91487-7

No. 44924-4-II

Washington State Supreme Court

State
v.
Steven Kravetz

No. 44923-4-II

PETITION FOR REVIEW

Steven D. Kravetz,
Petitioner.

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A. Identity of Petitioner

Steven D. Kravetz, is Petitioner.

B. Decision

CoA filed its unpublished opinion, $44923-4-II, on 2/18/15.

C. Issues Presented For Review

#1: Does a trial court deny a defendant the constitutional right to testify under Wa. Const., Art. 1 § 3, and U.S. Const., Amd. 14, when a defendant complains to the court about unknowingly waiving his right to testify, and the court does not take remedial steps to ascertain from him if he is asking to testify and within which context he is asking, and/or when conducting a colloquy with the defendant about the right to testify in which the court gives incomplete and misleading information to the defendant about when he is allowed to testify to the case-in-chief?

#2: Division 2's decision not to review the jury polling method claims in the instant case conflict with Division 3's decision to review the jury polling method claims in State v. Barnett.

#3: In a jury poll of multiple verdicts, does a verdict appear insufficient if each juror is asked if he simultaneously agrees with all verdicts, says no but it isn't certain if he was disagreeing with all or less than all verdicts? And does a trial court deny a defendant his constitutional right to be protected from double jeopardy under Wa. Const., Art. 1 § 9, and U.S. Const., Amd. 5, and of Due Process under Wa. Const., Art. 1 § 3, and U.S. Const., Amd. 14, when it sends a jury back to redeliberate on an acquittal that did not appear non-unanimous upon polling?

#4: Is an insufficient poll the equivalent of a refusal to poll, and in violation of a defendant's constitutional right to be protected from double jeopardy under Wa. Const., Art. 1 § 9, and U.S. Const., Amd. 14, when a trial court sends a jury back to redeliberate on an acquittal after conducting the insufficient poll?

#5: For purposes of double jeopardy and due process, under the WA/U.S. constitutions: as the result of a jury poll, a party does not fail to object to a poll or a trial court's rejection of jury verdicts and order for redeliberations when that party's first opportunity to do so comes after the verdicts were tainted by redeliberations.

#6: When a jury returns both a guilty verdict on a greater degree charge and a not guilty verdict on a lesser degree charge of the same alleged crime, rejection of the acquittal is barred by double jeopardy but the guilty verdict must be impunged (under the WA/U.S. constitutions double jeopardy and due process clauses).

D. Statement of the Case

Petitioner filed briefs (1/21/14, 4/9/14) and three statements of additional authorities with CoA Div. 2, arguing (among other things) the right to testify, due process, and double jeopardy. Respondent filed an answer (2/28/14). On 2/18/15, Div. 2 rejected Petitioner's claims.

E. Argument Why Review Should Be Accepted

ISSUE #1: CoA, when describing the trial court's colloquy with the defendant about his right to testify, omitted important comments (represented by a '...') of the trial court imforming the defendant that testifying to the case-in-chief within surrebuttal is prohibited (after telling him that it thinks that he is not asking to testify to the case-in-chief). Op at 3.

The way the exchange is presented on Op 3 appears as if the defendant is not asking to testify to the case-in-chief; this is deceptive. CoA claimed that Petitioner "did not ask to testify or to reopen his case-in-chief" and that "he told the trial court that he did not want to testify, but that he wanted to share his thought that his counsel should have been more informative." CoA later added that "[a] defendant is not denied his right to testify when he did not assert that right and when he declined to testify when given the opportunity", citing State v. Barnett, 104 Wn.App. 191, 198-99 (2001) to support their above claims. Op at 6.

Barnett is distinguishable in that Barnett explicitly told the trial court that he was waiving his right to testify to the case-in-chief, just before the defense rested. Id at 197. One day

later, he told the court that he wanted to testify to the case-in-chief while explicitly stating that he knew he previously waived it. Id at 197-98. The Barnett court quoted from State v. Thomas, 128 Wash.2d 553, 558 (1996) by stating that "[a] defendant may waive the right to testify. Id. That waiver must, however, be knowing, voluntary, and intelligent" and found that Barnett's was. Id at 197.

In the instant case, the defendant never told the court at any time that he didn't want to testify to the case-in-chief, and later told the court that he unknowingly waived it at a point when he did not expect it would be waived, implying to the court to resolve the problem. Rp 567-68.

The defendant stated that defense counsel's failure to inform him as to when the last allowable time for him to testify was affected his decision not to testify, implying that he previously made a tentative decision not to decide until the last allowable time came for him to do so, but due to the defense resting when he didn't expect it, it kept him from making his ultimate decision on invoking his right. RP 567-68.

This behavior of the defendant is acceptable when he is given forehand knowledge that the prosecution will call rebuttal witnesses, never having experienced a trial with such, as the layman usually thinks the defense gets the last word in the evidentiary portion of a trial.

If a defendant is having second thoughts about not testifying, and that alone, then why would he complain to the court unless he

wants it to do something about his complaint? This is obviously the defendant's intention. Because of that, a trial court is obliged to clarify a defendant's intent if his communications are unclear, especially if he suffers from a mental illness.

