

No. 300161

COURT OF APPEALS,  
DIVISION 3  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,  
Respondent

v.

JON A. STRINE,  
Appellant

---

**AMENDED APPELLANT'S BRIEF**

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## I. INTRODUCTION

Jon A. Strine appeals the trial court's decisions denying his motion to dismiss and to subject him to a second trial on two charges arising from a traffic accident that caused a serious injury to a motorcyclist and the death of the motorcyclist's passenger wife.

After a three-week trial and a day and a half of deliberations, a visibly emotional jury handed up written forms showing unanimous verdicts of acquittal on both charges against Mr. Strine. When the trial court read the verdict forms the decedent's daughter, who had been seated in the gallery, reacted emotionally and intensely; it was clear that jurors could hear her screaming "he murdered my mom" as and even after she ran out of the courtroom.

Later, after order was restored, the trial court did not file the verdicts. Instead, though no party had requested that it do so, the court polled the jury, in the erroneous belief that a poll was required by law. Some of the jurors now said that "the verdict" had not been theirs. They did not specify, and the trial did not ask, whether both of their two verdicts were disputed, or, if only one, which verdict. The trial court decided not to return the jury for further deliberations to resolve the issues raised by the poll on the erroneous belief that it could not do so after the jury had been polled.

Though the court and defense counsel immediately suspected that the dissenting jurors may have changed their minds as a result of the

daughter's outburst, the trial court took no steps to inquire and ensure that had not been the case; nor did the Court verify whether both of the two verdicts or only one was now in question. Because that is true, the State does not know and can give no assurances that the jury was truly deadlocked on both its verdicts, nor that the dissenting jurors did not simply change their minds as a result of the intervening events in a way forbidden by law. In such circumstances, the errors in the trial court had the effect of depriving Mr. Strine of his verdicts of acquittal and exposing him to a second trial in violation of the Fifth Amendment of the United States Constitution and Article 1 Section 9 of the Washington Constitution; each of the errors independently requires reversal of the trial court's denial of Mr. Strine's motion to dismiss.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in declining to file the verdicts, and instead conducting a poll because it believed the law required it in every case.
2. The trial court erred in conducting a jury poll instead of filing the verdicts after an emotional outburst by decedent's daughter.
3. The trial court erred in deciding to conduct a jury poll after the outburst without giving the jury limiting instructions.
4. The trial court erred in failing to inquire whether dissenting jurors had been influenced in the poll responses by the outburst.

5. The trial court erred in failing to determine whether the jury was deadlocked on both counts, or one.
6. The trial court erred in failing to return the jury for further deliberation before declaring a mistrial.

### **III. STATEMENT OF THE CASE**

#### **A. Facts.**

On June 2, 2009, Jon Strine was driving south on Browne Street in Spokane, Washington, when he was involved in a horrible accident. He collided with a motorcycle carrying Gary and Lorri Keller. Mr. Strine was driving south on Browne in an area of poor visibility under the I-90 freeway, while the Kellers were driving on Fourth Avenue across Browne after having stopped at a stop sign at the corner of Fourth and Browne. Mr. Keller did not see Mr. Strine's car, which had the right of way. Mr. Strine collided with the Kellers' motorcycle. As a result of the collision, Gary Keller was severely injured and Lorri Keller was killed. While there was evidence that Mr. Strine had consumed alcohol before he drove home, a significant issue tried to the jury concerned whether or not Mr. Strine's blood/BAC level was within the legal limit for driving after consuming alcohol.

**B. Procedure Below.**

On June 4, 2009, the State filed an Information charging Mr. Strine with two separate offenses. (CP 1). Count I of the Information charged Mr. Strine with vehicular homicide<sup>1</sup> as a result of Lorri Keller's death. *Id.* Count II charged Mr. Strine with vehicular assault<sup>2</sup> based on injuries sustained by Gary Keller. *Id.* On January 18, 2011, a jury was impaneled and sworn and trial commenced. (CP 92). On January 20, 2011, the State's first witness took the stand and testified. (CP 92). The trial continued for a period of 14 trial days. (CP 92). After closing arguments, on February 8, 2011, the jury was sent out to deliberate at approximately 5:00 p.m. (CP 92).

In the early afternoon of February 10, the jury informed the trial court that it had reached a verdict. (CP 92). Counsel were notified and the court convened at 2:35 p.m. (VRP, Feb. 10, 2011, at 2). The jury foreperson gave the trial court two verdict forms. *Id.* The trial court read both of the verdicts, which were in proper form.<sup>3</sup> *Id.* The forms stated clearly and unequivocally that the jury had determined that Mr. Strine was not guilty of vehicular homicide (Count I) and not guilty of vehicular assault (Count II). *Id.*

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<sup>1</sup> RCW 46.61.520

<sup>2</sup> RCW 46.61.522(1)

<sup>3</sup> The trial court stated: "[T]hey did it correctly as if it were unanimous." (VRP, Feb. 10, 2011, at 9)

After the verdicts were read, the decedent's daughter, who was seated in the gallery, had a severe emotional outburst. (CP 93). She reacted visibly to the announced verdicts and ran out of the courtroom doors crying hysterically. *Id.*; VRP, May 20, 2011, at 20. The decedent's daughter remained outside the courtroom; the people in the courtroom, including the lawyers, judge and jury continued to hear her crying and yelling "he murdered my Mom!" from immediately outside the courtroom door. *Id.* As the trial court later described the circumstances:

When the jury was brought in to the courtroom a number of the jurors were visibly upset. Some appeared as if they had been weeping. . . . The court . . . read the verdict forms. The deceased victim's daughter had a strong emotional outburst, and ran from the courtroom. From inside the courtroom she could be heard in the hallway yelling, "He murdered my mom!" *The jurors' reactions indicated that they, or at least some of them, heard the outburst.*

(CP 92-93 (emphasis added)).

