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Division III
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NO. 35361-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

BRANDON CATE,
Appellant.

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

Okanogan County Cause No. 17-1-00046-7

The Honorable Henry A. Rawson, Judge

BRIEF OF APPELLANT

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Cate's convictions were entered in violation of the Fifth and Fourteenth Amendment prohibition on double jeopardy.
2. Mr. Cate's convictions were entered in violation of the Wash. Const. art. I, § 9 prohibition on double jeopardy.
3. The trial court erred by ordering a mistrial following Mr. Cate's first jury trial.
4. The order for a mistrial following Mr. Cate's first jury trial was not based on manifest necessity.
5. The order for a mistrial following Mr. Cate's first jury trial was not based on "extraordinary and striking circumstances."
6. Double jeopardy barred Mr. Cate's re-trial following a mistrial order that was not based on manifest necessity.

ISSUE 1: Double jeopardy bars re-trial after a declaration of a mistrial based on an allegedly deadlocked jury unless the case poses "extraordinary and striking circumstances." Did the court err by entering convictions following a re-trial in Mr. Cate's case after declaring a mistrial when the jury claimed to be deadlocked after only thirty minutes of deliberation?

7. The court erred by including Mr. Cate's alleged prior convictions in his Judgment and Sentence when the state failed to present any evidence that those convictions had actually occurred.

ISSUE 2: The state must present some evidence that a prior conviction exists in order to use it to increase the offender score at sentencing. Did the trial court err by finding that Mr. Cate had ten prior felony convictions when the state did not present any evidence to that effect?

8. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

ISSUE 3: If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals

decline to impose appellate costs because Mr. Cate is indigent,
as noted in the Order of Indigency?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Brandon Cate was charged with second-degree burglary, second-degree theft, and malicious mischief -- all related to a break-in at a JC Penney store. CP 119-20.

His case proceeded to a jury trial, which lasted a day and a half. RP 70-185. The state called four witnesses at the trial. RP 70-185. The court admitted thirty exhibits. Exhibit List for Trial, Supplemental Designation of Clerk's Papers. The court gave the jury thirty-two pages of jury instructions. CP 75-106.

After thirty minutes of deliberations, the presiding juror asked the court what would happen if the jury was unable to agree on a verdict. RP 186; CP 74. The judge asked whether there was a reasonable chance that the jury would be able to reach a verdict within a reasonable amount of time. CP 74. The jury answered no. CP 74.

The judge called the jury and the parties and attorneys back into the courtroom. RP 186. The court again asked whether the jury would be able to reach a verdict within a reasonable amount of time and the presiding juror said no again. RP 188-89.

Without asking for the positions of Mr. Cate or the prosecution, the court declared a mistrial. RP 189-95. The court did not find manifest necessity for the mistrial. RP 189-95; CP 71.

Mr. Cate's case proceeded to a second jury trial. *See* RP 196-360.

The manager at the JC Penney store testified that someone had broken the glass doors to get into the store at night, broken a glass jewelry case, and removed several items from the case. RP 213-14. A later inventory established that three items were never recovered. RP 215.

The state also presented DNA evidence at the second trial that it had claimed was unavailable during the first trial. RP 20, 228-63. The evidence placed Mr. Cate at the scene of the break-in. *See* Ex. 9.

An officer witness testified that Mr. Cate had confessed to the burglary, but there was no recording of the confession or written statement by Mr. Cate. RP 285-87. Mr. Cate denied confessing to the crimes. RP 301-11.

The jury found Mr. Cate guilty of the three charges. CP 36.

At sentencing, the prosecutor claimed that Mr. Cate had an offender score of sixteen but did not offer any evidence that he had any prior convictions. RP 372-73. The prosecutor said that he "believe[d]" his calculation of Mr. Cate's offender score was correct but that he had

simply gotten the information from a plea form in a different case. RP 372.

This timely appeal follows. CP 1.

