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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By.....

No. 300161

COURT OF APPEALS,
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent

v.

JON A. STRINE,
Appellant

APPELLANT'S REPLY BRIEF

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I. SUMMARY OF ARGUMENT

The State concedes, by its failure to respond on the merits, the several errors in the trial court which deprived Jon Strine of his right against Double Jeopardy under the state and federal constitutions. The State defends its asserted entitlement to retry Mr. Strine based upon a single, narrow, and erroneous ground: that Mr. Strine has no right to seek relief in this Court because he failed to make the necessary objections below. This argument is faithful to neither the law nor the record: the law imposes upon the courts and the State, as well as a defendant, the duty to ensure that a defendant's fundamental rights are honored whether a defendant objects or not. The record discloses in any event that Mr. Strine did object, or had no opportunity to object at the time the critical errors were made in his case. The order granting a new trial should be reversed, and the case remanded with directions to dismiss.

II. ARGUMENT

A. **The State Concedes, By Its Failure To Argue Them, Several Critical Errors.**

In his opening brief, Mr. Strine demonstrated several prejudicial errors. The State has elected in its brief not to challenge Mr. Strine's demonstration on these points. It is therefore not disputed in this case that:

- 1) The trial court's decision to poll the jury was based upon a legal error.
- 2) A poll is intended to test whether the verdict was properly reported by the foreperson of the jury; a poll is not an opportunity for reconsideration of a verdict actually rendered.
- 3) A jury may not be put in a position to change its verdict after being exposed to extraneous influences.
- 4) The trial court's failure to preface the poll with an admonition to the jury that it was not free to change its mind in response to the outburst it had witnessed increased the likelihood that jurors improperly changed their minds.
- 5) Any uncertainty about whether the jury was improperly influenced to change its mind followed from the trial court's failure to inquire of the jury whether they had been influenced by the outburst in which the decedent's daughter alleged a "murder[er]" had been exonerated.
- 6) The Double Jeopardy bar requires that any ambiguity in the record about whether the jury was improperly influenced must be resolved in favor of Mr. Strine.
- 7) Even if the poll had been proper, the trial court erred, once it decided to poll, in failing to poll specifically as to the two

counts in the charge, resulting in the implied acquittal of Mr. Strine.

B. The State's sole argument, that Mr. Strine cannot seek a remedy on appeal because he failed to ensure the fairness of the proceedings against him, is not supported in law or by the record.

1. The State Overlooks the Law: the Right to Avoid Double Jeopardy is a Fundamental Constitutional Right, Violations of Which are Reviewable Whether a Defendant Objects or Not.

The State advances the extraordinary proposition that Mr. Strine was solely and entirely responsible to ensure the fairness of the proceeding against him, and that he is estopped to ask this Court to remedy any violation of his fundamental rights. The State is badly mistaken. On the contrary, the state and federal constitutions impose upon the State, in the persons of both the trial court and the prosecutor, a solemn responsibility to honor and protect the Constitutional rights of the accused. One manifestation of this principle is the rule that permits an appellant to raise issues relating to fundamental constitutional rights *whether or not* he has made an objection in the lower court. Rules of Appellate Procedure, RAP 2.5(a)(3) provides:

A party may raise the following claimed errors for the first time in the appellate court: . . . manifest error affecting a constitutional right.

The right not to be exposed to double jeopardy is a fundamental right, and our courts have repeatedly held that it is a right whose violation can and must be addressed by the appellate courts whether or not a defendant has objected. *State v. Jackman*, 156 Wash. 2d 736, 746 (2006); *State v. Bobic*, 140 Wash. 2d 250, 257 (2000); *State v. Ellis*, 71 Wash. App. 400, 404 (Div. II, 1993). Further, where the issue involves the potential contamination of a jury by extraneous influences, even in civil cases the courts have held that the integrity of the process demands availability of review even if no contemporaneous objection is made. *Jones v. Sisters of Providence in Washington*, 93 Wash. App. 727 (Div. 1, 1999).

Thus the State is wrong, as a matter of law. The State is *not* entitled to gloss over the errors that deprived Mr. Strine of his right against double jeopardy; it is *not* entitled to shift all responsibility for the protection of his rights onto Mr. Strine and his counsel. Mr. Strine would be entitled to review of the errors that threaten a violation of his rights to avoid double jeopardy *even if* he had failed to object in the lower court (but, as shown below, there was no such failure).