After order was restored the trial court, on its own accord, stated that it would poll the jury, mistakenly believing that "[t]he law requires in a criminal case in the state of Washington that the court poll the jury." (VRP, Feb. 10, 2011, at 2). The trial court asked each juror whether "the verdict" (without specifying *which* verdict) was his or her individual verdict, and whether it was the verdict of the jury. *Id.*, at 3. Jurors number one and two answered in the affirmative. *Id.* However, when juror number three was asked, she informed the court that "not-guilty" was not her verdict. *Id.*

Juror number three was not asked whether the verdict she disclaimed related to Count I or Count II, or both. *Id.* She stated simply that “not guilty” had not been her verdict. *Id.* The court then excused the jury from the courtroom. *Id.* Counsel conferred with the court and it was determined that the remainder of the jury should be polled. (VRP, Feb. 10, 2011, 3-6). Further concerns were raised regarding what steps should be taken if the jurors did not agree. *Id.* Just prior to calling the jury back in, the court informed counsel that under CrR 6.16(a)(3), the jury may be directed to retire for further deliberations or may be discharged at the conclusion of polling. *Id.*, at 6.

Polling the entire panel revealed that six (6) jurors affirmed that “not-guilty” was their individual verdict and the verdict of the jury. *Id.*, at 7. The remaining six jurors stated that “not-guilty” was not their verdict and that it was not the verdict of the jury. *Id.* The trial court then asked the jury foreperson whether she believed further deliberations would result in the jury reaching a unanimous verdict. *Id.*, at 8. The foreperson informed the court that she believed it would not. *Id.* Throughout this process, the trial court did not ask the dissenting jurors, or the foreperson, to be specific as to which of their two verdicts (or both) they disagreed about. (VRP, Feb. 10, 2011). It appears that the trial court may have assumed, without verifying through any colloquy with any juror, that the lack of unanimity applied to both verdicts as initially reported to the clerk on the jury forms, and that the jury foreman considered that further deliberation as to *either* verdict would be fruitless. *Id.*

The trial court had originally stated that it would consider further deliberations. (VRP, Feb. 10, 2011, at 5). Relying on CrR 6.15(f)(2), without further discussion, the trial court ruled that because the jury foreperson had opined the jury would not likely reach a unanimous verdict, the jury could not deliberate further, must be released, and a mistrial must be declared. *Id.*, at 8-12. The court asked counsel when they could start a new trial, stating that it should be as soon as possible. *Id.*, at 10-11. When asked to respond to the timing of the new trial, the only statement made by Mr. Strine's counsel was "Judge, I don't know." *Id.*, at 11. The court then declared a mistrial and dismissed the jury. *Id.*

The court dismissed the jury without creating a record identifying whether the jury believed it had or could actually reach a verdict on either count. *See* VRP, Feb. 10, 2011. It remains unknown at this time whether a verdict on either Count I or Count II was ever reached or could have been reached through further jury deliberations. *See id.* No effort was made to require the jury to deliberate further under instruction to disregard the outburst in the courtroom. *Id.* No inquiry was made to discover whether, and to what extent, any juror had been influenced in responding to the poll by the extremely emotional outburst of the decedent's daughter that his or her verdicts – initially reported to the trial court as "not guilty" on the verdict form signed by the foreperson and delivered to the clerk – were not (or no longer) his or her verdicts. *Id.*

Mr. Strine filed a motion to dismiss based on double jeopardy grounds on April 26, 2011. (CP 71). The trial court heard and denied it on

May 20, 2011. (VRP, May 20, 2011). Mr. Strine timely requested review of the trial court's order on July 21, 2011. On September 19, 2011, this Court ruled that Mr. Strine was entitled to review as a matter of right.

#### IV. ARGUMENT

##### A. Standard For Review.

“The standard of review for double jeopardy claims is *de novo*.” *State v. S.S.Y.*, 170 Wn.2d 322, 328, 241 P.3d 781 (2010) (citing *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005)).

##### B. The Double Jeopardy Clause Bars Retrial For The Same Offense.

###### 1. *The Double Jeopardy Clause protects an accused's right to be free from being twice tried on the same charges.*

The Fifth Amendment to the United States Constitution guarantees that “no person shall be....subject to 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 State Constitution is coextensive with the Fifth Amendment and is thus interpreted identically under Washington law. *State v. Wright*, 165 Wn.2d 783, 790, 203 P.3d 1027 (2009).

The Double Jeopardy Clause bars retrial if the following elements are met: “(a) jeopardy previously attached, (b) jeopardy previously terminated, and (c) the defendant is again in jeopardy for the ‘same offense.’” *State v. Corrado*, 81 Wn. App. 640, 645, 915 P.2d 1121 (Div. 2 1996) (citing *United States v. Dixon*, 509 U.S. 688 (1993), *Brown v. Ohio*,

432 U.S. 161, 166 (1977), and *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

In this case, the trial court erred in its decisions to poll the jury, to refuse to require further deliberation, and to deny Mr. Strine's motion to dismiss based on double jeopardy. The trial court further erred in setting the case down for a second trial on the same charges as those on which Mr. Strine already had been charged and on which the jury returned its verdicts of acquittal, which the trial court erroneously did not accept.

***2. The Double Jeopardy Clause also protects the accused's right to have charges against him resolved by a single tribunal.***

The Double Jeopardy Clause also protects a defendant's "valued right" to have his trial started and completed by one particular tribunal. *State v. Despenza*, 38 Wn. App. 645, 651, 689 P.2d 87 (1984) (citing *Arizona v. Washington*, 434 U.S. 497, 503 (1978)). "There are good reasons for this protection. A second prosecution following a discontinued trial prolongs the ordeal of the accused by adding to the financial and emotional burden he must shoulder while his guilt or innocence is determined. Moreover, exposure to a second tribunal may even increase the chances of an innocent defendant's being convicted." *State v. Jones*, 97 Wn. 2d 159, 162, 641 P.2d 708, 711 (1982).

