

COURT OF APPEALS  
DIVISION II

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

STATE OF WASHINGTON  
BY DM  
DEPUTY

NO. 40629-2-II

STATE OF WASHINGTON,

Respondent,

vs.

THADES RICH,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLALLAM COUNTY  
CAUSE NO. 09-1-00347-4

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**BRIEF OF RESPONDENT**

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*P.M. 3-7-2011*

<b>SERVICE</b>	Jodi Backlund/Manek Mistry Backlund & Mistry PO Box 6490 Olympia, WA 98507	This brief was served via U.S. Mail or the recognized system of interoffice communications as follows: original + one copy to Court of Appeals, 950 Broadway, Suite 300, Tacoma, WA 98402, and one copy to counsel listed at left. I CERTIFY (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED: March 7, 2011, at Port Angeles, WA <i>BWP</i>
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**I. STATEMENT OF THE ISSUES:**

1. Whether the trial court erred when it declared a mistrial and discharged the jury after (1) the jury acknowledged on its own accord it was deadlocked; (2) the jury affirmed, after further deliberation, there was no reasonable probability it could reach a verdict; and (3) the defense, which conceded the case was “relatively simple factually” and “[t]he law [was] not really that complicated,” agreed no further jury deliberation was necessary after the foreman confirmed there was no probability of reaching a verdict within a reasonable time.
2. Whether the trial court erred when it ruled the defendant’s statements to law enforcement were admissible because he knowingly and voluntarily waived his *Miranda* rights after his arrest.
3. Whether the trial court erred when it gave a “reasonable doubt” instruction that omitted a single sentence from the standard WPIC 4.01 instruction.

**II. STATEMENT OF THE CASE:**

“An Outrageous Overreaction”<sup>1</sup>

On August 18, 2009, Thades Rich and his girlfriend, Briana Ballis, visited a local bar in Port Angeles, Washington. RP (3/22/2010) at 24-25. Carmen Johnson was also at the tavern. RP (3/22/2010) at 99. At some point, Johnson went outside to smoke a cigarette where she met Ballis, who was crying on a bench. RP (3/22/2010) at 100. Johnson tried to

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<sup>1</sup> RP (4/21/2010) at 7.

console Ballis, who explained she had been fighting with Rich. RP (3/22/2010) at 100.

Johnson and Ballis soon began kissing one another. RP (3/22/2010) at 25, 100-01, 108; RP (3/23/2010) at 230. Rich witnessed the pair kissing and became furious. RP (3/22/2010) at 25, 27, 101, 120; RP (3/23/2010) at 231-32. Rich approached the women and demanded his debit card from Ballis. RP (3/23/2010) at 234. When Johnson tried to get off the bench, Rich pushed her to the ground.<sup>2</sup> RP (3/22/2010) at 101, 112; RP (3/23/2010) at 234. Rich told Ballis their relationship was over and he started walking down the street. RP (3/22/2010) at 101, 113.

Johnson ran after Rich, calling for him to stop.<sup>3</sup> RP (3/22/2010) at 33-34, 38, 50; RP (3/23/2010) at 19-20, 239. Rich turned back saying he wanted nothing to do with Johnson. RP (3/22/2010) at 45, 56, 116, 120; RP (3/23/2010) at 240. Johnson continued to follow Rich, and the two repeatedly stopped and argued with one another.<sup>4</sup> RP (3/22/2010) at 102, 121; RP (3/23/2010) at 19-20, 28, 30. Rich told Johnson to leave him

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<sup>2</sup> According to Rich, Johnson grabbed him and he subdued her with joint manipulation hold. RP (3/23/2010) at 234.

<sup>3</sup> According to Johnson, she wanted to apologize to Rich. RP (3/22/2010) at 45, 50. Alex Wolfe observed the same, testifying that Johnson appeared apologetic and that there was no aggressive tone in her voice. RP (3/22/2010) at 50-51, 54.

<sup>4</sup> According to Rich, he turned back only once to argue with Johnson, who was some distance behind him. RP (3/24/2010) at 25, 62.

alone and he continued walking away. RP (3/22/2010) at 39; RP (3/23/2010) at 29.

Johnson called out to a skateboarder, who was heading in the opposite direction, and asked him to monitor the situation. RP (3/22/2010) at 29, 34, 38; RP (3/23/2010) at 19-20, 29-30, 241. Johnson tried, again, to stop Rich and get him to speak with her. RP (3/22/2010) at 102, 117, 120, 123. Johnson lightly hit Rich in the back in order to get his attention.<sup>5</sup> RP (3/22/2010) at 34, 41, 43; RP (3/23/2010) at 20, 242.

Rich was aware of Johnson's presence and knew that she posed no threat to him; however, his back was facing her at the time of the contact. RP (3/22/2010) at 40-41, 57, 68, 75-75, 77-78. Rich retaliated: spinning around, picking-up Johnson, and slamming her to ground.<sup>6</sup> RP (3/22/2010) at 34, 41, 43, 51, 59-60, 62-63, 68, 78-79, 81, 86, 102, 118, 120; RP (3/23/2010) at 20-21 33, 243. Johnson's head and chest hit the ground first, followed by her feet. RP (3/22/2010) at 51, 62, 69; RP (3/23/2010) at 21-22, 33.

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<sup>5</sup> The exact nature of the contact is unclear. According to Johnson, she hit Rich with an open hand, placing it somewhere mid-shoulder or the back of the head. RP (3/22/2010) at 51, 59, 117. Wolfe described the contact as Johnson putting her hand on Rich's back. RP (3/22/2010) at 51. Eastman testified that Johnson did not hit Rich, but grabbed the clothing on his mid-back. RP (3/23/2010) at 21, 32. Rich explained he heard Johnson say "watch this" and then he immediately felt someone grab the back of his neck. RP (3/23/2010) at 242; RP (3/24/2010) at 26.

