

30016-1-III  
COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON  
STATE OF WASHINGTON, RESPONDENT

v.

JON A. STRINE, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

---

BRIEF OF RESPONDENT

---

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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erroneously failed to file written verdict forms until it had polled the jury to determine the unanimity and validity of the verdicts reflected thereon.
2. The trial court erroneously polled the jury rather than immediately file the written verdict forms after an exclamation was made in response to the announced verdicts.
3. The trial court erred polling jurors without providing limiting instructions.
4. The trial court failed to inquire whether the jurors had been influenced by the in-court exclamation when polled about the announced verdict.
5. The trial court failed to determine whether the jury was deadlocked regarding one or both counts.
6. The trial court failed to return the jury for further deliberations before declaring a mistrial.

II.

ISSUES PRESENTED

1. Did the trial court abuse its discretion denying the motion to dismiss the information as a violation of defendant's double jeopardy rights?
2. Did the trial court abuse its discretion by polling the jury to ensure that the announced verdicts were valid prior to being accepted by the court for recording?
3. Did the court abuse its discretion by not ordering the jury to deliberate further to resolve the announced deadlock prior to declaring a mistrial?

III.

STATEMENT OF THE CASE

The respondent accepts appellant's statement of the case for purposes of this appeal only.

#### IV.

#### ARGUMENT

- A. DEFENDANT IS PRECLUDED FROM CLAIMING PROCEDURAL ERROR BY COURT RULE AND CASE LAW BECAUSE DEFENDANT ELECTED NOT TO OBJECT TO THE TRIAL COURT'S ACTIONS.

The defendant neither objected nor took exception to the procedures employed by the trial court to address the discrepancy between the presiding juror's declaration of unanimous decisions and the disavowment of that announcement by one-half the jury upon being polled. Rule of Appellate Procedure ("RAP") 2.5(a) provides that appellate courts will not entertain issues not raised before the trial court. The rule promotes the efficient use of judicial resources by refusing to sanction a party's failure to object to an error at trial which the trial court, if afforded the chance, could correct. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). Here, a timely objection would have avoided this appeal based upon defendant's claimed errors and the necessity of a new trial. Defendant's failure to object to the trial court's procedure should preclude defendant from now avoiding the consequences of his choice by claiming that the error is of constitutional magnitude. Defendant contends that the procedure used by the trial court to determine whether the jury was unanimous prior to accepting & recording the jury's decisions as verdicts was flawed, yet the defendant elected to take

no action. Defendant waited until it was impossible for the trial court to implement any of the alternatives that defendant now proffers as proper procedures, then claims a double jeopardy violation.

In fact, defendant agreed that the jury polling should be completed. Defendant did not suggest to the trial court that it utilize any of the alternative means of jury inquiry that defendant claims should have been implemented by this appeal. The reasonable inference from defendant's failure to act is that defendant agreed that the trial court's procedure was the best means of resolving the issue. Defendant's tactical choice does not elevate the claimed error to one of constitutional magnitude to thereby thwart the trial court's action denying defendant's motion to dismiss as unfounded. Pursuant to RAP 2.5(a) and the defendant's choices at the critical times of the trial, the trial court did not abuse its discretion in denying defendant's motion to dismiss. The record reflects no cessation of the original jeopardy because no verdict had been finalized and accepted by the trial court. Accordingly, there can be no double jeopardy because defendant's remedy lies with the resolution of his original jeopardy.

*Standard of Review*

B. THE DECISION BY THE TRIAL COURT DENYING DEFENDANT'S MOTION TO DISMISS IS REVIEWED FOR ABUSE OF DISCRETION.

An abuse of discretion occurs where the trial court exercises discretion in a manner that is manifestly unreasonable, based upon untenable grounds, or where the court bases its decision on an incorrect legal standard. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008); *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). Here, the trial court applied the law and properly exercised its discretion in denying defendant's motion to dismiss.

C. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN POLLING THE JURORS TO ENSURE THAT THE ANNOUNCED ACTIONS WERE VALID PRIOR TO BEING ACCEPTED BY THE COURT FOR RECORDING AS THE VERDICTS OF THE JURY.