The defendant saying "just wanted to raise the fact that he [Arcuri] did not inform me properly" and "didn't have a chance to think about it as much as I could have" (RP 568) must be understood in the context of what was spoken prior to it. The defendant complained to the court that defense counsel's misinformation of his testimonial rights affected his decision not to testify, then the court asked him a two-part question. RP 567.

The way the question was worded starts with the case-in-chief part spoken in a past tense ("wanted") followed by a description of the defendant's tentative decision not to testify to the case-in-chief; this part is referring to something that happened in the past, not at the moment the court spoke. The defendant responded by declining the surrebuttal inquiry and confirming the case-in-chief inquiry about how his tentative decision was affected; this was a confirmation of his indication that he wanted to testify to the case-in-chief (because he was trying to incite the court's help by complaining to the judge), requiring further inquiry/clarification by the court if it still did not understand what the defendant was asking it.

After the court asked the defendant if he had anything else to say on the topic (RP 571), the defendant saying "No, that's alright" just means he has nothing to add to his previous statements,

since the question posed to him was general and didn't direct him to respond to anything about the topic at hand (RP 571); not adding to those statements simply shows that he wishes to let them stand, waiting for the court's determination.

"[...] if the defendant wants to testify, he can reject his attorney's tactical decision by insisting on testifying, speaking to the court, or discharging his lawyer." U.S. v. Joelson, 7 F.3d 174, 177 (1993)

If the defendant didn't understand the scope of his testimonial rights, and wanted to exercise them at a time in which he thought he could but couldn't, and later coming to that realization at a time when he can no longer exercise it, and complains to the court about it, the court is obliged to take remedial steps to resolve the problem in order to ensure a knowing waiver of his right to testify. One federal appeals court said about the issue:

"The trial court is neither required to sua sponte address a silent defendant and inquire whether the defendant knowingly and intentionally waived the right to testify, nor insure that the defendant has waived the right on the record.", however this is only the case "[b]arring any statements or actions from the defendant indicating disagreement with counsel, or the desire to testify". U.S. v. Webber, 208 F.3d 545, 551 (2000)

After the trial court stated that he believed that the defendant was not asking to testify and asked him if he had anything more to say on the topic (RP 571-73), some say that he could have answered "I would like to testify now" but didn't.

The problem with that view is that the court was supposed to ensure that the defendant waived his right to testify after he indicated his desire to, by simply asking him "Are you asking to testify to the case-in-chief, yes or no?" The defendant could then have answered "yes" or "no", and it would have ensured that waiver

of his right to testify (or to remain silent) was unequivocal; this didn't happen.

Instead, after the court commented that he thought the defendant was not asking to testify, he then talked about the pros and cons of testifying (RP 572-73) and also (in response to the defendant's earlier statement about wanting to testify to the case-in-chief after the rebuttal witnesses):

> "In the event there had been surrebuttal, the defense wanted to rebut the testimony of Dr. Trowbridge or Dr. Ronnei, that could have been offered. The problem with rebuttal, a lot of times especially with young attorneys don't know any better is that there has to be something to rebut, and rebuttal is not an opportunity to present evidence that should have been presented in the case-in-chief." RP 572.

This statement had the serious potential to influence the defendant's next response (to the court's later invitation about the colloquy), as the court was implying that it took the defendant's statements about testifying to the case-in-chief as being within the context of surrebuttal and that the defendant couldn't do that. There's no proof that he knew the trial court could reopen the case-in-chief to allow his testimony to the case-in-chief; he only believed that he could still testify after the rebuttal witnesses.

But when he heard the court say "rebuttal is not an opportunity to present evidence that should have been presented in the case-in-chief", he may have thought that he wouldn't be allowed to testify (to the case-in-chief) after the rebuttal witnesses for any reason, not just within the context of surrebuttal, as there is no proof that after the court made the above comment, he under-

stood that he could still testify to the case-in-chief outside the context of surrebuttal; this explains his response on RP 573.

As it relates to a trial court's colloquy with a defendant about exercising his right to testify, the WA Court of Appeals and Supreme Court said the following:

> "First, under our state constitution, as under the federal constitution, the right to testify is in tension with the right not to testify. For that reason, it will generally be inappropriate for a judge to influence a defendant's choice between these two rights. A colloquy that focuses on the right to testify may unduly influence a defendant's exercise of the right to do so." State v. Russ, 93 Wn.App. 241, 246 (1998)
>
> "Moreover, for the court to discuss the choice with the defendant could intrude into the attorney-client relationship protected by the Sixth Amendment and might also appear to encourage the defendant to invoke or to waive his Fifth Amendment rights." In re Lord, 123 Wn.2d 296, 317 (1994)

The instant case's record shows that the trial court's colloquy with the defendant influenced at least one of his answers. RP 573.

