



No. 35549-3-II

**COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION TWO**

STATE OF WASHINGTON,

Respondent,

v.

JUSTEN WILLIAM DeFRANG,

Appellant.

FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
#06-1-00160-4

BRIEF OF RESPONDENT

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ORIGINAL

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INTRODUCTION

Double jeopardy exists when a defendant must stand trial for a crime, jeopardy terminates, and defendant stands trial for the same crime again. Here, a Clallam County jury could not reach a verdict on the count of residential burglary against defendant Justin DeFrang. This did not terminate defendant's jeopardy for the charge. "A hung jury is an unforeseeable circumstance requiring dismissal of the jury in the interest of justice." State v. Ervin, 158 Wn.2d 746, 753, 147 P.3d 567 (2006). Because the trial court dismissed the jury in the interest of justice, jeopardy did not terminate and the State could appropriately retry defendant for residential burglary.

On retrial, a second jury found defendant guilty, and the State respectfully requests this Court to affirm DeFrang's conviction.

I. RESTATEMENT OF ISSUES PRESENTED.

Defendant's appeal raises three issues:

A. "When the jury cannot decide on a verdict, and disagreement is formally entered onto the record, then...the defendant can be retried." State v. Daniels, 160 Wn.2d 256, 264, 156 P.3d 905 (2007). The trial court on the record determined

there was no “reasonable possibility of the jury reaching an agreement within a reasonable time.” (8/11/06 VRP 3). Did the hung jury on Count I, Residential Burglary, allow the State to retry defendant DeFrang on that charge?

B. When a trial court dismisses a hung jury without defendant’s consent, it does not amount to an acquittal or termination of jeopardy. State v. Brunn, 22 Wn.2d 120, 145, 154 P.2d 826 (1945). The trial court dismissed the jury, with defendant and counsel present, after determining it could not reach a verdict. (8/11/06 VRP 2-7). Did dismissal of the jury without defendant’s consent amount to an acquittal?

C. “An objection to a jury instruction cannot be raised for the first time on appeal unless the instructional error is of constitutional magnitude.” State v. Dent, 123 Wn.2d 467, 478, 869 P.2d 392 (1994). The trial court, without objection from defendant, used the pattern instruction on the definition of accomplice. (10/4/06 154-55) (Jury Instruction No. 15; CP 26) (WPIC 10.51). Is the pattern instruction unconstitutional?

II. STATEMENT OF FACTS.

A. Defendant's Participation in The Burglary

On March 7, 2006, Defendant Justin DeFrang, Ron Leppanen and Nicole Parker had spent the night sleeping in DeFrang's car. They woke up and began looking for gas. As Leppanen testified at the first trial,

Q. What happened when you woke up on the morning of the 7th?

A. Went driving around looking for some gas and seen a house and we ended up burglarizing it.

Q. Did you know whether anyone was home or not when you decided to burglarize that home?

A. I didn't think so. I seen some people leaving the house, so figured that the house was empty.

(8/9/06 VRP 60).

They backed in the driveway and made sure the house was empty. (8/9/06 VRP 61). DeFrang was driving his '95 white Chevrolet Blazer, Leppanen was in the front seat and Parker was in the back. (8/9/06 VRP 61). When he could not break open a window, DeFrang broke through the front door. "JD was trying to bust open the window with something in his hand and then that didn't work and he shouldered the door open." (8/9/06 VRP 63).

They broke into the house to find valuables to trade for methamphetamine. (8/9/06 VRP 63)

Leppanen testified that DeFrang found and took sports memorabilia from the house.

[DeFrang] was into all the sports stuff, memorabilia's and collector items, stuff like that. I really got no knowledge of any of that stuff.

(8/9/06 VRP 73). While Parker watched from the Blazer, Leppanen and DeFrang ransacked the house and piled what they wanted at the door. Parker became concerned about a neighbor watching, so the two loaded everything into DeFrang's Blazer. "Everything was just kind of stockpiled at the door and just grabbed armfuls and threw it in the back of the vehicle." (8/9/06 VRP 75).

The three drove away without being caught.

B. Sequim Police Pull Over the Blazer, Arrest Defendant and Discover the Stolen Property

On March 11, 2006, Sequim police arrested Leppanen and defendant DeFrang in the white Blazer. (8/8/06 VRP 67) Leppanen was driving, and DeFrang was in the front passenger seat. (8/8/06 VRP 87-88). The police impounded the car, obtained a search warrant, and discovered stolen goods from the March 7th burglary. (8/8/06 VRP 69). After the burglary victims identified the

stolen property, the State charged defendant DeFrang with one count of Residential Burglary and one count of Possession of Stolen Property. (Information; CP 21).