Defendant's contention that the trial court abused its discretion by polling jurors based upon the mistaken belief that the law requires such in a criminal case is plainly misguided. Brief of Appellant at 1, 2, 5, 13, 14, 16, 17. In *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010), the Court noted: "General verdicts in criminal cases, of course, must still be unanimous to convict or acquit." Clearly, the Washington State Supreme

Court disagrees with the defendant's characterization of the trial court's responsibility to ensure that a general verdict is unanimous. Further proof of the requirement for unanimity is the existence of the Criminal Rule for Superior Court ("CrR") 6.16(a)(3) which provides, in pertinent part:

*Poll of Jurors.* When a verdict...is returned and before it is recorded, the jury shall be polled at the request of any party or upon the court's own motion. If at the conclusion of the poll, all of the jurors do not concur, the jury may be directed to retire for further deliberations or may be discharged by the court.

CrR 6.16(a)(3). It is noteworthy that this is a rule specifically promulgated for use in the procedural aspects of a criminal trial. The trial court's duty to poll the jury is characterized as discretionary by the court rule. Clearly, the law firmly places the responsibility for ensuring that a jury has fulfilled its assigned tasks in resolving a criminal trial upon the parties and the trial court. Where the parties do not request a poll of the jurors, the rule contemplates that the court has the separate discretion and responsibility to determine that the announced action complies with the law, i.e. is unanimous a verdict.

"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 Wn. App. 859, 860, 746 P.2d 839 (1987). "A verdict is not final until rendered in open

court and received by the judge.” *Id.*, at 860 (citing *State v. Robinson*, 84 Wn.2d 42, 46, 523 P.2d 1192 (1974)). As noted, appellate courts generally will not disturb a trial court’s discretionary ruling unless such is found to constitute a manifest abuse of discretion. An abuse of discretion exists when “no reasonable judge would have reached the same conclusion.” *Sofie v. Fiberboard Corp.*, 112 Wn.2d 636, 667, 771 P.2d 711, *corrected*, 780 P.2d 260 (1989). Here, the trial court accepted the presiding juror’s oral representation that unanimous verdicts had been achieved. Report of Proceedings (“RP”) from February 10, 2011. The trial court inquired of the presiding juror whether a verdict had been reached. RP 2. The presiding juror responded affirmatively and handed forward the written verdict forms. RP 2. The trial court orally announced the verdicts and advised of the necessity in a criminal case in Washington State of polling the jurors to ensure that the verdict was unanimous. RP 2.

“The right to have each juror individually state his or her verdict in his presence is essential to a criminal defendant’s constitutional right to a unanimous verdict.” *State v. Badda*, 63 Wn.2d 176, 182-83, 385 P.2d 859 (1963). In *State v. Pockert*, 49 Wn. App. at 862, this Court cited the Pennsylvania Supreme Court from *Commonwealth v. Martin*, as to the danger of failing to poll the jury.

[I]t is better that the case be tried again than that a precedent impairing a defendant's right to a poll of the jury be engrafted on our criminal procedure.

*Commonwealth v. Martin*, 379 Pa. 587, 109 A.2d 325, 327 (1954)

This fundamental perspective inures to the very basis of our criminal justice system and should not be lightly discarded regardless of the announced decision.

When juror number three disaffirmed the announced decisions, the trial court immediately ceased the poll to address the procedural issue presented, that the verdicts were really not unanimous as represented by the presiding juror. RP 3. Certainly, the defendant would have immediately moved for a mistrial had juror number three disaffirmed announced verdicts of "guilty;" otherwise, any "guilty" verdicts rendered thereafter by ordered further deliberations would be subject to attack as having been judicially coerced. Here, defendant agreed that the entire jury needed to be polled to make a record. RP 4-5. Once defendant agreed that the entire jury should be polled, defendant had elected his remedy of either further deliberations or a mistrial based upon a deadlocked jury. The polling was completed and a record was made that the jury had not reached a unanimous verdict. RP 6-8. At that point, the trial court properly inquired whether there was a possibility that the jury would reach a unanimous verdict. The presiding juror responded, "no."

RP 8. The trial court then conferred with counsel with regard on how to procedurally proceed from that point. RP 8-11. Ultimately, the trial court properly concluded that further deliberations would be fruitless because: half the jury had disaffirmed the announced verdicts, the presiding juror had advised that there was no possibility of a unanimous verdict, and of concern for avoiding judicial coercion of the jury to reach a unanimous verdict. RP 8-12.