To sum up, the defendant indicated (to the court) his desire to testify to the case-in-chief, and instead of ensuring a knowing waiver of his right to testify (or to remain silent), the trial court misconstrued the defendant's answer to its two-part question, failed to take remedial steps to ensure a waiver, and unduly influenced the defendant by it's colloquy describing the legalities of testifying to the case-in-chief after rebuttal witnesses testify. These actions prevented the defendant from testifying.

The law (including WA Const. Art. 1 § 3) is unclear in Washington as to the duty of a trial court, when a defendant complains to it about his right to testify being waived without his knowledge, what steps it must take to ensure that he knowingly waived it.

This court should hold that when a defendant indicates to the trial court that his right was unknowingly waived, it has an affirmative duty to confirm what he wants the court to do about it, such as asking yes or no questions like "Are you telling me you want to testify to the case-in-chief at this time?", or a question like "What do you want me to do about this?" Asking two-part questions can confuse the court and parties about the defendant's intent if his answers are not clear.

This court should further construe WA Const., Art. 1 § 3 to prohibit trial courts from making inaccurate comments about the ramifications of testifying after rebuttal witnesses testify if those comments don't completely disclose under what circumstances a defendant may testify to the case-in-chief. This is also a matter of substantial public interest, as the public does not want courts exercising their duties that affect the public's rights, base upon non-conclusive communications, especially when a misunderstanding leads to a loss of constitutional rights which can lead to serious threats to freedom.

ISSUE #2: CoA declined to review Petitioner's sub-claim (within his first claim of error in SAG 1) regarding the method of polling because he did not object to it at trial, citing RAP 2.5(a) and State v. Strine, 176 Wn.2d 742, 749 (2013) to support its decision [FN1]. Op at 6.

[FN1] However, Strine differs in that Strine claimed that error occurred not due to the polling method but when a jury poll was taken without the parties requesting it, upon the presumption that it was required. Id at 747, 749.

Compare the instant case with the polling issue brought up in State v. Barnett, 104 Wash.App. 191 (2001). In Barnett, the appellant raised the issue of improper jury polling for the first time on appeal, despite the fact that he didn't make such an objection at trial. Id at 196-97, 199. Yet, Division 3 didn't find that he was precluded from raising it, by reviewing it. Id at 199-200.

Division 2's decision not to review the same type of error in the instant case directly conflicts with Division 3's decision to review Barnett's claim. The CoA as a whole is prohibited by the equal protection clause of U.S. Const., Amd. 14 from denying an appellant from raising a specific claim of error for the first time on appeal when it already allowed another appellant to do the same in another appeal. In the light of this, this court should resolve this conflict to allow jury polling method claims raised for the first time on appeal, to make the instant case's sub-claim consistent with Barnett.

(facts that relate to Issues 3-6):

CoA claimed that verdict form B of Count 2 was redundant because the jury should not have completed it when they returned a guilty verdict on form A (Op 4), referring to RP 679 and 684 to support this claim. However, RP 679 only mentions the following:

> "[THE CLERK]: Count 2 again? THE COURT: Go ahead and read that one. That's a redundant verdict, but go ahead and read that one. THE CLERK: As to Count two, assault in the second degree, "We, the jury, find the defendant not guilty."" RP 679.

The court directed the clerk to read the acquittal into the record. RP 679. In the discussion with counsel in RP 684, the court only said that he thought if the jury voted guilty on the grea-

ter charge, the acquittal on the lesser was their intent not to return two guilty verdicts within the same count.

ISSUE #3: Coa claimed that Petitioner claimed only one constitutional violation - the right to a unanimous jury verdict, by means of improper jury polling and by sending the jury back to redeliberate on the first set of verdicts. Op at 6. The truth is, Petitioner claimed two other constitutional violations: the right to due process (SAG a, b, 3, 4, 7), and protection from double jeopardy (implied through his due process claims, and argunents relating to RCW 10.61.060) (SAG 4, 7; SoAA (12/11/14) page 1), occurring when the trial court rejected the verdicts (of the first set) and sending the jury back to redeliberate on them (implicating double jeopardy protections), based upon the trial court's erroneous ruling that no verdict was unanimous. SAG 3-4. It was the ruling on the verdicts and order for redeliberations that were at issue, not the poll (although the poll was implied as a sub-claim).

CoA claimed that the trial court properly sent the jury back to redeliberate on all verdicts because the poll showed that none of them were unanimous. Op at 6. This is false. When a jury returns their verdicts, they are presumed to be unanimous (according to the common law). U.S. v. Shepherd, 576 F.2d 719, 724 (1978). This means that if polling does not prove otherwise, the verdicts must be filed, because the presumption was not overcome and is controlling.