The trial court's error deprived Mr. Strine of both his right not to be tried twice and his right to a decision by the first jury.

**3. *RCW 10.61.060 forbids reconsideration of acquittals.***

The Double Jeopardy Clause is underscored in Washington law by a strong provision that protects accused persons who have been acquitted.

RCW 10.61.060 provides:

“When there is a verdict of conviction in which it appears to the court that the jury have mistaken the law, the court may explain the reason for that opinion, and direct the jury to reconsider the verdict; and if after such reconsideration they return the same verdict it must be entered, but it shall be good cause for new trial. When there is a verdict of acquittal the court cannot require the jury to reconsider it.”

The obvious purpose and effect of the statute is to further protect the rights of the accused against double jeopardy. It does so by requiring an acquittal, even one the trial court thinks is in error, to be respected and put into effect. The risk of a mistake is put squarely on the State, not the accused. This statute literally means that once the jury handed up its verdicts of not guilty, the case against Strine was at an end. No further inquiry could or should have been conducted, and the order subjecting Mr. Strine to a new trial should be reversed for that reason alone. A mistrial may be declared, and the accused subjected to a second trial before a second tribunal, only in extraordinary circumstances of manifest necessity.

Even assuming that RCW 10.61.060 permits a jury to be polled after delivering formally proper verdicts of not guilty, a mistrial should not have been declared. It is not debatable that courts may not freely interrupt and end criminal cases without consequence under the Double Jeopardy provisions of the state and federal constitutions. On the contrary, the

default rule is that the Double Jeopardy clause forbids retrial of a defendant in a criminal case if a court ends the proceedings without justification. Retrial is permitted only if the court's decision to end the proceedings before final verdict is required by "manifest necessity." *Arizona v. Wash.*, 434 U.S. 497, 503 (1978). A judge may exercise his or her discretion to discharge a jury that is not able to reach a verdict; however, that decision must be based on the existence of "extraordinary and striking circumstances which indicate that substantial justice cannot be obtained without declaring a mistrial." *Despenza*, 38 Wn. App. at 651 (citing *State v. Jones*, 97 Wn.2d 159, 163, 641 P.2d 708 (1982)). Federal and State Constitutional principles impose upon the government the burden to show "manifest necessity" for declaration of a mistrial and a second trial. The government cannot carry that burden in Mr. Strine's case; the errors in the trial court deprived Mr. Strine of his verdict and his right to a final decision by one tribunal.

**C. The Trial Court's Decision To Poll The Jury Rather Than Accept Its Not Guilty Verdict Based Upon Its Erroneous Belief That A Poll Was Required Was An Abuse Of Discretion.**

**1. Standard of review.**

A trial court has discretion to poll a jury. CrR6.16(a)(3). Exercises of discretion are normally reviewed under an "abuse of discretion standard." However, a failure to exercise discretion or discretion exercised under error of law are automatically abuses of discretion. Errors of law are reviewed under a *de novo* standard.

**2. A legal error is ipso facto an abuse of discretion.**

It is a well-established principle of Washington law that an exercise of discretion that is based upon an erroneous legal conclusion is itself an abuse of discretion. “A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.” *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn. 2d 299, 339, 858 P.2d 1054, 1075-76 (1993).

A trial court’s legal conclusions are reviewable *de novo* by the Court of Appeals. *State v. Vasquez*, 109 Wn. App. 310, 314, 34 P.3d 1255, 1258 (2001) *aff’d*, 148 Wn. 2d 303, 59 P.3d 648 (2002). Further, a discretionary decision that is made without an actual, conscious, and informed exercise of discretion is itself an abuse of discretion. *State v. Miles*, 77 Wn. 2d 593, 597-98, 464 P.2d 723, 726 (1970); *State v. Grayson*, 154 Wn. 2d 333, 342, 111 P.3d 1183, 1188 (2005); *State v. Perdang*, 38 Wn. App. 141, 146, 684 P.2d 781, 783 (1984); *see also State v. Pettit*, 93 Wn. 2d 288, 609, P.2d 1364 (1980) (holding, as to a prosecutor, that the prosecutor abused his discretion by refusing to exercise it).

**3. The trial court did not exercise conscious discretion to poll the jury; rather it acted upon an erroneous view that polling was required.**

The logic of RCW 10.61.060 suggests that a jury that delivers facially valid verdicts of “not guilty” should not be polled -- there is no point, where the statute commands that a not guilty verdict ends the

process. But even assuming the trial court had discretion to poll the jury after it handed up its not guilty verdicts in Mr. Strine's case, that discretion was abused. Neither the prosecution nor Mr. Strine made any request that the jury be polled after it had returned its verdicts of not guilty as to Mr. Strine. The trial court did so *sua sponte*, stating that it believed that it was invariably required by law to conduct a poll. Thus, the trial court did not exercise its discretion in ordering the poll; it ordered the poll on the mistaken belief it *had no* discretion.

Following the outburst by the victim's daughter, after order was restored, the trial court said it would poll the jury because "[t]he law requires in a criminal case in the state of Washington that the court poll the jury." (VRP, Feb. 10, 2011, at 2). That is incorrect.<sup>4</sup> CrR 6.16(a)(3) does not say "the jury shall be polled". It says the jury "shall be polled at the request of any party or upon the court's own motion."