2. The State Overlooks the Record: Mr. Strine Did Not Fail to Object to the Critical Errors.

a. Mr. Strine had no Opportunity to Predict and Object to the Trial Court’s Sua Sponte Announcement that the Law Required a Poll of the Jury

1. Neither the State nor Mr. Strine Requested a Poll.

The procedural rule governing polling of the jury after trial posits, as a default proposition, that a poll is conducted only if one of the parties asks for a poll. CrR 6.16(a)(3). In this case neither the State nor Mr. Strine requested that a poll be conducted. The parties thus had the right to reasonably expect that no poll would in fact be conducted; that is how the rule works.

2. The Court Announced Sua Sponte, Without Prior Notice to the Parties, that it Would Conduct a Poll on Erroneous Premises.

To be sure, the rule provides that the court may poll, “on its own motion” – which implies that the trial court perceives that a poll may be necessary for a reason, followed by a reasoned process toward a decision whether a poll should be conducted at the court’s instance. One would expect in the ordinary course of that process that the court would invite comments from counsel. Because of the trial court’s erroneous belief in this case that the law *required* a poll in every case, the trial court gave no

hint and did not invite counsel's views. The trial court announced that the law requires a poll, and proceeded to conduct it. Mr. Strine had already signaled to the Court that he did not want a poll – by not asking for it. He was not required to do more, and had no meaningful opportunity to do more to stop the poll, which was conducted in error and gave jurors an opportunity to change their minds in response to the highly emotional accusation from the decedent's daughter that they had freed a "murder[er]". The trial court's error, but for which the jury's verdicts of acquittal would have been recorded, cannot be blamed on Mr. Strine.

b. The Court Suggested that it Would Afford Counsel an Opportunity to Formulate a Plan, then Without Notice Withdrew that Opportunity.

The circumstances were unusual, and the record is clear that neither the trial court nor counsel had immediate answers as to what to do. The State now argues that Mr. Strine waived his right to urge the trial court to take any of the steps it should have taken, as outlined in Mr. Strine's opening brief on appeal, because he didn't ask the trial court to take them at the time. But the record shows clearly that he never had the chance. Recognizing that the situation was novel and unusual, after having conducted the poll, the trial court advised the parties that it

contemplated holding the jury while the parties had an opportunity to see what the law prescribes in such situations. The Court said:

. . . I don't know what the answer is, once we poll them all, then they have all said how they voted. So I'm not sure at this point after they have done that publicly we can send them back in and tell them to begin deliberating again. I don't know. We're going to need to bring the jury back and poll them.

* * * * *

Or put them back in and tell them not to talk about it anymore and do some research on how handle it.

* * * * *

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 publicly declared that verdict.

VRP Feb. 10, 2011 p. 5.

Far from remaining silent, Mr. Strine's counsel expressed his belief that some time for research and reflection was necessary: "I think we need to make the record and then I think we need to take the time to figure out what to do with it." But the opportunity for reflection and research never came. The trial court recalled the jury, conducted the poll, and decided to mistry the case without ever returning the jury to the jury room or affording counsel the opportunity to study the problem as the trial court had indicated moments earlier would occur. To imply a waiver by

Mr. Strine in those circumstances would be neither logically justifiable on the facts nor equitable.

c. The trial court did not consult counsel before sua sponte declaring a deadlock.

Immediately after it conducted the poll, without any interval, the trial court asked the foreperson of the jury:

THE COURT: Is there any reasonable possibility that if this jury were to be sent back to recommence deliberations you would be able to reach a verdict?

JUROR No. 7: A unanimous verdict, you mean?

THE COURT: Yes.

JUROR No. 7: No, Your Honor.

THE COURT: Juror No. 7, if you were given more time, again, do you think there is any possibility that you would . . . be able to reach a unanimous verdict?

JUROR No. 7: No, Your Honor.

VRP Feb. 10, 2011 p. 8.

The trial court declared a mistrial without any further effort at deliberations, and without any further inquiry as to whether the other factors indicating a true deadlock were present (they were not; see Mr. Strine's opening brief at p. 31-32). It is important to note that though it

appears from the trial court's later order denying Mr. Strine's motion to dismiss that the trial court believed (a) that the jury was deadlocked and (b) that such deadlock created "manifest necessity" for a mistrial, *the trial court did not say that at the time* the State claims Mr. Strine should have objected. Instead, the trial court ruled sua sponte that it could not send the jury back for further deliberations after having been polled (which was plainly erroneous given the plain terms of CrR 16).

d. The trial court declared a mistrial, to which the defendant had expressed opposition.