"[A jury poll's] object is to ascertain for a certainty that each of the jurors approves of the verdict as returned[.]" Humphries v. District of Columbia, 19 S.Ct. 637, 638-39 (1899). "The

purpose of polling the jury is to determine if the verdict signed by the foreman is that of the individual jurors and not one that has been coerced or caused by mistake." State v. Pockert, 49 Wash.App. 859, 860 (1987). "Jurors must be given an opportunity in open court to express their agreement or disagreement with the verdict." Government of the Virgin Islands, v. Hercules, 875, F.2d 414, 418-19 (1989)

The Hercules court, while interpreting a polling rule very similar to RCW 4.44.390 (Fed.R.Crim.P 31(d)) held it to be reversible error for a trial judge to conduct a jury poll that does not meet its purpose. In Hercules, the defendant was charged with multiple crimes. After the jury returned their verdicts, defense counsel timely requested a poll. The court then conducted the poll by directing defense counsel to look at the verdict forms and telling him that he (the judge) doesn't poll the jury by asking them about their verdicts. Defense counsel didn't object to the form of the poll, and the court thereafter filed all the verdicts. On review, the Hercules court stated:

""("[t]he form of the poll takes, so long as it is designed to elicit the agreement disagreement of each juror to the verdict, is within the discretion of the trial court.") We, therefore, review the trial judge's action for an abuse of discretion." [...] "in the absence of a valid poll upon a timely request, we must regard the verdict as defective." [...] "The government contends that '[w]hat Appellant is actually complaining of is not the absence of a jury poll but the method employed in the jury poll.' [...] Hercules argues that the signed verdict forms cannot constitute a form of polling the jury. [...] Because both a refusal to poll and a judge's abuse of discretion in his manner of polling lead to the same result, i.e., reversal of the conviction, we choose not to become embroiled in a battle of semantics." [...] ""[W]e conclude that the type of signed jury poll contained within the verdict forms with respect to each separate count does not meet the minimum requirements of sufficiency under our interpretation of Rule 31. We find, therefore, that the trial judge abused his discretion and will reverse the conviction." Id at 417-19, (FN5), (FN6).

In the instant case's first jury poll, the court asked each juror "Are these your verdicts?" and "Are they the verdicts of the

jury?" RP 680-83. The context of these questions shows that the jurors weren't being asked whether they agreed or disagreed with all verdicts, but whether or not they agreed with all of them (whether the juror's agreement on all verdicts was true or false).

Juror #12 expressed that this was false. RP 682-83; this still left open the possibility that he was still in agreement on at least one or more of the verdicts; this requires further inquiry by the trial court in order to reveal this concurrence (or lack thereof), by either asking the juror if he is in agreement with at least one or more verdicts, and if so, what they are, or by re-polling the jury on each separate verdict. Only then could the court ascertain if there were any unanimous verdicts left, and what ones they were.

But the form of polling the court used didn't allow the juror to express any assent with some verdicts while dissenting to others. Therefore, #1 - the acquittal on Count 2's lesser charge never appeared to be insufficient, and #2 - the form of the poll did not meet its purpose, making it invalid, and constitutes no poll.

CoA cites In re Candelario, 129 Wn.App. 1, 7 (2005), to rebut what they claim Petitioner is claiming about what an acquittal is in the light of a juror's dissent in a jury poll. Op at 6. [FN2]

Asking jurors "Are these your verdicts?" is sufficient only if

[FN2] In Candelario, the jury returned a conviction on the charged offense, and a special verdict that expressed uninimity as to one of the means the crime was committed, but also expressed that they weren't unanimous as to the other means. Id at 3-4. The Candelario court held that the jury not coming to agreement as to one of the means didn't constitute an acquittal on the charged offense. Id at 6-7. However, in Candelario, it was certain what the jury wasn't unanimous on; here (in the instant case), it is uncertain.

the entire jury says yes. But if a juror answers no, and the trial court thereafter claims (or implies) that the juror's answer means that he is disagreeing with every verdict, if in truth he was still in agreement with one or more of them, then the court's action of declaring all verdicts not unanimous, in effect, changed the juror's vote/s without their consent. In this circumstance:

"The trial judge is thereby barred from attempting to override or interfere with the juror's independent judgment in a manner contrary to the interests of the accused." U.S. v. Martin Linen Supply Co., 97 S.ct 1349, 1355 (1977)

There is no authority that allows, during a jury poll, the requirement that a verdict of acquittal be contingent that the jury is also in unanimous concurrence with all of the other verdicts.

Because juror #12 was never given an opportunity to express his assent to the acquittals while dissenting to agreement with all the verdicts, the acquittals never appeared to be insufficient. And because the form of the poll didn't meet the purpose of a poll, it is no poll (invalid poll). Therefore, the presumption that all verdicts of the first set were unanimous wasn't overcome, which meant they remained unanimous and were required to be filed. Therefore, the trial court's rejection of the acquittals and of sending the jury back to redeliberate on them, violated the defendant's right to be protected from double jeopardy.

The law is not clear in Washington as to what constitutes the appearance of insufficiency (under RCW 4.44.390) in a jury poll (of multiple verdicts) that asks jurors if they agree with all verdicts, a juror says no but does not indicate if he's referring to all or less than all verdicts. This court should hold that a

verdict appears insufficient in a jury poll when a juror explicitly dissents to it without their answer being confused with another verdict. This can be done by polling jurors on each separate verdict, or by asking each juror if he agrees with all verdicts, and upon a dissent, either asking him which verdict/s he dissented to (and continuing the poll on the remaining verdicts) or by repolling the jury on each separate verdict. This method would clearly determine the jury's true intent, and this court should construe RCW 4.44.390 and the double jeopardy clause of the WA Constitution to reflect the definition of the appearance of insufficiency in a jury poll to be consistent with the above argument.

