v.

Goldberg, 149 Wn.2d 888, 892–93, 72 P.3d 1083 (2003). However, jury unanimity is not required to answer “no.” State v. Bashaw, 169 Wn.2d at 146 (“The rule from Goldberg, then is that a unanimous jury determination is not required to find that the State has failed to prove the presence of a special finding increasing the defendant’s maximum allowable sentence.”).

Jury instructions are constitutionally sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the applicable law. *See State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). This Court applies *de novo* review to determine whether instructions met those standards. *See State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996). In this case, the instructions did not meet those standards.

In Goldberg, the jury was given the following special verdict instruction:

In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no".

Id.

Although the Supreme Court vacated the special verdict for other reasons, it did not find fault with this instruction. Goldberg, 149 Wn.2d at 894, 72 P.3d 1083. The Goldberg jurors originally rendered a “no” to the special verdict and, when polled, indicated that the “no” verdict was not unanimous. 149 Wn.2d at 891–93. The Supreme Court held that the trial court erred in refusing to accept that original “no” verdict and in ordering the jurors to continue deliberation until they were “unanimous”, because there is no requirement for such unanimity in order to answer “no”. Id.

In a subsequent case, Bashaw, the jury was given the following special verdict instruction:

Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.

Bashaw, 169 Wn.2d at 139. The Court held the instruction was in error:

Applying the Goldberg rule to the present case, the jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law. Though unanimity is required to find the presence of a special finding increasing the maximum penalty, [] it is not required to find the *absence* of such a special finding. The jury instruction here stated that unanimity was required for either determination. That was error.

Bashaw, 169 Wn.2d at 147 (internal citation omitted) (emphasis original).

In the present case, the jurors were instructed even more specifically than in Bashaw, and were told they *must* be unanimous to return a “no” verdict:

Because this is a criminal case, all twelve of you must agree in order to answer any special verdict form “yes”. You must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. *If you unanimously have a reasonable doubt as to this question, you must answer “no”. ...*

Instruction No. 54 at CP 378 (emphasis added). Instructing the jury that unanimity was required for the jury to answer “no” to the special verdict is contrary to Goldberg and Bashaw, and the special verdict must be stricken.

Harmless Error. In order to hold that a jury instruction error was harmless, "we must 'conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.'" Bashaw, 169 Wn.2d at 147 (citing State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting Neder v. United States, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999))). The Bashaw court found the erroneous special verdict instruction was an incorrect statement of the law. Bashaw, 169 Wn.2d at 147. A clear misstatement of the law is presumed to be prejudicial. Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002) (citing State v. Wanrow, 88 Wn.2d 221, 239, 559 P.2d 548 (1977)).

The Bashaw Court rejected the argument that the error was harmless simply because the jury affirmed the verdict when polled.

This argument misses the point. The error here was the procedure by which unanimity would be inappropriately achieved. In Goldberg, the error reversed by this court was the trial court's

instruction to a non-unanimous jury to reach unanimity. 149 Wn.2d at 893, 72 P.3d 1083. The error here is identical except for the fact that direction to reach unanimity was given preemptively.

Bashaw, 169 Wn.2d at 147. Because it could not “say with any confidence what might have occurred had the jury been properly instructed,” the Court declined to find the instructional error harmless and vacated the sentence enhancement. Bashaw, 169 Wn.2d at 148.

The situation in the present case is indistinguishable from Bashaw. The trial court’s directive to reach unanimity was given preemptively. It is impossible to speculate about what the jury would have decided if it had been given the correct instruction. The instructions in this case incorrectly required unanimity for the jury to answer “no” to the special verdict and under Bashaw cannot be deemed harmless.

Summary. A unanimity instruction that does not adequately inform the jury of the applicable law violates a defendant’s right to a unanimous jury verdict. State v. Watkins, 136 Wn. App. 240, 244, 148 P.3d 1112 (2006). Since the instructions given in this case misstate the law, the special verdict must be stricken. The matter must be remanded to vacate the jury’s finding of sexual motivation regarding Count 2. Bashaw, 169 Wn.2d at 148.

3. Cumulative error deprived West of a fair trial.

The usual remedy for retrial in violation of double jeopardy rights is dismissal of the subsequent conviction. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996). However, a defendant may be entitled to a new trial when errors, even though individually not reversible errors, cumulatively produced a trial that was fundamentally unfair. State v. Grieff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); State v. Alexander, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992).

Analysis of this issue depends on the nature of the error.

Constitutional error is harmless when the conviction is supported by overwhelming evidence. State v. Whelchel, 115 Wn.2d 708, 728, 801 P.2d 948 (1990); State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Under this test, constitutional error requires reversal unless the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error. Whelchel, 115 Wn.2d at 728, 801 P.2d 948; Guloy, 104 Wn.2d at 425.

Nonconstitutional error requires reversal if, within reasonable probabilities, it materially affected the outcome of the trial. State v.

Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993); State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

In State v. Johnson, the trial court improperly admitted evidence of the defendant's prior rape conviction and prior self defense claim, refused to allow the defense to impeach a prosecution witness with a prior inconsistent statement, and improperly admitted evidence of a defense witness's probation violation. While the Court of Appeals held that none of these errors alone mandated reversal, the cumulative effect of these errors resulted in a fundamentally unfair trial and thus warranted a new trial. State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998).