<sup>6</sup> Witnesses said Rich was much larger than the petite and intoxicated Johnson. RP (3/22/2010) at 35, 37, 62; RP (3/23/2010) at 21.

Johnson did not move after the impact. RP (3/22/2010) at 69; RP (3/23/2010) at 22-23. Witnesses pulled Rich off Johnson and called 911. RP (3/22/2010) at 35, 52; RP (3/23/2010) at 22; RP (3/24/2010) at 12, 24. Rich quickly told the witnesses that he was the police and walked away. RP (3/22/2010) at 35, 52, 77; RP (3/23/2010) at 23; RP (3/24/2010) at 24.

Responding officers found Johnson crying and bleeding profusely. RP (3/22/2010) at 85-86; RP (3/23/2010) at 39-42, 76, 88-90. It took three weeks for Johnson's face to heal from the injuries she sustained. RP (3/22/2010) at 104. Additionally, she was unable to eat anything for about a week due to the pain she experienced in her teeth after the incident. RP (3/22/2010) at 104-05, 119.

#### The Defendant's Statements to Law Enforcement

In response to the 911 calls, the Port Angeles Police Department (PAPD) dispatched Officer Dallas Maynard. RP (3/23/2010) at 48. Officer Maynard located Rich attempting to enter a taxi. RP (3/23/2010) at 48. When Officer Maynard activated his overhead lights, Rich walked toward him stating, "I'm the one you're looking for." RP (3/23/2010) at 48. Officer Maynard took Rich into custody, placing him in restraints and in the back of his patrol car. RP (1/5/2010) at 68. Officer Maynard

immediately read Rich his *Miranda* rights. RP (1/5/2010) at 69, 77; RP (3/23/2010) at 49, 51.

At the time of his arrest, Officer Maynard detected a strong odor of alcohol coming from Rich. RP (3/23/2010) at 54. Officer Maynard asked Rich to submit to a portable breath test (PBT). RP (1/5/2010) at 70. Rich provided a breath sample of 0.14. RP (1/5/2010) at 75. Officer Maynard concluded Rich was intoxicated and transported him to the police station. RP (1/5/2010) at 71; RP (3/23/2010) at 54.

Officer Maynard questioned Rich about the events that transpired at the bar. RP (1/5/2010) at 70; RP (3/23/2010) at 55. According to Officer Maynard, Rich was coherent and able to understand questions. RP (3/23/2010) at 55. Furthermore, Rich never expressed any confusion regarding his rights, never asked to speak with an attorney, and never expressed any reluctance to speak with law enforcement. RP (1/5/2010) at 69-70; RP (3/23/2010) at 52. According to Rich, he agreed to discuss the preceding events because Officer Maynard told him “Coasties (sic) always say [that they’re going to get into trouble] but nothing ever happens to them.” RP (1/5/2010) at 80. Nonetheless, Rich understood the import of his constitutional rights because he often worked closely with law enforcement during his employment with the U.S. Coast Guard. RP (1/5/2010) at 77-78, 81.

At the police station, Officer Maynard escorted Rich to an interview room. RP (1/5/2010) at 71. Inside the interview room, Officer Maynard re-advised Rich of his constitutional rights. RP (1/5/2010) at 71, 74, 77. Rich signed a formal waiver of his rights. RP (1/5/2010) 71, 77. At all times, Rich knew he was in the company of investigating officers who wanted to know about the assault. RP (1/5/2010) at 73, 82-83. Again, and despite his intoxication, Rich never express any confusion regarding his rights, the questions, nor did he request to speak with an attorney. RP (1/5/2010) at 72-74, 83.

Detective Robert Ensor, also, interviewed Rich at the station. RP (3/23/2010) at 77. Rich affirmed that Officer Maynard had previously advised him of his constitutional rights. RP (1/5/2010) at 49. Nevertheless, Detective Ensor briefly reviewed these rights with Rich before conducting a recorded interview. RP (1/5/2010) at 49. Rich stated he understood his rights and was willing to speak with the detective. RP (1/5/2010) at 49-51. Throughout the interview, Rich was articulate, expressed no confusion as to whom he was speaking, or what he was discussing. RP (1/5/2010) at 59-60. Rich never request an attorney. RP (1/5/2010) at 54.

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### 3.5 Hearing

At a 3.5 hearing, the trial court ruled that the statements Rich made to law enforcement would be admissible at trial. The trial court found: (1) Rich was in custody at the time he made statements to the officers; *see* RP (1/5/2010) at 86; RP (3/23/2010) at 56; (2) Rich received his *Miranda* rights immediately after his arrest, *see* RP (1/5/2010) at 86, RP (3/23/2010) at 56; (3) Rich understood his rights at the time of his arrest, *see* RP (3/23/2010) at 57; (4) Rich appeared to be coherent and orientated while speaking with the officers, *see* RP (3/23/2010) at 57; (5) Rich appeared to understand the questions and gave reasonable answers, *see* RP (3/23/2010) at 57; (6) the officers did nothing to overcome Rich's will and his ability to exercise his rights, *see* RP (1/5/2010) at 87; (7) there is no evidence to show the officers overcame Rich's will to resist the questioning; *see* RP (1/5/2010) at 87; and (8) Rich voluntarily made statements to the officers with an understanding of his rights, *see* RP (3/23/2010) at 57.

### Mistrial

The State charged Rich with Assault in the Second Degree. CP 16. On January 4, 2010, trial commenced. On January 6, 2010, the trial court read the jury its instructions. RP (1/6/2011) at 4; CP 21-42. The jury began

its deliberations at approximately 10:00 a.m. CP T.B.D. – Appendix A at 9. Approximately four hours later, the jury informed the court they had a “split vote.” RP (1/6/2010) – Supplement – at 2; CP TBD – Appendix B at 2.