While the trial court plainly had *authority* to poll the jury "on its own motion," it is clear from the record that it did not consciously exercise its discretion to decide that the jury should be polled, it simply assumed erroneously that it *must* do so. This error set in motion a series of events

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<sup>4</sup> We intend absolutely no personal criticism of the trial court, a capable and conscientious judicial officer. The situation was unprecedented and (in the court's word) "chaotic." Nevertheless, given the errors that occurred, Mr. Strine cannot be retried consistently with his constitutional guarantee against double jeopardy.

that deprived Mr. Strine of his constitutional right to be free from double jeopardy. The verdicts of acquittal were not recorded. The jury was permitted to reconsider its verdicts after exposure to external influences, and the jury was not permitted to mitigate the Court's error by completing its deliberations.

**4. *Because the trial court was unaware that it had discretion whether to conduct a poll, it never considered whether a poll was necessary, whether it should forego a poll, or whether it should first instruct the jury.***

- a. The trial court had a variety of alternatives in view of the circumstances and controlling law.

Had the trial court been mindful that polling was discretionary and not required (if indeed not forbidden by RCW 10.61.060) where neither party asked that the jury be polled, it would have considered other options available to it as alternatives to conducting the poll. First, it would necessarily have considered whether a poll was even necessary.

Second, the trial court would have considered whether to simply direct that the verdicts be recorded without a poll, given the requirement (discussed below) that a poll ought not to be taken after a jury has been exposed to extraneous influences. It would have considered the obvious risk that one or more jurors – who, the trial court had observed, were in a

state of extreme emotional distress<sup>5</sup> when they entered the jury box to return their verdicts – might be influenced to change their minds as a result of the decedent’s daughter’s raw display of emotion, in which she implicitly condemned the jury’s verdicts as tantamount to exonerating a “murder[er]” and which the trial court noticed that the jury had definitely observed. Had the trial court correctly understood that it had discretion to bring – or not bring – its “own motion” to poll the jury, it might justly have concluded that where neither party sought a poll, it was best to simply enter the verdicts and discharge the jury, in view of the obvious risk that one or more jurors had been influenced to change their minds by

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<sup>5</sup> The court observed that [w]hen the jury was brought in to the courtroom a number of the jurors were visibly upset. Some appeared as if they had been weeping.” (CP 92). This was neither a unique or unusual feature of a trial. Jury service is hard, and the special dynamic of deliberating to a verdict can be extremely emotionally taxing. That is not only an accepted American cultural meme, *see e.g.*, “Twelve Angry Men”, Orion & Nova Productions (1957), it is well documented in various studies. *See e.g.*, Daniel W. Shuman, Jean A. Hamilton, Cynthia E. Daley, et al., *The Health Effects of Jury Service*, 18 *Law & Psychol. Rev.* (1994) . It is well-understood that jury service can be stressful, and that the unique and peculiar dynamic that leads any given group of twelve to come to a consensus in their verdict may be transitory. These are doubtless leading reasons why our law accepts the jury verdict as final when recorded in the presence of the jury, and forbids jurors to impeach their own verdict or otherwise give effect to any “buyer’s remorse” jurors may feel on further reflection once exposed to extraneous influences that might cause them to reconsider their verdicts once free of the rules of the courtroom environment.

the unusual and raw display of emotion by the daughter of the deceased victim of the accident.

Third, the trial court could have probed the jury as to the possible effect of the outburst and preceded any poll with a strong prophylactic instruction aimed at eliminating the risk that any juror would improperly change his or her mind as a result of the outburst. But because the trial court erroneously believed it was *required* to poll the jury, it entertained none of those considerations, and thus set in motion a series of events that deprived Mr. Strine of the benefit of the acquittal the jury first returned. The trial court thus abused its discretion; in such circumstances the Double Jeopardy Clause forbids a second trial.

- b. The trial court made no considered decision that a poll was necessary.

CrR 6.16(a)(3) authorizes the trial court to conduct a jury poll “on its own motion.” Necessarily implicit in that authority, and the responsible exercise of it, is the premise that the trial court have some rational reason to call for a poll. Because here the trial court’s stated reason for conducting the poll was its mistaken belief that it was *required* to conduct a poll, it is obvious that the trial court did not make a reasoned decision that a poll was necessary under the circumstances. That, alone, was an abuse of discretion. *Miles*, 77 Wn. 2d at 597-98.

The record in this case discloses nothing that would indicate that a poll was in any way necessary to ensure that a fair and just outcome was achieved. The parties did not ask for a poll; thus, it is obvious that neither Mr. Strine's counsel nor counsel for the prosecution had perceived any reason to require one. The trial court saw that the verdict was unanimous, and in proper form. (CP 2, 9). The trial court did not record any observation necessitating a poll, beyond its stated and mistaken understanding that a poll was always required.

**5. *The trial court did not consider whether a poll should not have been conducted in the circumstances.***

a. A jury has no right to change its mind when polled.

The purpose of polling a jury is to ascertain that the verdict handed up is *in fact* the unanimous verdict of all the jurors. It is *not* an occasion for the jurors to reconsider their verdict and announce a change of mind. “The polling of the jury is for the purpose of determining that the verdict signed by the foreman is that of the individual jurors and not one that has been coerced or caused by mistake. It is not an invitation to the jurors to change their minds. *State v. Agtuca*, 12 Wn. App. 402, 406, 529, P.2d 1159 (Div. 3, 1974) (citing *McFarlane v. Chicago, M. & St. P. Ry.*, 129 Wn. 230, 224 P. 581 (1924)).

This is especially true where a jury has announced an acquittal. Washington law gives the trial court certain scope to send jurors back to further consider their verdicts. CrR 6.16(a)(3). And though Washington law generally provides for uniform rules to govern trial practice in civil and criminal cases, RCW 10.46.070, there is an important exception: Washington statutes recognize the double jeopardy problem involved in calling upon a jury to deliberate further when it has announced an acquittal, and therefore our statutes contain a special rule to forbid it. *“When there is a verdict of acquittal the court cannot require the jury to reconsider it.”* RCW 10.61.060 (emphasis added).