C. The Jury Deadlocks In Defendant's First Trial

Testimony in DeFrang's first trial took three days. On the fourth day, August 10, 2006, the case went to the jury in the morning. (8/10/06 VRP 47). After two jury questions and a full day of deliberation, the trial judge excused the jury at 4:30. (8/10/06 VRP 52).

The next day, August 11, 2006, the jury deliberated until it reached deadlock. The presiding juror notified the clerk that the jury had a verdict on one count, but could not reach agreement on the second. (8/11/06 VRP 2) ("you indicate and I have already indicated to counsel and to the prosecutor that you reached a verdict on one charge but you cannot reach a verdict on the other charge"). With defendant and defense counsel present, a substitute trial judge determined that the jury was unable to reach a verdict.

THE COURT: Is there a reasonable possibility of the jury reaching an agreement within a reasonable time as to any of the other counts?

JUROR RAMSEY: No.

THE COURT: Okay. Counsel have any questions or which any additional inquiry?

MR. SUND [Defense Counsel]: No.

MS. CASE [Deputy Prosecutor]: No, Your Honor, thank you.

THE COURT: Okay in that case we would – I would receive the verdict.

Verdict for A, which would be the charge of Residential Burglary, Count I, is the verdict that you could not reach?

JUROR RAMSEY: Yes.

THE COURT: Verdict form B, “We the jury find the defendant, Justin William DeFrang, guilty of the crime of Possession of Stolen Property in the First Degree, as charged in Count II.

Would you like the jury polled?

MS. CASE: No, Your Honor, not from the State.

MR. SUND: Only as to that verdict, Your Honor.

(8/11/06 VRP 3).

After polling the jury, the Court discharged the jury without objection from defense counsel or defendant. (8/11/06 VRP 5). The deputy prosecutor then announced the State’s intention to refile charges against DeFrang for Residential Burglary. “The State

is going to re-file on the burglary and so I'll prepare an order modifying the release conditions." (8/11/06 VRP 6).

D. At the Second Trial, the Jury Convicts Defendant Of Residential Burglary

On October 3-5, 2006, the State retried DeFrang on one count of Residential Burglary. Ron Leppanen testified for the State, describing defendant DeFrang's participation in the burglary.

[DeFrang and I] went to different rooms. He went to the master bedroom and I went to some side bedroom. And I started putting whole bunch of Playstation 2 games and Playstation 2 itself into a basket and whatever electronics I seen.

(10/3/06 VRP 18). On August 5th, the case went to the jury, which returned a guilty verdict later that day. (10/5/06 VRP 48).

Defendant now appeals.

ARGUMENT

III. STANDARD OF REVIEW

This court reviews defendant's claim of double jeopardy de novo. State v. Daniels, 160 Wn.2d 256, 261, 156 P.3d 905 (2007) ("double jeopardy...issue[] of law requiring de novo review"). The court reviews defendant's challenge to jury instruction number 15 de novo, for constitutional error.

If defendants did not timely except at trial, their challenge is raised for the first time on appeal. An

objection to a jury instruction cannot be raised for the first time on appeal unless the instructional error is of constitutional magnitude.

State v. Dent, 123 Wn.2d 467, 477-478, 869 P.2d 392 (1994).

IV. A HUNG JURY DOES NOT TERMINATE JEOPARDY

Double jeopardy occurs when a defendant is twice put into jeopardy for the same crime.

The United States Constitution guarantees “[n]o person shall be ... subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. amend. V. The Washington Constitution guarantees “[n]o person shall ... be twice put in jeopardy for the same offense.” Wash. Const. art. I, § 9. We interpret both clauses identically.

Three elements must be met for a defendant's double jeopardy rights to be violated: (1) jeopardy must have previously attached, (2) jeopardy must have previously terminated, and (3) the defendant is again being put in jeopardy for the same offense.

State v. Daniels, 160 Wn.2d 256, 261-262, 156 P.3d 905 (2007).

Here, the question is whether jeopardy terminated on the residential burglary charge between the first and second trial.

Washington courts have long held that a hung jury does not terminate jeopardy.

“[T]he protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy.” Richardson v. United States, 468 U.S. 317, 325, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984). Jury

silence can be construed as an acquittal and can therefore act to terminate jeopardy. Green v. United States, 355 U.S. 184, 188, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957) (stating jury's silence acted as implied acquittal). *But such is not the case when a jury fails to agree and such disagreement is evident from the record.*

Daniels, 160 Wn.2d at 262 (emphasis added). As the Daniels court concluded, "for over a century the United States Supreme Court has held that when a jury is unable to agree, jeopardy has not terminated." Daniels, 160 Wn.2d at 263.

Defendant challenges this rule on two grounds: (1) the trial court did not obtain DeFrang's consent before discharging the jury; and (2) the trial court did not following the proper procedures before discharging the jury. Neither argument invalidates the retrial or proves jeopardy terminated.