After learning of the “split vote”, the State asked the trial court to read a “hung jury” instruction. RP (1/6/2010) – Supplement – at 3. Both the trial court and the defense believed such an instruction was premature. RP (1/6/2010) – Supplement at 3. The trial court ordered the jury to continue its deliberations. CP TBD – Appendix A at 10.

Approximately, thirty minutes later, the jury informed the trial court that it did “not have a unanimous vote. More time will not help.” RP (1/6/2010) at 3-4; CP TBD – Appendix B at 3. The defense advised the trial court that the jury had been deliberating for approximately four hours and forty-five minutes on a “case [that] is relatively simple factually.” RP (1/6/2010) – Supplement – at 4. The defense continued:

The law is not really that complicated ... I guess I’m going to have to take them at their word. It does not seem to me like given what has gone on that more deliberation is likely to reach another verdict.”

RP (1/6/2010) – Supplement – at 4. The State renewed its request for the trial court to read an instruction to the foreman regarding the probability of reaching a verdict. RP (1/6/2010) – Supplement at 4.

The trial court then inquired of the parties:

[I]f I discuss probability of the verdict and the foreman indicates there's no probability, do you want me to send them out and discuss a mistrial or simply declare a mistrial?

RP (1/6/2010) – Supplement – at 4. The State and the defense both agreed no further deliberation was necessary. RP (1/6/2010) – Supplement – at 4-5.

The trial court then summoned the jury. RP (1/6/2010) – Supplement – at 5. The trial court read WPIC 4.70, asking the presiding juror if “there’s a reasonable probability of the jury reaching an agreement within a reasonable time as to any of the counts or as to the alternatives.” RP (1/6/2010) – Supplement – at 5-6. The presiding juror responded, “no.” RP (1/6/2010) – Supplement – at 6.

The trial court declared a mistrial and discharged the jury. RP (1/6/2010) – Supplement – at 6. The defense never objected to the court’s finding or the resulting discharge.<sup>7</sup> RP (1/6/2010) – Supplement – at 6-9. A new trial date was subsequently scheduled.

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<sup>7</sup> Defense did move the court to dismiss the case. The basis of the motion was because the defendant wanted to move back to Alabama and wanted the case to be behind him. The defense never argued the jury was dismissed improperly. RP (1/6/2010) – Supplement – at 8.

### The Jury Instructions

At the conclusion of the second trial, the defense objected to Instruction No. 3, *see* CP 26, the proffered “reasonable doubt” instruction. RP (3/24/2010) at 73. The defense explained the instruction omitted the sentence that “the defendant has no burden of proving that a reasonable doubt exists.” RP (3/24/2010) at 73. The trial court noted the exception, but stated it was “familiar with [the instruction’s] various permutations[.]”

After receiving its instructions, the jury found the defendant guilty of Assault in the Second Degree. RP (4/21/2010) at 2; CP 5. The trial court sentenced Rich to a four-month confinement term. RP (4/21/2010) at 7; CP 7. Rich appeals. CP 4.

### **III. ARGUMENT:**

#### **A. THE TRIAL COURT RESPECTED THE PROHIBITION AGAINST DOUBLE JEOPARDY.**

Mr. Rich argues his conviction violates double jeopardy. *See* Brief of Appellant at 9-14. Mr. Rich faults the trial court for (1) not considering the length of deliberations, (2) not considering the length of trial, (3) not considering the complexity of the issues, and (4) failing to make required findings to discharge the jury. *See* Brief of Appellant at 14. Mr. Rich’s arguments are not supported by the record or controlling case law. This Court should affirm.

A double jeopardy claim is an issue of law that this Court reviews de novo. *State v. Daniel*, 160 Wn.2d 256, 261, 156 P.3d 905 (2007), *affirmed*, 165 Wn.2d 267, 200 P.3d 711 (2009). Unchallenged findings of fact are binding on appeal. *Id.*

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. This Court interprets both clauses identically. *Daniel*, 160 Wn.2d at 261.

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 must again be put in jeopardy for the same offense. *Daniel*, 160 Wn.2d at 261-62. The issue in the present case is whether jeopardy terminated.

For more than a century, the United States Supreme Court has held that when a jury is unable to agree on a verdict, jeopardy does not terminate. *Daniel*, 160 Wn.2d at 263 (citing *Selvester v. United States*, 170 U.S. 262, 269, 18 S.Ct. 580, 42 L.Ed. 1029 (1898)). *See also Renico v. Lett*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 1855, 176 L.Ed.2d 678 (2010) (when a judge discharges a jury on the grounds that the jury cannot reach a verdict,

double jeopardy clause does not bar a new trial for the defendant before a new jury; judges may grant mistrial when, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for doing so).

A hung jury is an unforeseeable circumstance that requires dismissal of the jury in the interest of justice. *State v. Ervin*, 158 Wn.2d 746, 753, 147 P.3d 567 (2006). Furthermore, when a jury acknowledges through its foreman, and on its own accord, that it is hopelessly deadlocked, there is a factual basis sufficient to constitute the “extraordinary and striking” circumstances necessary to justify discharge. *State v. Fish*, 99 Wn. App. 86, 90, 992 P.2d 505 (1999).

Here, there was no double jeopardy violation. Jeopardy against Mr. Rich never terminated because the jury could not agree on a verdict. This constituted an extraordinary and striking circumstance that required a mistrial. As such, the State had the right to retry Mr. Rich for assault.<sup>8</sup>

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<sup>8</sup> While the State is allowed only one bite at the apple, its one bite is a full one. The Supreme Court has “effectively formulated a concept of continuing jeopardy that has application where criminal proceedings against an accused have not run their full course.” *Daniel*, 160 Wn.2d at 263-64. (quoting *Price v. Georgia*, 398 U.S. 323, 326, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970)). When the jury cannot decide on a verdict, and disagreement is formally entered onto the record, then the State’s one bite continues and the defendant can be retried. *Id.* at 264.