As noted, a jury's action does not become a verdict until it is accepted by the court and the jury is discharged. *Beglinger v. Shield*, 164 Wash. 147, 152, 2 P.2d 681 (1931). "A juror, after agreeing to a verdict, may, when the jury is polled and his name called, refuse to assent to the verdict, although within the jury room he has assented." *Bino v. Veenhuizen*, 141 Wash. 18, 22, 250 Pac. 450 (1926). In such a case, if the jury is not polled, there is no way of knowing whether the requisite number of jurors agreed with the verdict. *Id.*, at 22.

Here, the trial court properly exercised its discretion to poll the jury prior to accepting the announced decisions to ensure that such were the individual decisions of the respective jurors and unanimous prior to being recorded. It matters little whether it was juror number one or twelve who denounced the verdicts because it is the lack of unanimity which renders the verdicts unacceptable by the trial court. Thereafter, it is

the court's legal responsibility to determine whether further deliberations would result in a unanimous verdict. At such a point in the procedure the trial court must be cognizant that any comment made could very well constitute judicial coercion which would render any verdict thereafter returned just as invalid. Here, once the jury disclosed its lack of unanimity, the trial court's options were limited, at best, in light of the point in the procedure that the issue was discovered. Nevertheless, the defendant did agree to the trial court finishing the poll of the jury. RP 4.

The trial court properly inquired of the presiding juror whether unanimous verdicts could be rendered if the jury was returned for further deliberations upon completion of the polling. RP 8. Once the presiding juror declared in open court that unanimous verdicts could not be achieved through further deliberations, the trial court faced a very limited range of actions. At that point, defendant failed to suggest any of the procedures it now claims the trial court erroneously failed to implement as a means of remedying the problem. Instead, defendant elected to remain silent during the process which the trial court reasonably interpreted as defendant's implied consent to the declaration of a mistrial.

Once the jury was discharged, the trial court certainly had no further ability to remedy the denounced verdicts. The trial court could not legally accept the disavowed written verdicts and order the same recorded

by the clerk. Accordingly, the trial court properly denied the defendant's motion for dismissal for violation of double jeopardy because defendant's original jeopardy never ended.

D. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DECLARING A MISTRIAL AND NOT ORDERING THE JURY INTO FURTHER DELIBERATIONS ONCE HALF THE JURY HAD DISAFFIRMED THE ANNOUNCED DECISIONS.

A defendant may not be placed in jeopardy twice for the same offense where an acquittal has been entered as a final judgment. *Arizona v. Washington*, 434 U.S. 497, 503, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978). Additionally, this constitutional protection encompasses the defendant's right to have the trial completed by a particular tribunal in light of the financial and emotional burdens which accompany a second trial for the same offense. *Id.*, at 503. Nevertheless, the U.S. Supreme Court pointed out the context in which this protection exists.

What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal *must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.*" (Emphasis added)

*Arizona v. Washington*, 434 U.S. at 505, FN 11, *citing Wade v. Hunter*, 336 U.S. 684, 689, 69 S. Ct. 834, 837, 93 L. Ed. 974 (1949). The Supreme Court provided further:

Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury. Yet in view of the importance of the right, and the fact that it is frustrated by any mistrial, the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar...must demonstrate 'manifest necessity' for any mistrial declared over the objection of the defendant."

*Id.*, 434 U.S. at 505. Here, the defendant did not timely object to the trial court's declaration of a mistrial, so the burden of demonstrating a "manifest necessity" was not triggered.

The Supreme Court then advised that there are "degrees of necessity and we require a 'high degree' before concluding that a mistrial is appropriate." *Id.*, 434 U.S. at 506.

At one extreme are cases in which a prosecutor requests a mistrial in order to buttress weaknesses in his evidence...the prohibition against double jeopardy...was plainly intended to condemn this 'abhorrent' practice...At the other extreme is the mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict...the classic basis for a proper mistrial...in this situation there are especially compelling reasons for allowing the trial judge to exercise broad discretion in deciding whether...'manifest necessity' justifies a discharge of the jury...if he discharges jury when further deliberations may produce a fair verdict, the defendant is deprived of his valued right to have his trial completed by a particular tribunal. But if he fails to discharge a jury which is unable to reach a verdict after protracted and exhausting

deliberations, there exists significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors. If retrial...were barred whenever an appellate court views the 'necessity' for a mistrial differently from the trial judge, there would be a danger that the latter, cognizant of the serious societal consequences of an erroneous ruling, would employ coercive means to break the apparent deadlock. Such a rule would frustrate the public interest in just judgments. The trial judge's decisions to declare a mistrial when he considered the jury deadlocked is therefore accorded great deference by a reviewing court.