ARGUMENT

I. THE CONSTITUTIONAL PROHIBITION ON DOUBLE JEOPARDY BARRED MR. CATE’S RETRIAL BECAUSE THE MISTRIAL – DECLARED AFTER ONLY THIRTY MINUTES OF JURY DELIBERATION – WAS NOT BASED ON MANIFEST NECESSITY.

Both the state and federal constitutions prohibit double jeopardy.

U.S. Const. Amends. V, XIV; art. I, § 9.¹ The proscription on double jeopardy protects 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) (quoting *Arizona v. Washington*, 434 U.S. 497, 503 n. 11, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978)).

The U.S. Supreme Court has safeguarded this “valued right” because a second prosecution in a criminal case:

...increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is

¹ A claim that a conviction has been entered in violation of the proscription on double jeopardy is a constitutional issue, which is reviewed *de novo* and can be raised for the first time on appeal. *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2006), *as corrected* (Feb. 14, 2007); RAP 2.5(a)(3).

entitled to one, and only one, opportunity to require an accused to stand trial.

Arizona, 434 U.S. at 503–05.

In order to protect the “valued right” to have a criminal case decided by a particular tribunal, jeopardy attaches when a jury is impanelled and sworn or when the first witness has answered a question. *Jones*, 97 Wn.2d at 162 (citing *State v. Morlock*, 87 Wn.2d 767, 770, 557 P.2d 1315 (1976)). Accordingly, an accused person is protected against a second prosecution if his/her trial is terminated at any point after those events have occurred. *Id.*

There is an exception, however, for cases in which a trial is terminated because “manifest necessity” warrants declaration of a mistrial. *Id.* at 162-63; *State v. Robinson*, 146 Wn. App. 471, 479, 191 P.3d 906 (2008). A mistrial that is declared in the absence of manifest necessity functions as an acquittal for double jeopardy purposes and double jeopardy prohibits re-trial. *Id.* at 484.

In cases of a jury’s alleged inability to reach a verdict, a mistrial is only manifestly necessary in cases posing “extraordinary and striking circumstances.” *Jones*, 97 Wn.2d at 164. The judge should consider “the length of time the jury has been deliberating in light of the length of the

trial and the trial and the volume and complexity of the evidence.” *Id.* (citing *State v. Boogaard*, 90 Wn.2d 733, 739, 585 P.2d 789 (1978)).

The jury’s own assessment that it is deadlocked, by itself, is not sufficient grounds for declaring a mistrial. *State v. Taylor*, 109 Wn.2d 438, 443, 745 P.2d 510 (1987), *disapproved of on other grounds by State v. Labanowski*, 117 Wn.2d 405, 816 P.2d 26 (1991).

In *Jones*, for example, the Supreme Court found that the trial court erred by ordering a mistrial because there were “hardly extraordinary and striking” when the jury had been deliberating for almost twelve hours after a four-day trial and the presiding juror said that they would be unable to reach a verdict in another ninety minutes. *Id.* at 165.

Similarly, in *Charles*, double jeopardy barred re-trial when the judge declared a mistrial based on the presiding juror’s claim that the jury was deadlocked after one and a half hours of deliberation following four hours of evidence. *See State ex rel. Charles v. Bellingham Mun. Court*, 26 Wn. App. 144, 149, 612 P.2d 427 (1980).

In Mr. Cate’s case, the jury only deliberated for thirty minutes² before the court declared a mistrial. There is no way that the jury had time

² The jury began deliberating at 11:10am and asked the court what would happen if they were unable to reach a verdict at 11:40am. RP 186. Though the court did not declare the

(Continued)

to do so much as review the thirty exhibits or twenty-one pages of jury instructions in that timeframe.

Though the evidence in this case was less voluminous than the four-day trial in *Jones* (in which the jury deliberated for nearly twelve hours) it was far more substantial than the four-hour trial in *Charles* (in which the jury deliberated for an hour and a half). If the courts erred by declaring mistrials in *Jones* and *Charles*, than the court in Mr. Cate's case erred by ordering a mistrial after only thirty minutes of deliberation.