ISSUE #4: CoA refused to address Petitioner's claim on SAG 9-10 (failure/refusal to poll jury). However, they are supposed to review claims that a trial court failed/refused to poll a jury upon timely request. Petitioner's claim was intended to show that because the trial court didn't conduct a sufficient jury poll, it's the same as a refusal to poll (see Gov. of the Vir. Isl. v. Hercules, 857 F.2d 414 (1989) and ISSUE #3). State v. Pockert, 49 Wash.App. 859 (1987) was cited (SAG 9-10) and Hercules was included (in Petitioner's SoAA (12/11/14) pages 2-4) to show that a jury poll that didn't meet its purpose was the equivalent of a refusal to poll, requiring relief.

This is a matter of substantial public interest because courts that don't want certain verdicts filed due to judicial bias can use the psuedo-polling method used in the instant case to deliberately misconstrue a juror's answer in order to reject verdicts

that the juror agrees with that the judge doesn't want to accept, in the hopes that a party will not object to the polling method; if this kind of practice catches on, it will frequently place defendants in unnecessary jeopardy. This is also a significant WA/U.S. Const. question of law as the law isn't clear in Washingtton as to the effect of an insufficient poll upon timely request; this court should use the rationale in Hercules and Pockert to hold that a multi-verdict poll that does not clearly determine what verdicts stand 12-0 and which ones do not, are not valid polls and are reversible error; for accepted convictions, reversal, for rejected acquittals, a double jeopardy bar.

ISSUE #5: CoA cites State v. Strine, 176 Wn.2d 742, 749 (2013) to assert that Petitioner's failure to object to the jury poll and redeliberations precludes review of his claims that relate to it [FN3]. Op at 6.

At the CrR 3.5 hearing (2/27/13 - four weeks before the trial) the trial judge gave directions to counsel for both parties as to process for discussing issues that arise during trial (like the

[FN3] Even if this were true, Strine differs from the instant case. In Strine, when a poll (on multiple verdicts) was taken, and jurors dissented to agreeing with all the verdicts, the jury was directed to go back to the jury room but not to talk about the case until further notice. Id at 147. After they left, the parties were given an opportunity to discuss the poll and what to do from there. Defense counsel requested that the rest of the jury be polled, which later happened. Id at 747-48. By following that procedure, the parties had an opportunity to do something about the poll and verdicts. In the instant case, after juror #12 dissented, the court immediately sent the jury back with directions to begin deliberations again, the jury left, then the court gave the parties an opportunity to discuss what to do about the poll and verdicts. RP 682-85.

above jury poll). RP 913-17:

"THE COURT: I would appreciate your jury instructions the first day of trial. I don't do meetings in chambers any longer. Any pretrial issues, anything of that sort, we'll do on the record here in the courtroom. Same thing with respect to any questions from the jury. Once the jury goes out, I don't do sidebars. If there's an issue you want to discuss, we'll send the jury out. We'll do it on the record. That way we don't have any -- FULLER: My next question is you have a jury congregation place someplace in this building?" RP 915.

Neither party objected to this procedure, and it was followed at trial with respect to the first set of verdicts and the poll relative to it. RP 915-17, 683-85. The first time counsel for both parties had discussed the issue of the first set of verdicts was after the jury was sent back (the court incited that discussion). RP 683-85. From what happened at the 3.5 hearing and trial, the record shows that counsel for both parties obeyed the court's directions regarding when to bring up an issue at trial (see RCW 7.21.020).

This means that the court never gave the parties an opportunity to object to the polling method and the court's action's subsequent to it, until the verdicts were already tainted by redeliberations. The discussion about the verdicts was irrelevant because, by that time, the verdicts were already tainted, so there was nothing defense counsel could do about the poll and verdicts to remedy problems that arose from it [FN4]. Therefore, when the jury began deliberations on the acquittals, the defendant's right to be

[FN4] Additionally, other courts have held that a trial judge is solely responsible for properly handling a jury poll and his actions subsequent to it, and that counsel is not required to object to the polling method in order to preserve the error for review. Sincox v. U.S., 571 F.2d 876, 877-79 (1978); Application of Reynolds, 287, F.Supp 666, 672-73 (1967)

protected from double jeopardy was already violated.

This is a matter of substantial public interest because a party should not be precluded from raising errors for the first time on appeal due to trial court orders that require a party to object to the error when it's too late to correct it, especially if double jeopardy results. For that reason, this is also a significant question of law under the WA/U.S. double jeopardy clauses. This court should hold that a party doesn't waive the right to raise the above errors on review despite their failure to object at trial when they weren't given an opportunity to raise them until it was too late to correct it (such as the above d.j. violations).