The State argues that Mr. Strine "impliedly" waived his objection to a mistrial and new trial. That contention is not supported by the record. After the trial court heard from some jurors that they dissented, but before it completed the jury poll, the trial court had a colloquy with counsel, in which the State clearly stated its preference for a mistrial, and the defense attempted to state its opposition, but was cut off by the court, which at that point indicated that an opportunity to research would be presented:

THE COURT: . . . We're going to need to bring the jury back and poll them.

MS. BRADY: And perhaps declare a mistrial.

MR. ORESKOVICH: Judge, I'm not –

THE COURT: Or put them back in and tell them not to talk about it anymore and do some research on how you handle it.

VRP Feb. 10, 2011 p. 5

Later, after completing the poll of the entire jury, and hearing from the jury foreperson that she doubted a verdict could be reached, the trial court called counsel to the sidebar and announced that a mistrial would have to be declared. She asked if counsel concurred; the State began to express agreement but was cut off by another, different question from the Court, to which the State then replied. The Court then followed up with a series of different questions, drawing replies from both counsel. When the Court returned to the topic of a mistrial, it was not to give defense counsel an opportunity to take a position, but rather to announce a ruling. The Court announced “I’m going to release them, then”, and commenced a discussion about dates for a new trial, to which defense counsel’s only response was “Judge, I don’t know.” VRP Feb. 10, 2011 pp 9-10.¹

¹ THE COURT: . . . I think once they’ve said there is no reasonable possibility of reaching a unanimous verdict, I have to release the jury and declare a mistrial. Is that what you think?

MS. BRADY: That’s what I think, too, because I think –

THE COURT: I don’t think I can force them back in.

MS. BRADY: No. And I don’t think that would be productive.

The record thus reflects defense counsel's effort, first, to say that he was not in agreement with a mistrial ("Judge, I'm not --"), and second, to say that he agreed with the Court that the matter needed to be studied. At no time did the defense counsel make any statement remotely suggesting concurrence with the State's position that a mistrial should be granted.² Even if it were not the law that Mr. Strine is entitled to ask this

THE COURT: Did we leave out an instruction?

MR. ORESKOVICH: No

* * * [A colloquy ensued on what could have happened with the jury]

THE COURT: . . . All right. I'm going to release them, then.

² The State seeks to backstop its argument with a personal reference to the experience and stature of Mr. Strine's trial counsel, suggesting that Mr. Strine bore an even greater burden to ensure that his trial was properly conducted because his lawyer is skilled and experienced. The State furnishes no legal authority for this extraordinary submission. And it doesn't help the State, even if it is correct – the State's counsel was *also* an experienced and highly regarded trial lawyer. Where both the trial judge and defense counsel had *said out loud* that they each feared the dissenting jurors may have changed their minds as a result of the outburst they had witnessed [VRP Feb. 10, 2011 p. 2-3], State's counsel is fairly chargeable with the knowledge, when she immediately and repeatedly pressed for a mistrial [VRP Feb. 10, 2011 pp 5, 6, 9, 10], that the possibility that jurors changed their minds had serious implications for Mr. Strine's rights under the Double Jeopardy clause, if steps were not taken to ensure that an improper change of mind had not occurred. But counsel did nothing to establish the facts, and instead insisted on a mistrial. Were we to indulge an untoward personal attack of the sort hazarded by the State in its suggestion that Mr. Strine's counsel attempted an "ambush", we might be tempted to argue that the State was improperly motivated to simply

Court to protect his right against double jeopardy without making any objection, the record shows that an objection was attempted to be stated, and a request to do further research was requested. There was no waiver.

e. Mr. Strine Formally Moved for Dismissal on Double Jeopardy grounds.

Mr. Strine filed a motion for dismissal, expressly calling to the trial court's attention that a new trial would violate his right not to be exposed to double jeopardy. This appeal is in part from the trial court's denial of that motion. Mr. Strine has never waived his double jeopardy rights. Mr. Strine had no greater duty than the Court or the State to ensure that his fundamental right against exposure to double jeopardy was protected; he would be entitled to ask this Court to vindicate that right even if he'd done nothing. But the record reflects nevertheless that he took every reasonable opportunity to protect his right. He was not required to anticipate the trial court's unforeseeable sua sponte errors, and he made every reasonable effort to urge a cautious, thoughtful process, and to oppose the decision to mistry the case.

