

**SEP 23 2011**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 29894-9-III

COURT OF APPEALS, DIVISION THREE  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
*Appellant*

vs.

JAMES L. COLBERT  
*Respondent*

---

**BRIEF OF RESPONDENT**

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**I. ANSWER TO STATEMENT OF ISSUE**

The Respondent, James L. Colbert, concurs with the State's assignment of error in its Statement of the Issue on appeal; namely, double jeopardy principles bar retrial of Colbert on the charge of vehicular homicide, and the trial court erred in denying the State's Motion to Dismiss the case.

**II. STATEMENT OF THE CASE**

The Statement of the Case contained in the Appellant's opening brief is generally accurate, though Colbert offers the following supplement to that narrative.

On January 4, 2011, at the end of the second day of Colbert's first jury trial, it came to the attention of defense counsel and the trial court that certain measurements from the vehicle accident scene, which were critical for reconstructing the accident, and determining the speed of the vehicle and the rate at which it rolled, had never been provided to defense counsel. RP-A 21-22. Despite specific requests for such measurements, the prosecution did not disclose them—either through inadvertent error or because it did not realize that what appeared to be “gibberish and a bunch of

numbers” were in fact the scene measurements that defense counsel had requested. RP-A 21-22; RP-B 38.

In argument before the court on the issue on the evening of January 4, 2011, defense counsel declared:

They robbed my client of a fair shot at this *kind of* defense. He can’t make a defense based on a no-scale diagram. That’s the whole problem in this case. We can’t defend because we have no doubt upon which to reconstruct this statement—or this accident.

RP-A 8 (emphasis added). Shortly thereafter, without reaching a decision on the discovery issue, the trial judge adjourned court for the evening. RP-A 26. Counsel was invited to submit supplemental motions in the morning. RP-A 26.

The next morning, January 5, 2011, defense counsel moved to dismiss the case for Brady violations. RP-B 50-53. In particular, counsel argued that:

I asked the State for complete information. None was provided until this morning. And that’s simply too late. That’s a Brady violation. It absolutely chills the defense—cloaks—cloaks the defense. And the motion [to dismiss] should be granted.

RP-B 53. Defense counsel also made clear that he was “not moving for a mistrial. The State—or the defense is prepared to go forward.” RP-B 50.

Ultimately, the trial court denied defense counsel's Motion to Dismiss, and instead, on its own motion, declared a mistrial. RP-B 53, 55. The trial judge explained that while he was not sure whether the State's actions or inactions constituted a Brady violation, the requested measurements were only finally produced "last night at the end of the second day of trial [and that's] a failure to comply with discovery on behalf of the State." RP-B 54.

In response to the court's decision, defense counsel maintained the following:

I did not move for mistrial, but the reason why not—one of the reasons is, you know, we've got a good case. Now that we've educated the State, maybe they'll (inaudible) the case. But so far their defense is so full of holes, you're—you're denying my client the right to end this, and you're continuing his (inaudible) though we appreciate the fact that, ah, the court is ordering his release.

RP-B 56. Clearly, Colbert objected to any mistrial, and defense counsel believed that, notwithstanding any discovery violations that precluded Colbert from making a certain *kind* of defense, the defendant had a good case and could successfully put forth a defense.

### III. ARGUMENT

#### A. THE TRIAL COURT ERRED IN DENYING THE STATE'S MOTION TO DISMISS

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) (quoting *In re Pers. Restraint of Davis*, 142 Wn.2d 165, 171, 12 P.3d 603 (2000)).

The double jeopardy clause embraces a defendant's “valued right” to have the charges resolved by a particular tribunal. *State v. Wright*, 165 Wn.2d 783, 792-3, 203 P.3d 1027 (2009) (quoting *Arizona v. Washington*, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978)). When the jury is discharged before rendering an express verdict, and without the defendant's consent, retrial is constitutionally impermissible unless the trial terminated under circumstances amounting to “manifest necessity.” *Wright*, 165

Wn.2d at 793 (citing to *Gori v. United States*, 367 U.S. 364, 368-69, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961)).

A court considering a mistrial must engage in a “scrupulous exercise of judicial discretion” before foreclosing a defendant’s “valued right to have his trial completed by a particular tribunal.” *State v. Melton*, 97 Wn. App. 327, 332, 983 P.2d 699 (1999) (citing to *State v. Browning*, 38 Wn. App. 772, 775, 689 P.2d 1108 (1984)). Several guiding principles have emerged for determining whether a judge exercised sound discretion in granting a mistrial for “manifest necessity.” *State v. Melton*, 97 Wn. App. 327, 332, 983 P.2d 699 (1999). They include the following: (1) whether the court acted impulsively or gave both parties full opportunity to explain their positions; (2) whether it “accorded careful consideration to [the defendant’s] interest in having the trial concluded in a single proceeding”; and (3) whether it considered alternatives to declaring a mistrial. *Melton*, 97 Wn. App. at 332 (citing to *Arizona*, 434 U.S. at 516; *United States v. Jorn*, 400 U.S. 470, 487, 91 S.Ct. 547, 558, 27 L.Ed.2d 543 (1971)).