- b. Washington law requires a poll to be conducted before a jury is exposed to extraneous influences.

A jury poll must be conducted immediately after the jury returns its verdict, and before it is exposed to other extraneous influences that might cause jurors to rethink their verdict. The reasons for this were cogently explained by the Supreme Court of North Carolina:

The purpose of polling the jury is to ensure that the jurors unanimously agree with and consent to the verdict at the time it is rendered. If the jury is unanimous at the time the verdict is returned, the fact that some of them change their minds at any time thereafter is of no consequence; the verdict rendered remains valid and must be upheld. The rationale behind requiring that any polling of the jury be before dispersal is to ensure that nothing extraneous to the jury’s deliberations can cause any of the jurors to change their minds. (internal citations omitted).

*State v. Black*, 400 S.E. 2d 398, 402-03 (1991).

In its Standards for Criminal Justice, the American Bar Association has laid down that polling must occur before dispersal of the jury. It has explained that the reason is that after dispersal jurors may have come into contact with outside influences. *ABA Standards for Criminal Justice: Discovery and Trial by Jury*, 3rd Ed., Section 15--5.6 (1996).

Washington's decisions do not explain the rationale as completely as the North Carolina court did in *Black, supra*, but it is nevertheless clear that Washington law is to exactly the same effect. Washington jurors are forbidden to change their minds when polled, and it is also true in Washington the jurors must be polled before they are subjected to extraneous influences. For example, the Washington Supreme Court said:

In short, the verdict cannot be amended after the jury has been exposed to outside influence, nor can an amendment be effected by less than the whole body of the jury.

*State v. Whitney*, 96 Wn. 2d 578, 581, 637 P.2d 956, 959 (1981).

Likewise in *State v. Zwiefelhofer*, 75 Wn. App. 440, 444, 880 P.2d 58, 60 (1994), the court was emphatic that juries may not further consider verdicts, especially verdicts of acquittal, after they've been exposed to extraneous influences. In that case, the trial court recalled the jury to reconsider its verdict six days after the jury had acquitted the defendant,

when the foreperson submitted an affidavit stating that she had filled out the jury form mistakenly to show acquittal rather than conviction. On appeal the court said:

Only under limited circumstances may a trial court, upon determining that the verdict form is inaccurate, correct the verdict to conform to the actual finding of the jury. The jury must not have passed from the trial court's control, jurors must not have had an opportunity to mingle with nonjurors, and the jurors must not have renewed their deliberations or discussed the merits of the case. . . . The law presumes that the jury is contaminated when jurors "pass from the sterility of the court's control and ... separate or disperse and mingle with outsiders." . . . . A jury simply can no longer function as a jury after the court has received and recorded the verdict and discharged the jury.

*Id.*, at 444, 880 P.2d at 60 (internal citations omitted).

In the *Zwiefelhofer* case, the jury had been dispersed for several days before the trial court court called it back to reconsider its verdict. There was evidence that the jurors had discussed the case amongst themselves and with others in the interim, but there was no evidence that such discussions had had any particular effect upon their views about the case. Nevertheless the *Zwiefelhofer* Court held that contamination of the jury must be *presumed*. *Id.*

In Mr. Strine's case, the time that intervened between the jury's return of its acquittal and the trial court's attempt at getting it to reconsider was more brief, but the evidence of contamination of Mr. Strine's jury is utterly compelling. The trial court recorded that the jurors displayed

varying degrees of emotional distress on returning their verdict, and found that at least some jurors definitely heard the “strong emotional outburst” by the decedent’s daughter. In these circumstances, more so even than in *Zwiefelhofer*, the Court should conclude as in *Zwiefelhofer* that “[u]nder the facts here, the correction of the jury verdict violated *Zwiefelhofer*’s constitutional rights against being placed in double jeopardy.” *Id.* *Zwiefelhofer* did not discuss RCW 10.61.060, which states categorically that not guilty verdicts may not be reconsidered.

**6. *The trial court, being erroneously of the view it had no discretion, did not conclude as it should that no poll should be conducted.***

Before deciding to poll the jury “on its own motion,” the trial court did not consider the foregoing principles in the context presented when the jury returned its verdicts in favor of Mr. Strine. The jury was stressed (quite naturally; the facts are tragic). The outburst involved ragged emotion, and effectively an accusation by the distraught daughter of the deceased victim of the accident that the jury had decided to let a murderer walk free. In such circumstances, there is every reason to suppose that an informed trial court, aware of its discretion, would decide no beneficial purpose would be served by a poll, and that the risk of improper influence was simply too high. Indeed, absent other indications of necessity not present in this record, a decision to conduct a poll on the court’s motion,

had it been consciously made, might very likely have constituted an abuse of discretion and been reversed on its merits.

- a. The trial court did not consider whether the poll should be preceded by special instructions to the jury.

Had the trial court actually exercised informed discretion as to whether to poll the jury, and had it concluded that it would do so notwithstanding the risks posed by the outburst, it could have taken affirmative steps to avoid or minimize the risks by issuing special instructions to the jury. For example, the trial court could have explained to the jury (a) that the members of the jury absolutely **must not** permit themselves to be influenced by the decedent's daughter's outburst, no matter how difficult or painful; and (b) that the poll was absolutely **not** an opportunity for a change of heart but only to report whether the verdict delivered to the court had been an accurate account of the jury's verdict *as of the time of their final verdicts prior to their delivery to the court.*

It is far from certain that such instructions would have had their intended effect of nullifying the emotional impact of the decedent's daughter's outburst, but at least the trial court would have actually exercised discretion and the record would be far less ambiguous as to whether the dissenting jurors' problem was that the verdict form had been wrong in the first instance, or whether the six jurors had improperly

decided to change their votes (in which case the Double Jeopardy Clause forbids retrial).