ISSUE #6: CoA claimed that Petitioner claimed that the verdicts for Count 2 (of the first set) were inconsistent based upon the forms only (Op 7) [FN5], rejecting the claim as invalid because the trial court rejected the forms and determined that they were invalid, citing State v. Eggleston, 164 Wash.2d 61, 73 (2008) to imply that the trial court had the authority to reject the lesser-included verdict of Count 2 because the jury was instructed not to complete the form if the verdict for the greater charge was guilty, implying that a lesser-included general verdict is a special verdict. Op at 7.

However, Count 2's lesser verdict of acquittal is a general (not special) verdict (see WA Prac.: Cr. Prac. & Proc. 4602).

[FN5] But Petitioner was also implying the return of the verdicts and the results of the poll relative to it. SAG 22-23; this claim was dependent upon CoA's agreement with either of the first two claims of error in Petitioner's SAG.

Second, the jury instructions allowed the jury to render a verdict on the lesser charge first as it's an 'unable to agree' instruction. CP 302-03. In State v. Labanowski, 117 Wash.2d 405 (1991), the WA Supreme Court held that "unable to agree" instructions allow a jury to consider/render a verdict on a lesser-included charge before the greater charge. Id at 423.

The jury was also instructed and required to return an acquittal on Count 2's greater charge if they weren't satisfied beyond a reasonable doubt that the defendant was guilty of it, of if they considered (or rendered an acquittal on) the lesser charge (CP 284, 292, RP 585, 589), and to return an acquittal on the lesser if they weren't satisfied beyond a reasonable doubt that the defendant committed Assault 2 (whose elements are necessary to be found positive for conviction on the greater charge). CP 284, RP 586-87.

From the record and instructions, it cannot be determined which of the two verdicts the jury rendered first, and courts are prohibited from deciding which one was. But even if the instructions were controlling, the double jeopardy doctrine trumps all of the above. In his separate concurring opinion in Eggleston, supra, J. Sanders put it best:

"[a] verdict of acquittal is enforceable, even where the verdict was clearly in error. See Fong Foo v. United States, 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962); United States v. Martin Linen Supply Co., 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977). This is true even where "the acquittal was based upon an egregiously erroneous foundation," including the inability to enter a verdict. Fong Foo, 369 U.S. at 143, 82 S.Ct. 671; Sanabria v. United States, 437 U.S. 54, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978)." . "The Ninth Circuit follows Supreme Court precedent by giving effect to a jury's verdict even where the jury was not

required to complete the verdict form. For example, in Stow v. Murashige, 389 F.3d 880, 883 (9th Cir.2004), the defendant was charged with attempted first degree murder and two counts of attempted murder in the second degree. The jury was instructed, "[i]f you find the defendant not guilty ... of attempted murder in the first degree, ... then you must consider whether the defendant is guilty ... of attempted murder in the second degree." Id. at 884. The jury found the defendant guilty of attempted murder in the first degree but indicated not guilty next to each of the attempted murder in the second degree charges. Id. The Ninth Circuit held these "Not Guilty" notations, although unnecessary and contrary to the jury instructions, were valid acquittals of the lesser included offenses. Id. at 888-92."

In Stow, supra, the Ninth Circuit also stated: "We further hold that the jury's "Not Guilty" verdicts create a double jeopardy bar to Stow's impending retrial on the charges of attempted second degree murder. To do otherwise, and allow an appellate court over six years later to speculate whether the jury really meant to acquit when it wrote "Not Guilty," would create an unwarranted exception to the "fundamental" and "absolute" rule of double jeopardy that a jury's verdict of acquittal is final-an exception that would inevitably undermine the rule's "absolute" nature. See Burks v. United States, 437 U.S. 1, 16, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) ("[W]e necessarily afford absolute finality to a jury's verdict of acquittal.")"" Id at 883 [FN6].

There is not a case in Washington that addresses the issue of a jury returning both a greater-degree guilty verdict and a lesser-degree not guilty verdict of the same alleged crime, and how to resolve it. Stow is factually on par with the instant case, and its holdings are controlling here. Therefore, this court must clarify the WA Constitution's double jeopardy clause to reflect Stow's holdings to make Stow consistent with the instant case, and also hold that when a jury returns both a greater-degree guilty

[FN6] Also see Id at 888-92 (among holdings relative to erroneous acquittals: "any instructional error, even if it led to the jury's verdict of "Not Guilty," is irrelevant for double jeopardy purposes" because "The Supreme Court [...] has explicitly held that jury acquittals, even when based on instructional error, still create a double jeopardy bar.").

verdict and a lesser-degree acquittal of the same alleged crime, the acquittal must stand but the guilty verdict must not, for the acquittal makes negative findings necessary to be found positive for conviction on the greater charge, and cannot be impunged.

This issue raises a significant WA/U.S. constitutional question of law.

Conclusion

This court should order reinstatement of the acquittal returned for the lesser charge of Count 2 (of the first set of verdicts) and direction of an acquittal (or dismissal with prejudice) on Count 2's greater charge, based upon the trial court's rejection of the acquittal and upon sending the jury back to redeliberate on it when it was still unanimous.

And this court should order reversal (on all counts) and a new trial based upon the trial court's failure to afford the defendant an opportunity to testify on his own behalf.