- a. *Double Jeopardy principles bar retrial because Colbert objected to a mistrial and a mistrial was not warranted by manifest necessity*

Double jeopardy attaches in the present case for two reasons. First, Colbert did not consent to a mistrial and, in fact, strenuously objected to it. Defense made clear that although he was seeking dismissal based on Brady violations, he was “not moving for a mistrial,” and was prepared to go forward. RP-B 50.

Second, mistrial was not warranted by manifest necessity. The trial judge made clear in declaring a mistrial that he believed the State had committed discovery violations, but that he was unsure whether the violation rose to a level warranting dismissal. RP-B 53, 55. Accordingly, the trial court reasoned that mistrial was appropriate to give the defendant more time to pursue his theory of the case. RP-B 54. This stated basis does not support a finding of manifest necessity as discussed below.

In considering the first of the three guiding principles for determining whether a trial court exercised sound discretion in declaring a mistrial out of manifest necessity, the trial court record shows that the court acted impulsively and did not give the parties full opportunity to explain their positions. Throughout the evening

of January 4 and the morning of January 5, 2011, defense counsel argued only for dismissal based on Brady violations. In arguing for dismissal, defense counsel maintained that Colbert had been precluded by the State's failure to disclose the accident scene measurements from asserting a *particular kind* of defense, namely, that scientific evidence did not support the State's theory that Colbert was driving the motor vehicle when it crashed. RP-A 8; RP-B 53. While Colbert could not successfully assert this theory of the case due to the lack of scientific measurements, he did assert an alternative theory—the investigating police officers did not properly investigate the accident scene and, for this reason, the driver of the vehicle could not be proven by the State. RP-B 56. Defense counsel told the trial court that he believed this was a good theory of the case and one that Colbert could go forward with, notwithstanding any Brady violations. RP-B 50, 56. Not only did the trial judge not weigh or speak to defense counsel's assertion that Colbert could go forward, but also, after determining that dismissal was not appropriate, he quickly and impulsively declared a mistrial on his own motion. RP-B 56. No arguments with respect to mistrial, aside from those peripherally advanced by counsel in arguing for dismissal, were heard from either party.

In considering the second guiding principle, there is no evidence that the trial court carefully considered on the record the defendant's interest in having the trial concluded in a single proceeding. RP-B 53-55. The only consideration given by the trial court of Colbert's interest in the proceedings was its finding that the State's actions or inactions had precluded Colbert from asserting one of his theories of the case (granted one that could have been successful), "[a]nd that's wrong. That's unfair." RP-B 55. No consideration was given to Colbert's interest in receiving a single, speedy trial, despite defense counsel's insistence that Colbert was prepared to proceed with his alternative theory of the case.

Finally, in considering the third guiding principle, there is no evidence that the trial court considered on the record alternatives to declaring a mistrial. RP-B 53-55. For example, the trial court did not consider a continuance or recess.

Because a mistrial was not warranted by manifest necessity, double jeopardy attached and now bars retrial of Colbert. It was error for the trial court to deny the State's Motion to Dismiss on double jeopardy grounds.

#### IV. CONCLUSION

Colbert respectfully requests that the court find that the trial court erred in denying the State's Motion to Dismiss and dismiss this matter with prejudice.

The trial court erred in declaring a mistrial on January 5, 2011, during Colbert's first jury trial. Colbert did not consent to a mistrial and the facts of the case did not support a finding of manifest necessity. Accordingly, double jeopardy attaches and precludes retrial of Colbert. For this reason, it was error for the trial court to deny the State's Motion to Dismiss on the grounds that retrial is barred by double jeopardy principles. Moreover, given the circumstances of this particular case, dismissal is appropriate in the interests of justice.

Respectfully submitted this 22nd day of September, 2011.



Andrea Burkhardt, WSBA #38519  
Attorney for the Appellant

**CERTIFICATE OF MAILING**

I certify that on September 22, 2011, I mailed a true and correct copy of the foregoing Brief of Respondent by depositing the same in the United States mail, postage prepaid, addressed as follows:

Rea L. Culwell, Prosecuting Attorney  
Columbia County Prosecuting Attorney's Office  
116 N. 3rd Street  
Dayton, WA 99328

James L. Colbert  
514 W. Shoshone  
Pasco, WA 99301

A handwritten signature in black ink, appearing to read "Andrea Burkhart". The signature is written in a cursive style with a long horizontal stroke extending to the right.

Andrea Burkhart, WSBA #38519