**7. *The trial court erroneously failed to take authorized steps to determine whether, at the time the jury was polled, it had been affected by extrinsic events.***

- a. The trial court could and should have inquired to determine whether jurors were influenced by the outburst they witnessed.

On the record in Mr. Strine's case, no one can say for certain whether the jury had not reached true, unanimous verdicts (that is, whether the written, unanimous verdicts of acquittal handed up by the foreperson a mistake or the result of coercion), or whether the dissenting jurors, already stressed and emotional over the difficult process of reaching a verdict of not guilty, were improperly induced by the decedent's daughter's display of emotion and implied charge of wrongdoing to retreat from the verdict they had earlier reached. Mr. Strine believes, regretfully, that it is the latter, but it is true that the record is not conclusive.

However, it need not have been the case that the record is ambiguous. Of course "[n]either parties nor judges may inquire into the internal processes through which the jury reaches its verdict." *State v. Linton*, 156 Wn. 2d 777, 787, 132 P.3d 127, 133 (2006). But "[o]n the other hand, if the juror's affidavit establishes misconduct of the jury by facts or circumstances that do not inhere in the verdict, the facts must be

considered.” *Gardner v. Malone*, 60 Wn. 2d 836, 842, 376 P.2d 651, 655 (1962) *amended*, 60 Wn. 2d 836, 379 P.2d 918 (1963).

Thus, though the trial court could not ask about how any juror was reasoning about Mr. Strine’s guilt or innocence, it could, and should, have conducted a limited inquiry to determine whether the dissenting jurors had been influenced by the outburst to change their verdicts after they had been published by the jury foreperson.

**8. *When there is any doubt that the jury was improperly influenced, the Double Jeopardy Clause requires the doubt to be resolved in favor of the accused.***

The trial court was aware of a risk that the jury possibly had been improperly influenced. After it learned in response to its *sua sponte* poll of the jury that one juror disputed the verdict, the trial court observed that one possibility was that the juror had reconsidered and renounced the verdict because of the outburst.<sup>6</sup> Defense counsel expressed concern that was what happened and suggested more information was necessary. (VRP, Feb. 10, 2011, at 4). The State took no steps to lay that concern to rest. Instead, it insisted, immediately and repeatedly, that the case be mistried. (VRP, Feb. 10, 2011, at 4,5, 9,10). The trial court could have posed the simple question whether the dissenting jurors had been influenced to change their mind, but it did not.

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<sup>6</sup> The Court: “It’s difficult for me to know at this point whether or not they were all in agreement and the jurors had second thought. . . .” (VRP, Feb. 10, 2011, at 3-4).

Where the trial court failed to conduct an inquiry as to whether the jurors changed their minds as a result of the outburst by the decedent daughter, and where the state failed to request it (the defense alone pressed for more information about what was occurring, VRP, Feb. 10, 2011, at 5), the logic of the Double Jeopardy clause demands that the resultant ambiguity cannot be resolved in favor of the State, on a guess that the dissenting jurors were not influenced improperly to change their minds by the outburst. Rather, the presumption ought to be that the verdict actually returned by the jury was regular and proper, and that a defendant cannot be forced to stand trial a second time absent evidence that the outburst did *not* improperly contaminate the jury and cause members improperly to change their minds. A record could easily have been made had either the State or the trial court wanted to make the necessary inquiry.

This Court should not conclude that a *presumption on a silent record* operates in favor of the State and against the constitutional interests in the Double Jeopardy Clause where the State had a clear opportunity to inquire and resolve doubt on the issue but chose not to take it. (VRP, Feb. 10, 2011, at 4). The law of Washington, as expressed in cases like *State v. Linton, supra*, is to the contrary, and requires that such ambiguities must be resolved in favor of vindication of the interests protected by the Double Jeopardy clause.

**9. *The trial court's poll was improper, having failed to establish with clarity what the dissenting jurors disagreed about.***

- a. Where polling results are ambiguous double jeopardy imposes "implied acquittal."

"By its own terms, the Double Jeopardy Clause only applies if 'there has been some event, such as an acquittal, which terminates the original jeopardy.'" *State v. Scott*, 145 Wn. App. 884, 891, 189 P.3d 209 (2009) (quoting *Richardson v. United States*, 468 U.S. 317, 325 (1984)). Silence by the jury can be construed as an acquittal "and can therefore act to terminate jeopardy." *State v. Daniels*, 160 Wn.2d 256, 262, 156 P.3d 905 (2007) (citing *Green v. United States*, 355 U.S. 184, 188, 785 S.Ct. 221 (1957)).

A jury's silence is not to be confused with a jury's failure to reach a verdict which is formally entered on the record. *See Daniels*, 160 Wn.2d at 263. When a jury is silent as to certain counts of the indictment and is subsequently discharged, the effect of the discharge is equivalent to an acquittal. *State v. Davis*, 190 Wn. 164, 166-67, 67 P.2d 894 (1937). The reason for this result is because "the record affords no adequate legal cause for discharge of the jury, any further attempt to prosecute would amount to a second jeopardy, as to the charge with reference to which the jury has been silent." *Id.* On the other hand, "where a jury have not been silent as to a particular count, but where to the contrary, a disagreement is formally entered on the record" retrial is not barred. *Id.* at 167. The effect of a formal disagreement on the record as to a particular count "justifies

the discharge of the jury, and therefore a subsequent prosecution for the offense as to which the jury has disagreed...would not constitute double jeopardy.” *Id.*

In *Davis*, the defendant was charged with three counts: vehicular homicide, driving while intoxicated, and reckless driving. *Id.* at 164. The jury returned a verdict of not guilty on the vehicular homicide count but were unable to agree on the two remaining counts. *Id.* The court then excused the jury without a verdict on the two remaining counts and without creating a record that supported the jury’s discharge based on the court’s belief that there was no probability of the jury being able to reach a verdict. *Id.* at 165. The defendant moved to dismiss the two remaining counts, arguing that double jeopardy barred retrial. *Id.* The court granted the motion to dismiss and the State appealed. *Id.* The Supreme Court affirmed the trial court’s decision and held that that the jury’s silence and the fact that the record did not indicate the reason for discharge resulted in an implied acquittal implicating double jeopardy. *Id.* at 166. The Supreme Court set out as a general rule, that “where an indictment or information contains two or more counts and the jury either convicts or acquits upon one and is silent as to the other, and the record does not show the reason for discharge of the jury, the accused cannot again be put upon trial as to those counts.” *Id.* at 166.