1. Federal precedent does not support Mr. Rich's claim that his conviction violated double jeopardy.

The U.S. Supreme Court has repeatedly held that “when a judge discharges a jury on the grounds that the jury cannot reach a verdict, the Double Jeopardy clause does not bar a new trial for the defendant before a new jury.” *Renico*, 130 S.Ct. at 1862-63 (citing *United States v. Perez*, 9 Wheat. 579, 579-80, 6 L.Ed. 165 (1824)). The high court has explained that trial judges may declare a mistrial “whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity” for doing so. *Id.*

The U.S. Supreme Court has clarified that the “manifest necessity” standard “cannot be interpreted literally,” and that a mistrial is appropriate when there is a “high degree” of necessity. *Renico*, 130 S.Ct. at 1863 (citing *Arizona v. Washington*, 434 U.S. 497, 506, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978)). The decision to grant a mistrial is reserved to the “broad discretion” of the trial judge. *Id.*

In particular, “[t]he trial judge’s decision to declare a mistrial when he considers the jury deadlocked is ... accorded great deference by a reviewing court.” *Renico*, 130 S.Ct. at 1863 (citing *Washington*, 434 U.S. at 510)). “A mistrial premised upon the trial judge’s belief that the jury is

unable to reach a verdict [has been] long considered the classic basis for a proper mistrial.” *Id.*

The reasons for “allowing the trial judge to exercise broad discretion” are “especially compelling” in cases involving a potentially deadlocked jury. *Renico*, 130 S.Ct. at 1863 (citing *Washington*, 434 U.S. at 509). The trial court is in the best position to assess all the factors that must be considered in making a discretionary determination whether the jury will be able to reach a just verdict if it continues to deliberate. *Id.*

The U.S. Supreme Court has declined to require the “mechanical application” of any “rigid formula” when trial judges decide whether jury deadlock warrants a mistrial. *Renico*, 130 S.Ct. at 1863. A trial judge is not required to make explicit findings of “manifest necessity” nor to “articulate on the record all the factors which informed the deliberate exercise of his discretion”.<sup>9</sup> *Id.* at 1863-64 (quoting *Washington*, 434 U.S. at 517). Additionally, the U.S. Supreme Court has “never required a trial judge, before declaring a mistrial based on jury deadlock, to force the jury to deliberate for a minimum period of time, to question the jurors individually, to consult with (or obtain the consent of) either the prosecutor or defense counsel, to issue a supplemental jury instruction, or to consider any other means of breaking the impasse.” *Id.* at 1864. In fact,

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<sup>9</sup> This legal pronouncement demonstrates Mr. Rich’s argument that the trial court erred because it failed to make requisite findings is without merit.

the U.S. Supreme Court has never “overturned a trial court’s declaration of a mistrial after a jury was unable to reach a verdict on the ground that the “manifest necessity” standard had not been met. *Id.*

Here, the trial court exercised its broad discretion when it declared a mistrial and discharged the jury. Upon its own volition, the jury informed the trial court that it could not reach a verdict. CP TBD – Appendix B at 2; RP (1/6/2010) – Supplement - at 2-4. The trial court instructed the jury to continue its deliberations. However, when the jury affirmed that it still could not agree upon a verdict, and additional time would be of no assistance, the trial court properly declared a mistrial. CP TBD – Appendix B at 3; RP (1/6/2010) – Supplement - at 5-6. These facts are sufficient to satisfy the manifest necessity standard. In fact, a mistrial under these facts is a “classic basis for a proper mistrial.” *Renico*, 130 S.Ct. at 1863. This Court should find there is no double jeopardy violation.

2. State precedent does not support Mr. Rich’s claim that his conviction violated double jeopardy.

The state and federal constitutional proscriptions against double jeopardy not only protect a defendant from a second prosecution for the same offense after a conviction or acquittal but also protect 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). Nevertheless, a

retrial is allowed where the discharge of the first jury was necessary in the interest of the proper administration of justice. *Id. See also* RCW 4.44.330; CrR 6.10.

A trial court's decision to declare a mistrial when the judge considers a jury deadlocked is accorded great deference. *Jones*, 97 Wn.2d at 163. "Nevertheless, there must be a factual basis for the exercise of the discretion to discharge a jury; 'extraordinary and striking circumstances' must exist before the judge's discretion can come into play. *Id.* at 164.

In *State v. Jones*, the Washington Supreme Court stated:

Obviously, if the jury, through its foreman and of its own accord, acknowledges that it is hopelessly deadlocked, there would be a factual basis for discharge if the other jurors agree with the foreman. 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.

*Id.* Additionally, a trial court may consider such factors as the length of time the jury had been deliberating, the length of the overall trial, and the volume and complexity of the evidence.<sup>10</sup> *Id.* at 164.

However, the trial court must be scrupulous to avoid questions that might tend to influence a juror's decision. *Jones*, 97 Wn.2d at 164. The right to a fair and impartial jury trial demands that a judge not bring coercive pressure to bear upon the deliberations of a jury. *Id.*

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<sup>10</sup> This is a non-exhaustive list. Washington trial courts are not limited to these three factors. *Jones*, 97 Wn.2d at 164.

Here, the record shows that the jury, on its own accord, sent a letter to the trial court informing the judge that the jurors could not agree upon a verdict. CP TBD – Appendix B at 2; RP (1/6/2010) – Supplement – at 2. The trial court instructed the jury to continue its deliberations. RP (1/6/2010) at 3. However, the jury quickly affirmed that it could not reach a verdict and no amount of time would assist its deliberations. CP TBD – Appendix B at 3; RP (1/6/2010) – Supplement – at 3-4. Under Washington law, these facts are sufficient to support a mistrial and subsequent discharge of the jury. *See Jones*, 97 Wn.2d at 164.