“live to fight another day” by obtaining a mistrial, rather than pursue the careful steps necessary to obtain the facts and to ensure that Mr. Strine's rights were scrupulously honored. But that sort of personal attack has no more place here than it does in the State's argument.

Given the State's concession, in its failure to address Mr. Strine's arguments on their merits, that several errors plagued the proceedings below after the jury handed up its verdict of acquittal, the order for retrial should be reversed, and the matter remanded with instructions to dismiss.

C. RCW 10.61.060 Is Clearly Intended to Protect Defendants From Precisely the Kind of Prejudice Suffered by Mr. Strine.

1. RCW 10.61.060 is Intended to Protect a Defendant From Retracting an Acquittal Because of Second Thoughts.

If a trial court believes a jury has made a mistake in handing up a verdict of guilty, the Court is expressly permitted to offer clarifying instructions to the jury and require it to deliberate further. But RCW 10.61.060 clearly and expressly forbids the trial court to require a jury to deliberate further after returning a verdict of not guilty. The rationale for the statute is obvious: the legislature decided that the risk of the jury changing its mind and convicting a defendant it had declared not guilty is intolerable.

The State cannot give this Court or Mr. Strine any reassurance that such is not *exactly* the fate that befell Mr. Strine in this case. The jury returned a verdict of not guilty. Its verdict was clearly the product of a highly emotional process. It was then exposed to an extremely emotional display by the daughter of the accident victims, who loudly and repeatedly

cried out that a murderer was going free. The trial court then polled the jury on erroneous grounds. The State cannot assure this Court, or Mr. Strine, that the dissenting jurors did not then take the opportunity to change their minds.

2. Mr. Strine's Right to a Poll is Not Implicated Here.

The State devotes much of its argument to the proposition that a *defendant* has a right to poll a jury that returns a verdict of *guilty*, which is an important protection for a defendant to ensure against a non-unanimous guilty verdict. Mr. Strine has no quarrel with that proposition, but it has nothing to do with this case. Mr. Strine was not convicted by the jury's verdict; he was acquitted. He did not desire a poll, and did not ask for one (nor did the State). The State does not explain how a defendant's important right to poll a jury following a guilty verdict has any bearing whatsoever on the circumstances presented here, in which the jury handed up a verdict of acquittal which, but for the trial court's undisputed legal error, would have been recorded in favor of Mr. Strine. No right of a defendant to a poll following a guilty verdict would be limited or compromised in any way by the ruling Mr. Strine seeks from this Court. On the contrary, the essential interests underlying the Fifth Amendment to the United States Constitution, Article I § 9 of the Washington Constitution, and RCW 10.61.060 would all be vindicated.

3. RCW 10.61.060 Plainly Applies Before a Verdict is Recorded.

The State suggests that RCW 10.61.060 only comes into a play after a verdict is finally recorded. The statute does not say that, and its terms suggest the opposite. It is universally accepted that once a verdict is recorded it cannot be reconsidered; the statute exists in that context. Thus, the statute necessarily implies that the authority to further consider a guilty verdict, and the prohibition on further considering a not guilty verdict, apply to a point in time after a jury hands up its verdict but before it is recorded and the jury discharged.

D. The Trial Court Abused Its Discretion in Polling the Jury.

The State argues that a trial court has discretion to poll a jury on its own motion. Mr. Strine has not disputed that. However, Mr. Strine's opening brief demonstrated that the trial court in this case did not exercise its discretion; it acted on a mistaken belief that it had no discretion. That was a legal error, and when a trial court bases a discretionary ruling on a legal error the authorities are clear it has abused its discretion.

E. The Trial Court's Failure to Poll as to Each Count Results in an Implied Acquittal.

The State did not respond to Mr. Strine's argument that, because the poll conducted by the trial court was not specific as to whether the

dissenting jurors now disputed *both* their not guilty verdicts, or just one, that gap in the record works an acquittal as to all counts by operation of law. See Opening Br. P. 26-28. The State has therefore conceded that point, as well.

III. CONCLUSION

The Order denying Mr. Strine's Motion to Dismiss should be reversed, and the matter remanded with instructions to dismiss.

DATED this 11th day of May, 2012.

Respectfully Submitted

WITHERSPOON KELLEY

A handwritten signature in cursive script, appearing to read "Leslie R. Weatherhead", written over a horizontal line.

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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 11th day of May 2012 the foregoing NAME was filed with the Court of Appeals, Division III, and delivered to the following persons in manner indicated:

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