In this case, the trial court improperly allowed the jury on retrial to hear evidence regarding a number of similar charges involving multiple victims in violation of double jeopardy and improperly instructed the jury as to the special verdicts. The combined constitutional errors and this Court's inability to rule out the prejudicial effects of the errors produced a second trial that was fundamentally unfair.

Count 13 (first degree rape), Count 14 (first degree kidnapping) and Count 15 (harassment seeking finding of sexual motivation) involved West's alleged conduct against Ms. Hanlen-Perry. The fact that West was

found not guilty of these charges in Trial No. 2²⁶ offers no insight into whether a reasonable jury would have reached the same overall trial verdicts in the absence of cumulative error. This Court cannot be convinced beyond a reasonable doubt that the evidence of impermissible “other bad acts” did not taint the jury with respect to the remaining twelve similar counts involving four other alleged victims.

Counts 5 and 7 (second degree rape) involved alleged conduct against two other women. The fact that the second jury found West not guilty of one count and again could not decide as to the second count²⁷ does not mean that the jury would have reached the same overall trial verdicts in the absence of the prejudicial effect of this and “other bad acts” evidence that was barred by double jeopardy.

Regarding the first degree kidnapping charges in Counts 3, 6 and 8, the fact that West was again found guilty of two lesser included unlawful imprisonment counts and not guilty of a third lesser included in Trial No. 2²⁸ does not offer enlightenment as to whether a reasonable jury would have reached the same overall trial verdicts in the absence of cumulative error. Moreover, the double jeopardy clause is aimed at protecting a defendant against the “risk or hazard of trial and conviction, not of the

²⁶ CP 413, 414, 415, 416, 417.

²⁷ CP 399, 403.

ultimate legal consequences of the verdict.” Price, 398 U.S. at 331 (where petitioner’s retrial for first degree murder violated double jeopardy, reversal required even though petitioner was convicted of lesser offense of manslaughter). “To be charged and to be subjected to a second trial for first-degree murder is an ordeal not to be viewed lightly.” Id. More importantly, this Court cannot say whether the existence of the three first degree kidnapping charges for which the jury in the first trial was unwilling to convict West, also made the second jury less willing to consider his innocence. *See Price*, 398 U.S. at 331 (“we cannot determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence.”); Brazzel, 491 F.3d at 986.

West contends that each double jeopardy error engendered sufficient prejudice on its own to merit reversal. The errors together created a cumulative and enduring prejudice that cannot be ruled out by this Court and was likely to have materially affected the jury's verdicts. West did not receive a fair trial.

²⁸ CP 397, 402, 406.

D. CONCLUSION

For the reasons stated, the convictions must be reversed and the matter remanded for a third trial on only those charges for which jeopardy has not terminated in the first and second trials.

Respectfully submitted January 4, 2011.

A handwritten signature in cursive script, reading "Susan Marie Gasch".

Susan Marie Gasch
Attorney for Appellant

VERDICT FORM SUMMARY – TRIAL 1

Count Number	Charge	Guilty as Charged	Not Guilty	Guilty of Lesser Included Charge	With Sexual Motivation	Not Able to Reach a Decision
Mary	Lindsay					
Count 1	2 nd Degree Rape	X				
Count 2	2 nd Degree Assault	X			Yes	
Count 3	1 st Degree Kidnapping	(blank)		Unlawful Imprisonment		
Count 4	Harassment	X			Yes	
Jennifer	David					
Count 5	2 nd Degree Rape	(blank)		(blank)		X
Count 6	1 st Degree Kidnapping	(blank)		Unlawful Imprisonment		
Carol	Kivett-Cross					
Count 7	2 nd Degree Rape	(blank)		(blank)		X
Count 8	1 st Degree Kidnapping	(blank)		Unlawful Imprisonment		
Count 9	2 nd Degree Assault	X			Yes	
Count 10	Harassment	X			Yes	
Elizabeth	Troudt					
Count 11	2 nd Degree Rape	X				
Count 12	Harassment	X			Yes	
Kristen	Hanlen-Perry					
Count 13	1 st Degree Rape		X			
Count 14	1 st Degree Kidnapping	(blank)		(blank)		X
Count 15	Harassment	(blank)				X

TRIAL 1

APPENDIX A

VERDICT FORM SUMMARY – TRIAL 2

Count Number	Charge	Guilty as Charged	Not Guilty	Guilty of Lesser Included Charge	With Sexual Motivation	Not Able to Reach a Decision
	Mary	Lindsay				
Count 1	2 nd Degree Rape	X				
Count 2	2 nd Degree Assault	X			Yes	
Count 3	1 st Degree Kidnapping		X	Unlawful Imprisonment		
Count 4	Harassment		X			
	Jennifer	David				
Count 5	2 nd Degree Rape		X			
Count 6	1 st Degree Kidnapping		X			
	Carol	Kivett-Cross				
Count 7	2 nd Degree Rape	(blank)		(blank)		X
Count 8	1 st Degree Kidnapping		X	Unlawful Imprisonment		
Count 9	2 nd Degree Assault		X			
Count 10	Harassment		X			
	Elizabeth	Troudt				
Count 11	2 nd Degree Rape	X				
Count 12	Harassment		X			
	Kristen	Hanlen-Perry				
Count 13	1 st Degree Rape		X			
Count 14	1 st Degree Kidnapping		X			
Count 15	Harassment		X			

TRIAL 2

APPENDIX B