Additionally, the defense informed the trial court that the jury had been deliberating for almost five hours on a case that was “relatively simple factually” and where “[t]he law was not really that complicated.” This concession supports the trial court’s decision to declare a mistrial and discharge the jury. *See Jones*, 97 Wn.2d at 164. The State also reminded the trial court that the trial had lasted more than two days. RP (1/6/2010) – Supplement – at 4. These facts belie Mr. Rich’s claims that the trial court did not consider the length of the deliberations, the length of trial, or the complexity of the issues.

The trial court was, also, scrupulous to avoid questions that would influence the jurors’ decision. Pursuant to the State’s request, the trial court read WPIC 4.70 to the entire jury. RP (1/6/2010) – Supplement – at

5-6. When the trial judge asked the presiding the juror whether there was “a reasonable probability of the jury reaching an agreement within a reasonable time”, the foreman responded “no.” RP (1/6/2010) – Supplement – at 6. Mr. Rich appears to fault the trial court for not ascertaining whether each juror agreed with the foreman’s assessment. *See* Brief of Appellant at 12. However, individual questioning of the juror is not required per WPIC 4.70; and such questioning may have brought undue pressure contrary to the advisement in *Jones*. *See* 97 Wn.2d at 164.

Finally, the defense did not object to the trial court declaring a mistrial and dismissing the jury without any further deliberations. RP (1/6/2010) – Supplement – at 4, 6-9.

The record clearly demonstrates “extraordinary and striking circumstances” to support the trial court’s discretionary decision to order a mistrial and discharge the jury. Because the first trial resulted in a hung jury, jeopardy did not terminate and the State was entitled to retry Mr. Rich for his crimes. There is no double jeopardy violation. This Court should affirm.

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B. THE DEFENDANT'S STATEMENTS TO THE POLICE  
ARE ADMISSIBLE.

Mr. Rich argues that the statements he made to law enforcement following his arrest were the product of his intoxication and involuntary. *See* Brief of Appellant at 15-19. This court should reject the argument.

This Court reviews the record to determine whether substantial evidence supports the trial court's determination regarding a fundamental right. *State v. Garner*, 28 Wn. App. 721, 723, 626 P.2d 56 (1981). Intoxication alone does not render a statement involuntary, but it may be a factor in determining whether the defendant understood his rights and made a conscious decision to forgo them. *Id.* The trial court's conclusion as to the admissibility of the accused's statements should not be set aside on appeal if there is substantial evidence to support that the defendant voluntarily made the statements to police. *Id.*

1. The due process test for voluntariness.

The test of voluntariness for due process purposes is "whether the behavior of the State's law enforcement officials was such to overbear petitioner's will to resist and bring about confessions not freely determined[.]" *State v. Reuben*, 62 Wn. App. 620, 624, 814 P.2d 1177 (1991). This Court should not set aside the trial court's conclusion if there

is substantial evidence that the defendant voluntarily made statements to the police. *Id.*

Here, there is no evidence of overreaching by the two PAPD officers. When Officer Maynard first contacted Rich, he was driving a marked patrol vehicle. RP (3/23/2010) at 48. Rich voluntarily approached Officer Maynard stating, “I’m the one you’re looking for.” RP (3/23/2010) at 48. Officer Maynard immediately read Rich his rights before asking Rich to explain what happened. RP (1/5/2010) at 69, 77; RP (3/23/2010) at 49, 51. Both Officer Maynard and Detective Ensor repeatedly re-advised Mr. Rich of his rights. RP (1/5/2010) at 49, 71, 74, 77. In the present case, there is no evidence of coercion. However, there is substantial evidence in the record indicating that Mr. Rich made his statements voluntarily and in accordance with the standards of due process. *See Reuben*, 62 Wn. App. at 624-25; *Gardner*, 28 Wn. App. at 723-24. This Court should affirm.

2. The *Miranda* test for voluntariness.

The test of voluntariness for *Miranda* purposes places upon the prosecution the burden of establishing the defendant was fully advised of his rights, understood them, and knowingly and intelligently waived them. *Reuben*, 62 Wn. App. at 625.

The evidence that Mr. Rich was fully advised of his rights is uncontroverted. On three separate occasions, law enforcement advised him of his constitutional rights. RP (1/5/2010) at 49, 69, 77, 74, 77; RP (3/23/2010) at 49, 51. The trial court's conclusion that Rich understood his rights is also supported by the record. Rich admitted he understood his rights and their import. RP (1/5/2010) at 77-78, 81. The fact that Rich was also able to track the conversation with the police and give coherent responses to questions indicates he knew exactly what was going on. RP (1/5/2010) at 59-60, 69-70, 72-74, 83; RP (3/23/2010) at 52, 55. The trial court did not err in finding Rich had been fully advised of his rights and that he understood them. *Reuben*, 62 Wn. App. at 625.

In deciding whether Rich waived his right to remain silent, evidence of intoxication is a factor to be considered. *Reuben*, 62 Wn. App. at 625. Here, Rich never slurred his words. RP (1/5/2010) at 59. Again, he had no difficulty following the conversation and giving coherent responses to police questions. RP (1/5/2010) at 59-60, 69-70, 72-74, 83; RP (3/23/2010) at 52, 55. This is evidence that Rich was an alcohol-seasoned person who could show less than usual impairment at a .14 percent level of intoxication. *See Reuben*, 62 Wn. App. at 626 (testimony regarding defendant's cirrhotic liver was evidence that he was an alcohol seasoned

person who could show less than usual impairment at a .29 percent level of intoxication).

Finally, Mr. Rich never invoked his right to remain silent. In *Reuben*, the appellate court held defendant's expletive to a trooper and the act of turning his head away from the officer required police to cease the interrogation. *Id.* The appellate court stated "while there is no per se proscription on further questioning by the police, resumption of interrogation after a short respite, about the same incident and without new warnings, violates *Miranda* guidelines." *Id.* In contrast, Mr. Rich never invoked *Miranda*; and the officers repeatedly reminded the defendant of his constitutional rights. RP (1/5/2010) at 49, 54, 69, 71-74, 77, 83; RP (3/23/2010) at 49-51. This Court should hold Rich voluntarily waived his constitutional rights.