First, the trial court need not obtain DeFrang's consent before finding the jury deadlocked and dismissing it. In State v. Brunn, 22 Wn.2d 120, 145, 154 P.2d 826 (1945), the Supreme Court overruled earlier cases "in so far as they approve the rule that, if a jury, sworn to try a criminal case, be discharged without the defendant's consent, the discharge is equivalent to an acquittal, and a defendant so discharged has, in the constitutional sense,

been once in jeopardy.” The rule in Washington is that a hung jury does not terminate jeopardy.

Defendant’s citation to State v. Juarez, 115 Wn. App. 881, 64 P.3d 83 (2003) does not change this rule. In Juarez, defense counsel received transcripts from surveillance tapes on the day before trial. On the day of trial, the court chose and swore in the jury, and then denied defendant’s motion to dismiss the case for the late discovery. Juarez, 115 Wn. App. at 885. The court would not grant a continuance for defendant to review the new material unless the defendant made a formal motion, waiving the speedy trial deadline. Defense counsel refused, and the court declared a mistrial. Juarez, 115 Wn. App. at 886.

Because Juarez did not involve a hung jury, the Court examined carefully whether “manifest necessity” prompted the mistrial. Juarez, 115 Wn. App. at 889. A deadlocked jury automatically constitutes manifest necessity; it is an extraordinary and striking circumstance requiring a new trial.

The jury’s acknowledgment of hopeless deadlock is an “extraordinary and striking” circumstance which would justify the judge’s exercise of his discretion to discharge the jury.

State v. Jones, 97 Wn.2d 159, 164, 641 P.2d 708 (1982). As the

Court stated two years later,

neither this court nor the United States Supreme Court has ever held that a hung jury bars retrial under the double jeopardy clauses of either the Fifth Amendment or Const. art. 1 § 9.

State v. Russell, 101 Wn.2d 349, 351, 678 P.2d 332 (1984). Once

the trial court concluded the jury was deadlocked, the State had the right to retry defendant DeFrang on the residential burglary charge.

Second, defendant's procedural objections do not undermine the trial court's discretion to declare a hung jury. Defendant lists four objections – the court did not ask all jurors if they were deadlocked, the court did not know how long the jury had deliberated, the court did not make the proper findings, and the court did not formally declare a mistrial. (Defendant's Brief at 7-8). Yet defendant and defense counsel raised none of these objections in the trial court and have not preserved them for appeal. If these procedures were essential, defendant would have argued them to the trial court.

Furthermore, the court had credible evidence from the presiding juror that the jury was deadlocked. Given the straightforward issues in the case – did DeFrang participate in the

robbery or not – the court was well within its discretion to find deadlock after two days of deliberation. No compelling reason exists to overturn the trial court’s decision that the jury could not agree on a verdict.

V. THE ACCOMPLICE INSTRUCTION IS CONSTITUTIONAL

Defendant challenges jury instruction number 15, the accomplice instruction, for the first time on appeal. Counsel did not object to the instruction at trial. (10/4/06 VRP 155). To challenge the instruction, defendant must show that the error is of constitutional magnitude. Defendant cannot make that showing because the instruction, based on WPIC 10.51, is a correct statement of law.

No court has held the 2005 pattern instruction unconstitutional. Defendant argues that the instruction allows the jury to convict DeFrang merely for his presence at the crime. (Defendant’s Brief at 10). But neither the instruction, nor the evidence of defendant’s guilt supports this argument. The instruction expressly states that “more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.” (Jury Instruction No. 15; CP 26). The court presumes that the jury followed the

instructions as given. State v. Lord, 117 Wn.2d 829, 861 P.2d 177 (1991).

Next, the evidence of defendant's participation in the crime was clear and compelling. To reach its verdict, the jury accepted Ron Leppanen's testimony that DeFrang and he broke into the house and stole its contents. The jury had the responsibility to determine whether DeFrang participated in the burglary or not. By finding him guilty, the jury necessarily found him a willing partner in the crime.

Finally, defendant's argument that the jury instruction is internally inconsistent does not state a constitutional argument. If accepted at face value, the assertion is merely an error of law, not a due process violation. Defendant cannot on appeal claim an instruction is confusing if he did not object to the instruction at trial.

CONCLUSION

A hung jury does not terminate a defendant's jeopardy for a crime. Because defendant DeFrang provides no compelling reason to depart from this well-established rule, the State of Washington respectfully requests the Court to affirm defendant's conviction and dismiss his appeal.

DATED this 19th day of November, 2007.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the date stated below, I mailed or caused delivery of **Brief of Respondent** to:

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DATED this 19th day of November, 2007.


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