Because the mistrial following Mr. Cate's first trial was not based on manifest necessity or "extraordinary and striking circumstances," the constitutional prohibition on double jeopardy barred his retrial for the same offenses. *Jones*, 97 Wn.2d at 164; *Robinson*, 146 Wn. App. at 479. Mr. Cate's convictions must be reversed and the charges dismissed with prejudice. *Robinson*, 146 Wn. App. at 484.

II. THERE WAS NO EVIDENCE SUPPORTING THE ALLEGED PRIOR CONVICTIONS USED TO CALCULATE MR. CATE'S OFFENDER SCORE.

In order for a prior conviction to be included in an offender score calculation, the state must prove that the conviction occurred by a

mistrial until the afternoon session began, the jury almost certainly was at lunch at that time. *See Jones*, 97 Wn.2d at 165 (accounting for presumed jury breaks in assessing the length of deliberation). Indeed, the trial court never ordered the jury to resume deliberation after answering the question at 11:40am and there is no evidence that the jury deliberated for longer than thirty minutes.

preponderance of the evidence. *State v. Hunley*, 175 Wn.2d 901, 909, 287 P.3d 584 (2012). Bare assertions on the part of the state fail to meet this burden. *Id.* The state must introduce “evidence of some kind to support the alleged criminal history.” *Id.*

Here, Mr. Cate’s Judgment and Sentence lists ten prior convictions. CP 4. But the state did not present any evidence at sentencing that Mr. Cate had ever been convicted of a crime. RP 372-85. No evidence supports the court’s finding that Mr. Cate had any prior felony convictions.

Mr. Cate’s case must be remanded for correction of his Judgment and Sentence. *Hunley*, 175 Wn.2d at 909. The alleged prior convictions must be deleted and he must be resentenced with an offender score of zero.

III. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD DECLINE ANY REQUEST TO IMPOSE APPELLATE COSTS UPON MR. CASE BECAUSE HE IS INDIGENT.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should

it substantially prevail. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016).³

Appellate costs are “indisputably” discretionary in nature. *Sinclair*, 192 Wn. App. at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court’s discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The trial court found Mr. Cate indigent at the end of the proceedings in superior court. CP 34-35. The court waived all non-mandatory LFOs as a result of his indigency. RP 377; CP 8-9.

That status is unlikely to change, especially with the imposition of a lengthy prison term and over \$4000 in restitution. The *Blazina* court indicated that courts should “seriously question” the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839.

Additionally, the newly amended RAP 14.2 specifies that the trial court’s finding of indigency stands unless the state presents evidence that the accused’s financial circumstances have changed:

When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's

³ Division II’s commissioner has indicated that Division II will follow *Sinclair*.

financial circumstances have significantly improved since the last determination of indigency.

RAP 14.2 (*as amended by 2017 WASHINGTON COURT ORDER 0001*).

The state is unable to provide any evidence that Mr. Cate's financial situation has improved since he was found indigent by the trial court.

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested. RAP 14.2; *Blazina*, 182 Wn.2d 827.

CONCLUSION

Mr. Cate's convictions were entered in violation of the constitutional prohibition against double jeopardy because the mistrial in his first trial was not based on manifest necessity. Mr. Cate's convictions must be reversed and the charges must be dismissed with prejudice.

In the alternative, the sentencing court erred by increasing Mr. Cate's offender score based on alleged prior convictions when the state did not present any evidence of those convictions. Mr. Cate's case must be remanded for resentencing.

In the alternative, if the state substantially prevails on appeal, this court should decline to impose appellate costs on Mr. Cate because he is indigent.

Respectfully submitted on February 2, 2018,



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

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

Signed at Seattle, Washington on February 2, 2018.



Skylar T. Brett, WSBA No. 45475
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LAW OFFICE OF SKYLAR BRETT

February 02, 2018 - 2:10 PM

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