Mr. Rich's statements were voluntary and were not coerced like the confessions in the cases upon which he cites to support his argument. *See* Appellant's Brief at 15-16 (citing *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963)). This Court should affirm the trial court's finding that Mr. Rich voluntarily made statements to law enforcement, and that such statements are admissible at trial.

C. THE INSTRUCTION ON REASONABLE DOUBT  
DEPARTED FROM THE RECOGNIZED PATTERN  
INSTRUCTION.

Mr. Rich argues the trial court erred when it gave a non-standard instruction reasonable doubt. *See* Brief of Appellant at 6-9. While the instruction properly informed the jury that the prosecuting authority had the burden to prove each element beyond a reasonable doubt, the State concedes error.

Instructions must convey to the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. *State v. Castillo*, 150 Wn. App. 466, 469, 208 P.3d 1201 (2009). Jury instructions must define reasonable doubt and clearly communicate that the State carries the burden of proof. *Id.* Instructions must also properly inform the jury of the applicable law, not mislead the jury, and permit each party to argue its theory of the case. *Id.* It is reversible error to instruct the jury in a manner relieving the State of its burden to prove every element of a crime beyond a reasonable doubt. *Id.* A challenged jury instruction is reviewed *de novo*, in the context of the instructions as a whole. *Id.*

In *State v. Bennett*, the Washington Supreme Court instructed trial courts to use WPIC 4.01 to inform the jury of the government's burden to prove every element of the charged crime beyond a reasonable doubt. 161

Wn.2d 303, 318, 165 P.3d 1241 (2007). There is nothing ambiguous about the Supreme Court’s directive: trial courts are to use *only* WPIC 4.01 as the reasonable doubt instruction “until a better instruction is approved.” *Castillo*, 150 Wn. App. at 472 (citing *Bennett*, 161 Wn.2d at 318). The court neither said nor implied that lower courts were free to ignore the directive if they could find the error of failing to give WPIC 4.01 harmless beyond a reasonable doubt. *Id.*

Here, the trial court’s reasonable doubt instruction was almost a verbatim copy of WPIC 4.01. CP 26. However, the instruction did omit one sentence: “The defendant has no burden of proving that a reasonable doubt exists [as to these elements].” *See* CP 26. While the State’s closing argument never implied anything to the contrary, “[t]he omission of the last sentence of WPIC 4.01 from the given instruction warrants the conclusion that Instruction No. 3 is not better than the WPIC.” The State concedes error. *See State v. Castillo*, 150 Wn. App. 466, 208 P.3d 1201 (2009).

This Court should remand for further proceedings.

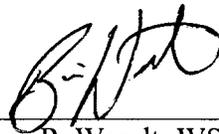
#### IV. CONCLUSION:

For the foregoing reasons, the State respectfully requests that this Court (1) affirm that Mr. Rich’s subsequent trial did not violate

constitutional prohibitions against double jeopardy, and (2) affirm that Mr. Rich knowingly and voluntarily made statements to law enforcement after he was apprised of his constitutional rights.

This Court should reverse Mr. Rich's conviction solely upon the basis that the jury received an incorrect instruction on reasonable doubt, and remand for further proceedings.

RESPECTFULLY SUBMITTED this 7th day of March 2011.



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Brian P. Wendt, WSBA No. 40537  
Deputy Prosecuting Attorney

# APPENDIX - A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLALLAM

STATE OF WASHINGTON

NO. **09-1-00347-4**  
JUDGE: Ken Williams  
RPTR: Lisa McAneny  
CLERK: Serena Gorss  
DATE: 01/04/2010  
TIME: 9:10/4:32  
BAILIFF: Gail Triggs/Darryl Rumble  
**JURY TRIAL - Day 1**

Plaintiff

Vs

Rich, Thades

Defendant

ATTORNEY FOR PLAINTIFF: Ann Lundwall  
ATTORNEY FOR DEFENDANT: Loren Oakley

**JURY**

- |                     |                          |
|---------------------|--------------------------|
| 1. Jack Iacolucci   | 8. Judy Judd             |
| 2. Nicole Anderson  | 9. Michael Subert        |
| 3. Edward Minturn   | 10. James Duff           |
| 4. Daniel Failoni   | 11. Allan Smith          |
| 5. Glenna Pitt      | 12. Paul Wakefield       |
| 6. Charles Clarkson | 13. Lola Little-McCubbin |
| 7. Nancy Jost       |                          |

**STATES WITNESSES & EXHIBITS**

Exhibits 1 - 26 marked for identification	
Corporal Robert Ensor	1:45/1:53
Exhibit 22 & 23 admitted	
Jaime Miller	1:54/1:59
Trent Blore	2:00/2:14
Exhibit 27 marked for illustrative purposes	
Juliet Kindred	2:16/2:37
Alex Wolf	2:58/3:28
Carmen Johnson	3:29/3:55
Exhibits 7 - 20 identified	
Officer John Nutter	3:56/4:14
Exhibits 1 - 6 admitted	
Detective Kevin Spencer	4:15/4:30
Exhibits 7 - 21 admitted	
State Rests	4:30

FILED  
CLALLAM CO CLERK  
2010 JAN - 6 P 3:43  
BARBARA CHRISTENSEN

**VERDICT**

**Jury is unable to come to a unanimous decision - Court declares a mistrial.  
Next hearing: Review on 1-15-10 @1:30**

SCANNED - 10

## MINUTES

9:10 This matter comes on as a 2 or 3 day jury trial. Present are the defendant, Thades Rich, not in custody with attorney Loren Oakley. Also present is deputy prosecutor Ann Lundwall for the State.

Scheduling is discussed and respective Counsel agree to open preemptory challenges, not objection to bailiff pre drawing the jurors, that jurors be allowed to take notes and that witnesses be excluded prior to testimony.