- b. The Double Jeopardy Clause bars remand because Mr. Strine has been explicitly and expressly acquitted of both offenses.

While this case is not identical to the facts in *Davis*, the analysis set out by the Supreme Court is instructive. In a multi-count indictment, silence as to the verdict on one of the counts amounts to an implied acquittal. *See Davis*, 190 Wn. at 166. In this case Mr. Strine was initially acquitted on both counts. After the in-court outburst, the trial court polled the jury and concluded that Mr. Strine was neither convicted nor acquitted of either charge, and ordered a mistrial as to both. Because the trial court's failure to make a clear record as to which of two counts (Count I, Count II, or both) the jury found itself in disagreement over, the record remains unclear as to whether he was actually acquitted of either count in light of the jury indicating "not-guilty" on the verdict forms. The Trial Court did not poll the jury as to the individual counts; thus, there is no way to know whether the jury was deadlocked on one or both counts. Because the record is silent, it "affords no adequate legal cause for discharge of the jury." *Id.*, at 166-67. Therefore, any additional attempt to prosecute Mr. Strine would amount to double jeopardy because disagreement as to either count is not clear from the record. In light of these double jeopardy considerations, the case against Mr. Strine should be dismissed.

- c. The trial court failed to establish clearly whether dissenting jurors raised questions as to one or both their verdicts.

The jury had reached, and reported to the clerk, verdicts of “not guilty” on both counts; but after the emotional display by the decedent’s distraught daughter, six jurors recanted “the verdict” (using the singular noun “verdict” rather than the plural “verdicts”) but were not specific as to whether they meant their verdict on Count I, their verdict on Count II, or both verdicts. Thereafter the foreperson reported her opinion that the jury was likely going to be unable to complete its task if it deliberated further. However, the record remains ambiguous as to whether the foreperson was predicting the jury was unable to reach a verdict on Count I, Count II, or both counts. As a result, Mr. Strine has been either expressly or impliedly acquitted of both offenses, barring retrial.

When it denied Mr. Strine’s motion to dismiss the trial court reasoned that its failure to clearly establish whether the jury disagreed over Count I, Count II, or both was immaterial. The trial court reasoned that because there was “one automobile/motorcycle wreck, one defendant . . . [and] [t]he sole reason there are two counts is that there are two victims”, there was no need to be specific as to the jury’s view of each count, because the “counts were inextricably joined. . . .” (CP 99).

But that was not a judgment the trial court was empowered to make. The jury had the right to “acquit a defendant on one count while convicting on another count, based on its belief that the applicable law

would result an unjust punishment.” *State v. Goins*, 113 Wn. App. 723, 726, 54, P 3d 723, 730 (Div. 1 2002).

**10. *The trial court’s decision not to send the jury for further deliberation was an abuse of discretion.***

a. A legal error is *ipso facto* an abuse of discretion.

As established by the authorities set out in paragraph 2.1, *supra* if a trial court bases a discretionary decision on an error of law, that is an abuse of discretion.

b. The trial court erroneously concluded that it lacked authority to require further deliberations.

The trial court ruled that once it had polled the jury, the jury could not recommence deliberations.<sup>7</sup>(CP 100, VRP, Feb. 10, 2011, at 9). Mr. Strine submits that RCW 10.61.060 means, if it means anything, that the trial court was not free to reject the not guilty verdicts delivered by the jury. If it was free to poll the jury and then to reject those verdicts on the theory that the jury was not in agreement, then it should not be the case that the jury (the “same forum”) should not have been given the opportunity to continue deliberations (though, as RCW 10.61.060 suggests, a conviction might be open to a new trial.)

However, CrR 6.15(a)(3) explicitly states:

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<sup>7</sup> The trial court stated that “both counsel agree[ed] the jury could not be asked to deliver a verdict after they had been polled,” but that is not correct, only the State agreed. (VRP, Feb. 10, 2011, at 6, 9).

“[w]hen a verdict or special finding is returned and before it is recorded, the jury shall be polled at the request of any party or upon the court’s own motion. *If at the conclusion of the poll, all of the jurors do not concur, the jury may be directed to retire for further deliberations* or may be discharged by the court.”

CrR 6.15(a)(3) (emphasis added). The court’s finding that jury deliberations could not recommence after the jury is polled was error; such further deliberations are specifically authorized by rule.

Under Washington law, the trial court’s failure to send the jury for further deliberations, in circumstances where only the statement of the foreperson supported the decision, meant that a mistrial was not “manifestly necessary”, and the decision to retry the case violated Mr. Strine’s rights against double jeopardy.

Federal and state law both require that a jury must be “genuinely deadlocked” before a mistrial can be declared. *State v. Ervin*, 158 Wn.2d 746, 757 n. 10, 147 P.3d 567 (2006) (quoting *Arizona*, 434 U.S. 497, 509, 98 S.Ct. 824 and *Jones*, 97 Wn.2d at 164 641 P.2d 708 (finding that “hopeless deadlock is an ‘extraordinary and striking’ circumstance”)). The law requires that before discharging a deadlocked jury, the trial court should consider not only the opinion of the foreperson, but also “tak[e] all the circumstances into consideration” including the length of the trial, the complexity of the evidence, and how long the jury had already been deliberating. *Jones, supra*, 97 Wn.2d at 164. Here, the jury had deliberated for less than two days. It had not pronounced itself deadlocked before the outburst and the jury poll. The case had taken 14 days to try, but the evidence was not unduly difficult to follow, nor the law

to apply. The trial court recited no factors in support of its decision to pronounce the jury deadlocked beyond the opinion of the foreperson, which was necessarily speculative, since the jury was never asked to deliberate further after the jury poll.