3/20/15

Steven D. Kravetz

Steven D. Kravetz,
Petitioner.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. STEVEN DANIEL KRAVETZ, Appellant.	No. 44923-4-II UNPUBLISHED OPINION

LEE, J. — Following a jury trial, Steven Daniel Kravetz was convicted of first degree assault, second degree assault, and disarming a law enforcement officer. Kravetz appeals, arguing that the trial court denied him his right to testify. Kravetz, in a statement of additional grounds (SAG),[1] also challenges the validity of the jury's verdicts, arguing that he was denied his right to a unanimous verdict and that the jury rendered inconsistent verdicts. Kravetz's arguments are without merit. We affirm.

FACTS

Following an assault at the Grays Harbor courthouse,[2] the State charged Kravetz with the following crimes: Count I—second degree attempted murder, count II—first degree assault of

[1] RAP 10.10.

[2] The venue for this trial was changed from Grays Harbor County to Lewis County.

Deputy Polly Davin, count III—disarming a law enforcement officer, and count IV—first degree assault of Judge David Edwards.

Kravetz's case proceeded to a jury trial on March 26, 2013. On April 1, after both parties presented their cases, the trial court dismissed the jurors for the day.

The next morning, defense counsel informed the court that Kravetz wished to address the court. The following exchange took place:

> THE COURT: Mr. Kravetz, as I understand it, you wish to address the Court directly yourself. Again, as I told you at the outset, you have the right to remain silent. You are not required to say anything. As I told you at the outset [you] had the right to take the stand and testify, and it was my understanding from yesterday from the action taken by [defense counsel] in calling his expert witness, then, subsequently calling your mother, then, resting that the decision was made that you were not going to testify. If you want to be heard on that, this is your opportunity. Bear in mind, you are not required to say anything, and anything you do say is being taken down by the court reporter and may end up being used against you.
>
> THE DEFENDANT: Last time I had spoken with [defense counsel] in the jail, he told me that regarding the presentation of the defense yesterday that he would call his witnesses and then the prosecution would call the rebuttal witnesses, but he never told me that the defense was required to rest, before the rebuttal witnesses, and I thought that I might have a chance to testify after the rebuttal witnesses, because he never informed me of that, so that's just—basically, that's maybe sort of affected my decision possibly to not testify, and *so I'm just raising that he should have been more informative about me and that's all.*
>
> THE COURT: Well, are you telling me that you wanted to take the stand and testify in your own defense and that somehow you misunderstood [defense counsel's] advice and as a result of that chose not to or are you just telling me you wanted an opportunity to rebut the State's rebuttal witnesses?
>
> THE DEFENDANT: *No, I don't want to do that, but I just wanted to raise the fact that he did not inform me properly*, so that I didn't have a chance to think about this as much as I could have.
>
> ....

> THE COURT: Mr. Kravetz, is there anything else you would like to say on this topic? Again, you are not required to say anything. Anything you say is being taken down by the reporter and may be used against you.
>
> THE DEFENDANT: No, that's all right.
>
> THE COURT: From your statements, it is my understanding that you are not telling me that you, the defendant, in fact did want to testify on your own behalf merely that you apparently did not understand or so you say today the procedure that the Court follows with respect to a trial . . . .
>
> . . . .
>
> It's on the record. You have made your record for it, but I think that what happened here was trial strategy, and I understand the strategy. I think all the attorneys in the courtroom understand the strategy, and I'm going to leave it at that, unless you have something else that you want to say on the topic.
>
> THE DEFENDANT: No.

Verbatim Transcript Proceedings (VTP) (April 2, 2013) at 566-68, 571-73 (emphasis added). After the above exchange, the parties proceeded to closing arguments.

The trial court instructed the jury on the lesser included offense of second degree assault as to counts II and IV. On count II, the jury received a verdict form A for first degree assault and a verdict form B for second degree assault. The trial court instructed the jury to not complete verdict form B if they found Kravetz guilty of first degree assault on verdict form A. On count IV, the jury received a verdict form A for first degree assault and a verdict form B for second degree assault. The trial court again instructed the jury to not complete verdict form B if they found Kravetz guilty of first degree assault on verdict form A.

The jury returned the following verdicts:

Count I: Second degree attempted murder—not guilty;
Count II: First degree assault of Deputy Polly Davin, Form A—guilty;
Count II: Second degree assault of Deputy Davin, Form B—not guilty;
Count III: Disarming a law enforcement officer—guilty;
Count IV: First degree assault of Judge David Edwards—not guilty
Count IV: Second degree assault of Judge Edwards—guilty

Clerk's Papers (CP) at 304-09. In regards to the jury completing verdict form B for count II, the trial court said that the response was "a redundant verdict" because the jury should not have completed verdict form B (count II-assault in the second degree) when it found Kravetz guilty of first degree assault. VTP (April 3, 2013) at 679, 684.

The trial court polled the jury at Kravetz's request. Each juror, except for juror 12, reported that the verdicts reflected their verdicts and the verdicts of the jury. Juror 12 reported that "[t]hey were not my verdicts. They were the verdicts of the jury." VTP (April 3, 2013) at 683. Kravetz did not object to the trial court's polling method.