Court grants all the State's written motions in limine with no objections from the defense.

State presents oral motions in limine, and moves the defense not be allowed to inquire into witnesses' prior drug history.

Defense had not planned on inquiring.  
Court grants.

State moves to exclude Ms Johnson's actions prior to the incident.

Defense feels this may be relevant to state of mind.

Court will grant toward her demeanor, but to be addressed outside jury's presence.

State moves to interview Briahn Ballas prior to testifying.

No objections from Defense.

Court grants.

State moves to exclude testimony of Ms Johnson's pending DWI file and any relationship she may or may not have with Officer Nutter.

Defense feels this brings up conflict of interest issues.

State responds and moves to be asked outside jury's presence.

Court will allow, but to be addressed outside jury's presence.

Defense has no motions in limine.

9:30 Court is at recess for 15 minutes to allow Counsel to review the prospective jury list.

9:49 Court reconvenes as heretofore.

9:50 Jury venire enter open Court for the first time today.

Court reviews the proceedings with the jury venire.

10:01 Jury venire quote the "Oath of Voir Dire."

Court asks general questions.

10:08 State begins voir dire.

10:26 Defense begins voir dire.

10:48 Court excuses the venire for a 15 minute recess. Juror 25 is to remain for individual voir dire outside the other juror's presence.

Respective Counsel voir dire with Juror 25.

10:57 Court excuses Juror 25 for 15 minute recess.

10:58 Court is at recess.

11:10 Court reconvenes as heretofore.

11:11 Jury venire in.

11:13 Defense continues voir dire with the jury venire.

11:21 Defense moves to excuse jurors #5 & 23 for cause.  
State inquires further.  
Court excuses Juror 23 for cause, but will deny excusing #5 at this time.

State inquires #4, #16 & #37 for hardship reasons.  
State moves to excuse.  
Defense has no objection.

11:25 Court excuses jurors #4, 16 & 37 for hardship reasons.

11:26 State has rebuttal voir dire.

11:28 Defense has rebuttal voir dire.

11:30 First 13 jurors are seated in jury box. Open peremptory challenges begin.

11:40 Jury panel is accepted. Remaining jury venire are thanked and excused.

11:41 Jury panel sworn in.  
Court gives preliminary instructions.

11:45 Jury panel excused until 1:30.

11:46 Court is at recess until 1:30.

1:30 Court reconvenes as heretofore. Corporal Ensor has joined the deputy prosecutor at the State's table.

1:31 Jury in.

Court gives preliminary instructions on the trial proceedings.

1:35 State presents opening statements.

1:38 Defense presents opening statements.

1:44 Court instructs the jury panel on note taking.

1:45 State began Case in Chief.

2:38 Jury out for a 15 minute recess.

2:39 Court is at recess.

2:55 Court reconvenes as heretofore.

2:57 Jury in.

4:30 State rests.

4:31 Jury out until 9:00 am tomorrow.

4:32 Court is at recess.

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLALLAM**

STATE OF WASHINGTON

Plaintiff

Vs

Rich, Thades

Defendant

NO. **09-1-00347-4**

JUDGE: Ken Williams

RPTR: Lisa McAneny

CLERK: Serena Gorss

DATE: 01/05/2010

TIME: 9:13/3:48

BAILIFF: Gail Triggs

**TRIAL – DAY 2**

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ATTORNEY FOR PLAINTIFF: Ann Lundwall

ATTORNEY FOR DEFENDANT: Loren Oakley

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**TRIAL**

**DEFENSE WITNESSES & EXHIBITS:**

Briahn Ballas	9:50/10:01
Thades Rich II	10:02/10:32

**3.5 HEARING**

**STATE'S EXHIBITS & WITNESSES**

Exhibit 1 & 2 marked for identification	
Corporal Robert Ensor	10:50/11:04
Officer Dallas Maynard	11:46/11:54

**DEFENSE'S EXHIBITS & WITNESSES**

Thades Rich II	11:55/12:01
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**STATE'S REBUTTAL WITNESS**

Sergeant Grant Lightfoot	2:36/3:01
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**MINUTES**

9:13 Court reconvenes for day 2 of the Jury trial. All parties present as heretofore. Court reviews with Defense the jury instructions submitted regarding lesser included and lesser degree.

Defense will take a look at that.

State renews her objection to Zachary Ballas's testimony and feels the testimony is irrelevant.

Defense responds presenting argument and feels is relevant.

Court will grant the State's motion and deny the testimony.

State reports Officer Lightfoot may be used as a rebuttal witness, but is here only as a consultant regarding self defense tactics.

Defense is not prepared for this and objects, moving to continue and requesting discovery as well as CV.

Court will reserve ruling at this time.

9:20 Court is at recess to allow State time to interview Defense's witness Briahn Ballas.

9:48 Court reconvenes as heretofore.

9:49 Jury in.

9:50 Defense began Case in Chief.

10:32 Jury out for a 10 to 15 minute recess.

10:33 Court is at recess.

10:47 Court reconvenes as heretofore.

State moves for a 3.5 hearing as her cross examination may involve statements made to the police.

No objections.

Court grants.

10:50 3.5 hearing commences.

State began Case in Chief.

11:04 State moves for a recess to have officer Maynard available to testify.

Defense objects.

Court will grant as the Court ruled earlier to do the 3.5 hearing whenever necessary.

11:05 Court is at recess.

11:15 State reports her witness will be available in approximately 1/2 hr.

11:16 Jury in.

Court lets the jury know of the delay.

Court excuses the jury for lunch to return at 1:30.

11:17 Jury out.

Proposed instructions are reviewed.

Defense reports his client does not wish to consider the lesser degree of Assault 3 and did not intend on including that instruction.

Defense reports they will be using the instruction for Assault 4.

State has no objections.

State reports that she will be calling Officer Lightfoot for rebuttal testimony and suggests Defense interview if necessary during the lunch hour.