In *State ex rel. Charles v. Bellingham Municipal Court*, the record show[ed] that the court discharged the jury immediately upon the foreman's statement that they had been unable to arrive at a verdict . . . [and] only one factor was taken into consideration; i.e. length of deliberation" – in that case, one hour and fifteen minutes. 26 Wn. App. 144, 148, 149, 612, P.2d 427, 430 (Div. 1, 1980). On that record, the Court of Appeals easily concluded that the trial court's "precipitous discharge of the jury operated as an acquittal, [and] that the defendant was placed twice in jeopardy for the same offense." *Id. Compare State v. Dysktra*, 33 Wn. App. 648, 656 P.2d 1137 (Div. 2 1983) (affirming trial court's finding of mistrial appropriate where one juror was worried about the hospitalization of her husband, another was suffering sever emotional distress, the jury had divided into groups, the deliberative process had broken down, there was a lack of progress toward a verdict after 13 hours of deliberation, and the foreperson saw no hope that a verdict could be reached in a reasonable time).

The circumstances in this case were certainly unusual, but they were not beyond the power of the trial court to remedy short of declaring a mistrial and exposing Mr. Strine to a second trial. However the trial court erroneously failed to determine (a) whether both or only one (and, if only

one, which) of the jury's verdicts were subject to disagreement; (b) what influences were operating on the jury causing some of its members to dispute the verdict they had reported to the clerk; and (c) whether such influences could be cured by appropriate instruction and further deliberation. In short, the trial court erroneously failed to explore alternatives to exposing Mr. Strine to the stress, expense, and risk of a second trial.

The trial court recognized its failure to poll the jury as to each individual count, however, it found that its failure was immaterial because of the interrelatedness of the counts. (CP 99). This proposition is flawed because it is based upon speculation regarding the thoughts of the jurors, and invades the province of the jury. Due to the court's premature discharge of the jury, whether or not it was capable of reaching a verdict on either count will never be known. As a result of the court's error, Mr. Strine cannot be retried on either count because retrial would violate his rights under the Double Jeopardy Clause.

c. Mr. Strine did not consent to a mistrial.

Under Washington law, retrial will not be barred when a defendant "freely consents" to a mistrial or the discharge is compelled by a manifest necessity or emergency which justifies discharge of jury. *See State v. Juarez*, 115 Wn. App. 881, 888, 64 P.3d 83 (2003). The trial court denied Mr. Strine's motion to dismiss in part because it believed that Mr. Strine

had, through his counsel “impliedly consented” to a mistrial. (CP 96-97). That too was error.

But Mr. Strine did not freely consent to a new trial. The events that transpired after the erroneous jury poll were tense, rapidly evolving, and chaotic. The trial court first indicated an intention to hold the jury and afford the parties an opportunity to research what to do.

All right. So we’ll bring them back. I will poll the entire jury. We’ll find out if it is, as it seems, a non-unanimous jury verdict. If so, we’ll put them back in there and I will give you the opportunity to do some research on it if we can tell them to recommence deliberations once they have publically declared that verdict.

(VRP, Feb. 10, 2011, at 5-6)

But that opportunity never came. Instead, the trial court ruled that it would declare a mistrial: “All right, I’m going to release them, then.” (VRP, Feb. 10, 2011, at 10). After it so ruled, the trial court inquired regarding counsels’ availability for retrial. *Id.*, at 9-11. Defense counsel’s only comment was, “Judge, I don’t know.” *Id.*, at 11.

Contrary to the court’s finding, Mr. Strine did not freely consent to the mistrial and objected in a reasonable amount of time given the circumstances of this case. The court’s finding of implied consent in this case, based upon his counsel’s response “I don’t know” when asked when available for a retrial the trial court had already declared she would grant, was unsupported by evidence or reason.

## V. CONCLUSION

The circumstances of this case are highly unusual. Nevertheless, a jury returned two written verdicts of acquittal as to the charges against Mr. Strine. Members of the jury varied from that verdict *only after* they had been exposed to an extraordinary and highly emotional reaction by the decedent's daughter to their verdicts – a reaction in which she effectively accused an already stressed and emotional jury with having wrongfully exonerated her mother's murderer. They need never have been presented with an opportunity for improper reconsideration of their verdicts – neither the State nor Mr. Strine ever asked that they be polled. They were polled, erroneously and improperly, after their exposure to the extraneous influence of the outburst. No effort was made to ensure they were not responding to the outburst and changing their minds.

Even after they were polled, it was never made definite whether the dissenting jurors meant to question both or only one of their verdicts (and if only one, which one). And though none of the usual indications of hopelessly deadlocked jury were present (indeed, the jury never declared itself deadlocked), the trial court declined to send the jury back for further deliberations to resolve the issue raised by the poll, and instead prematurely discharged the jury.

Under all those circumstances, the Double Jeopardy provisions of the state and federal constitutions absolutely require that Mr. Strine not be exposed to the expense, stress, and risk of a second trial on the same

charges. The trial court's denial of Mr. Strine's motion to dismiss the charge on double jeopardy grounds should be reversed.

DATED this ~~27<sup>th</sup>~~ day of February, 2012.

Respectfully Submitted

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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 24th day of February 2012 the foregoing AMENDED APPELLANT'S OPENING BRIEF was filed with the Court of Appeals, Division III, and delivered to the following persons in manner indicated:

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