The trial court determined that the verdicts were not unanimous as required, and directed the jury to continue deliberations. On the record, the trial court determined (after discussion from the parties) that the first set of verdicts were invalid because they were not unanimous, that the jury did not follow the trial court's instructions regarding filling out the verdict forms, and that the trial court would give the jury a clean set of verdict forms. Kravetz did not object to the trial court's ruling to send the jury to continue deliberations.

After continued deliberations, the jury returned the following verdicts:

Count I: Second degree attempted murder—not guilty
Count II: First degree assault of Deputy Polly Davin, Form A—guilty
Count II: Second degree assault of Deputy Davin, Form B—"redundant"
Count III: Disarming a law enforcement officer—guilty

Count IV: First degree assault of Judge David Edwards—not guilty
Count IV: Second degree assault of Judge Edwards—guilty

CP at 314-19. The trial court again polled the jury at Kravetz's request, which revealed that the verdicts were unanimous. Kravetz did not object to the trial court's polling method. Kravetz appeals.

ANALYSIS

A. THE CONSTITUTIONAL RIGHT TO TESTIFY

Kravetz argues that the trial court denied him his constitutional right to testify when it did not allow him to reopen his case-in-chief after he told the trial court that he did not want to testify, but that he wanted to share his thought that his counsel should have been more informative.[3] Br of Appellant at 14. His argument fails.

The defendant has a fundamental right to testify. *State v. Robinson*, 138 Wn.2d 753, 758, 982 P.2d 590 (1999). We review a trial court's decision whether to reopen a case-in-chief to allow a defendant to testify for manifest abuse of discretion. *State v. Barnett*, 104 Wn. App. 191, 199, 16 P.3d 74 (2001). A trial court abuses its discretion when its decision is based on untenable grounds or untenable reasons. *Barnett*, 104 Wn. App. at 199.

Here, Kravetz did not ask to testify or to reopen his case-in-chief. A defendant is not denied his right to testify when he did not assert that right and when he declined to testify when given the opportunity. *See Barnett*, 104 Wn. App. at 198-99 (holding the trial court did not abuse its discretion to not reopen the case-in-chief to allow the defendant to testify where the defendant stated that he changed his mind about testifying the day after the defense rested its case).

[3] Kravetz does not assert that he asked to or wanted to testify prior to April 2, 2013.

Moreover, the trial court cannot abuse its discretion by refusing to reopen a defendant's case-in-chief when the defendant did not ask to reopen his case-in-chief. Accordingly, Kravetz's claim that the trial court denied him his right to testify by not reopening his case-in-chief lacks merit.

B. SAG—JURY VERDICTS

1. Unanimous Jury Verdicts and Jury Polling

Kravetz argues that the trial court denied him his right to a unanimous jury verdict by improperly polling the jury and improperly directing the jury to continue deliberations. SAG at 1, 9. We disagree.

First, Kravetz did not object to the trial court's poll. Therefore, he is precluded from assigning error to the form of the jury poll. RAP 2.5(a); *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013) (holding that the court would not review the defendant's assignment of error related to the jury poll when the defendant did not object at trial).

Second, Kravetz argues that the trial court improperly directed the jury to continue deliberations because the jury returned an acquittal on count II for second degree assault of Deputy Davin. Kravetz's assertion that the jury acquitted him of count II is unequivocally incorrect. Here, the jury poll showed that the first set of verdicts were not unanimous. A nonunanimous verdict is not an acquittal. *In re Pers. Restraint of Candelario*, 129 Wn. App. 1, 7, 118 P.3d 349 (2005). Accordingly, the jury poll did not demonstrate that Kravetz was acquitted—it demonstrated that the jury had not reached a unanimous verdict. *See State v. Noyes*, 69 Wn.2d 441, 446, 418 P.2d 471 (1966) (holding when a hung jury stands 11 to 1 for acquittal, defendant is not permitted to waive a unanimous verdict and accept the vote of 11 jurors as a valid verdict for acquittal). Thus, Kravetz's arguments regarding the improper polling of the jury fails.

2. Inconsistent verdicts

Kravetz argues that the jury rendered inconsistent verdicts based on the first set of verdict forms. Specifically, he argues that it was inconsistent for the jury to find him guilty for first degree assault as to count II, but not guilty of the lesser included crime of second degree assault.

Kravetz's argument fails because the trial court rejected the first set of verdict forms and determined that they were not valid. The trial court may properly disregard the jury's completion of a special verdict form when the jury found the defendant guilty and was instructed to complete the form only if they found the defendant not guilty. *State v. Eggleston*, 164 Wn.2d 61, 73, 187 P.3d 233, *cert. denied*, 555 U.S. 1075 (2008).

Also, the second set of verdict forms, which the trial court accepted because they were unanimous and valid, did not find him not guilty on form B. Thus, the alleged inconsistency that Kravetz relies on does not exist in the accepted jury verdicts.

We affirm Kravetz's conviction.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Johanson, C.J.

Maxa, J.