Defense renews his objection.

Court will allow State to present offer of proof outside jury's presence.

11:21 Court is at recess until witness is available.

11:45 Court reconvenes as heretofore.

12:01 State presents closing arguments.

12:03 Defense presents closing arguments.

12:04 Court finds the statements are admissible.

12:09 Court is at recess until 1:30.

1:40 Court reconvenes as heretofore.

1:41 Jury in.

1:44 Jury out to listen to a CD outside presence of the Jury.

1:46 Jury in

2:12 Defense rests.

2:14 Jury out to discuss matters outside presence of the Jury.

2:15 State calls Sergeant Grant Lightfoot for testimony as to offer of proof.

2:28 State presents argument.

2:29 Defense presents argument.

2:30 Court will allow the "takedown" method described and limited testimony without any expertise.

2:35 Jury in.

2:36 State presents rebuttal testimony.

3:02 Jury out to allow Court to prepare instructions.

3:05 Court is at recess.

3:33 Court reconvenes as heretofore.  
Respective Counsel begin formal objections and exceptions.

State reviews 17.04 WIPIC and presents argument, but will defer to Defense as she has no objection to how it reads.

Court to interlineate the instructions.

3:38 Court is at recess to correct the instructions.

3:40 Court reconvenes as heretofore.

3:41 Jury in.

3:43 Court excuses the Jury until tomorrow morning at 9:00.

3:44 Defense moves to dismiss and feels the State has not made a sufficient Prima Facie Case.

State presents argument.

Defense has rebuttal argument.

Court finds enough evidence to proceed.

3:48 Court is at recess until tomorrow at 9:00.

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLALLAM**

STATE OF WASHINGTON

Plaintiff

Vs

Rich, Thades

Defendant

NO. **09-1-00347-4**

JUDGE: Ken Williams

RPTR: Lisa McAneny

CLERK: Serena Gorss

DATE: 01/06/2010

TIME: 9:04/2:44

BAILIFF: Gail Triggs

**TRIAL - DAY 3**

---

ATTORNEY FOR PLAINTIFF: Ann Lundwall

ATTORNEY FOR DEFENDANT: Loren Oakley

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**MINUTES**

- 9:04 Court reconvenes with all parties present as heretofore.  
No formal objections or exceptions to the instructions.
- 9:05 Jury in.  
Court reads the instructions of the law.
- 9:21 State presents closing arguments.
- 9:27 Defense presents closing arguments.
- 9:40 State presents rebuttal argument.
- 9:49 Juror #12, Paul Wakefield, is selected as the alternate juror.
- 9:50 Jury out for deliberation.
- 9:52 Court is at recess until a question or verdict is met.

- 2:07 Court reconvenes as a question has come from the Jury Panel.  
Juror #5, Glenna Pitt was selected the presiding juror.  
Respective Counsel agree on an answer and respond accordingly.
- 2:09 Court is at recess until a question or verdict is met.
- 2:35 Court reconvenes as a new communication has come from the Jury panel.  
Respective Counsel do not feel further deliberation will change the situation.
- 2:37 Jury in.  
Court gives instruction on when a unanimous decision is no longer reasonably met, and questions the presiding juror.  
Answer "no".
- 2:38 Court declares a mistrial.
- 2:40 Jury panel thanked and excused.  
  
Defense moves to dismiss.  
Court will let the State decide if they intend to take the matter to trial again.  
A review of this matter will be on **1-15-10 @ 1:30 pm.**
- 2:44 Court is adjourned.

# APPENDIX - B

SCANNED - 1

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLALLAM

State of Washington

Plaintiff,

vs.

Thaddeus Beck II

Defendant,

No. 09-1-00347-4

JURY NOTE  
(PRESIDING JUROR)

FILED  
CLALLAM CO CLERK  
2009 JAN - 6 P 3:41  
BARBARA CHRISTENSEN

Name of Presiding Juror:

Glenna Pitt

Date:

1/6/10

Time:

9:55 Am

Scomis Code: JYN

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLALLAM

State of WA

Plaintiff(s),

vs.

Shades Rich II

Defendant(s).

NO. 09 1 00347 4

INQUIRY FROM THE JURY  
AND COURT'S RESPONSE

JURY INQUIRY:

*we have a split vote between  
assault II & Assault IV.  
Is there an alternative?*

*Glenna Pitt*  
PRESIDING JUROR

BARBARA CHRISTENSEN

2000 JAN - 6 3 42

CLALLAM CO CLERK

FILED

DATE AND TIME RECEIVED:

*1/6/10 1:50 6T*

COURT'S RESPONSE:

(AFTER AFFORDING ALL COUNSEL/PARTIES  
OPPORTUNITY TO BE HEARD)

*you have all the INSTRUCTIONS ON THE LAW  
which is AVAILABLE to you.*

*Ken Wilson*  
JUDGE

DATE AND TIME RETURNED TO JURY:

*1/6/10 @ 2:07pm*

DO NOT DESTROY  
SAVE - MUST BE FILED

SCANNED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLALLAM

State of WA

Plaintiff(s),

vs.

Shades Rich II

Defendant(s).

NO. 09 1 00347 4

INQUIRY FROM THE JURY  
AND COURT'S RESPONSE

JURY INQUIRY: We do not have a unanimous  
note. More times will not help.

Gloria Pitt  
PRESIDING JUROR

DATE AND TIME RECEIVED: 2:30 1/6/10 GT-

COURT'S RESPONSE: (AFTER AFFORDING ALL COUNSEL/PARTIES  
OPPORTUNITY TO BE HEARD)

JUDGE

FILED  
CLALLAM CO CLERK  
2010 JAN - 6 P 3:42  
BARBARA CHRISTENSEN

DATE AND TIME RETURNED TO JURY: \_\_\_\_\_

DO NOT DESTROY  
SAVE - MUST BE FILED

INQUIRY FROM THE JURY

SCANNED - 1