*Id.*, at 507-510. Here, the trial court was in the best position to assess all the factors inherent in determining whether the jury would be able to reach a just verdict through continued deliberations. As defendant noted, it was the trial judge who noted *prior to the verdict forms being handed to the court that "a number of jurors were visibly upset...some appeared as if they had been weeping."* Brief of Appellant, p. 5. The trial judge made this observation *prior* to the emotional outburst that followed the reading of the forms. The trial court was the judge most familiar with the evidence produced, background of case, the arguments and the apparent effect of all those items on the jury. There is no evidence that the prosecutor did anything to precipitate a mistrial, so the "necessity" herein falls into the category of the classical reason for declaring a mistrial, a deadlocked jury. The trial court's declaration of a mistrial protected defendant against the real possibility of a conviction from a jury ordered to

further deliberate. The trial court acted rationally and responsibly in resolving the issue when half the jury disaffirmed the verdicts upon being polled. Again, it is critical to note that the defendant failed to timely object to the trial court's declaration, so no finding of a "manifest necessity" was required. Accordingly, the trial court's declaration of a mistrial is entitled to great deference.

E. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DISCHARGING THE JURY ONCE IT DETERMINED THAT THE JURY WAS DEADLOCKED.

The issue is whether the trial court properly exercised its discretion in discharging the jury after being advised by the presiding juror that further deliberations would not yield a unanimous verdict. Though the double jeopardy clause protects against a second prosecution for the same offense after conviction or acquittal and the "valued right" to have a trial completed before a specific tribunal, that protection is not absolute. *State v. Jones*, 97 Wn.2d 159, 162, 641 P.2d 708 (1982).

Defendant contends that the trial court's discharge of the jury over defendant's objection acts as an absolute bar to a retrial; however, the record herein reflects that defendant made no timely formal objection to the declaration of a mistrial or the discharge of the jury. As previously noted, objecting after the jury has already been discharged is of no value

to remedy the circumstance because the act of discharge relieves the jurors of their oaths against outside influences. Defendant's failure to timely object afforded the trial court absolutely no chance of remedying the situation by implementing any of the suggested means defendant now proffers as acceptable to this Court after the fact. Defendant should not be permitted to profit from his own lack of timely action.

Whether a trial court has abused its discretion in discharging a jury is determined by the existence of "extraordinary and striking circumstances" which clearly indicate to the court in the reasonable exercise of its discretion that the ends of substantial justice cannot be obtained without discontinuing the trial. *State v. Jones*, 97 Wn.2d at 163 (citing *State v. Bishop*, 6 Wn. App. 146, 150, 491 P.2d 1359 (1971)). As the Supreme Court noted:

[T]here 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. 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 jurors agree with the foreman. The jury's acknowledgement 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 at 164. The Supreme Court further observed that "one situation where the proper administration of justice requires the

discharge of the jury is where that jury is unable to agree on a verdict.” *Jones*, 97 Wn.2d at 163. Here, there is no doubt that the trial court faced an “extraordinary and striking circumstance” when fully one half of the jury denounced the unanimity of the jury’s decisions to the trial court after the representations by the presiding juror. Defense Counsel, the prosecutor, and the trial court all admitted that they had never before faced such a circumstance.

Defendant’s citation to RCW 10.61.060 does not support his position since no final verdict was accepted and entered by the trial court prior to the disaffirmance of the announced decisions by one half of the jury. Again, it matters not whether the denouncement was uttered by juror number one or number twelve, once any juror in a criminal trial announced a position contrary to the announced decisions, there was evidence in the record that the decisions were not unanimous and could not be accepted by the court for entry. It is counterintuitive and procedurally dangerous for a trial court at such a point to inquire further of the individual jurors because of the possibility of judicial coercion. The same dangers stand against the trial court utilizing the provisions of RCW 10.61.060 once it is notified that the announced decision of acquittal is not unanimous. Immediately thereafter the trial court properly inquired of the presiding juror and was advised that the jury could not reach

unanimous decisions. “A trial judge should be allowed broad discretion in deciding whether the circumstances justify a discharge of the jury. *State v. Jones*, 97 Wn.2d at 163. The trial court committed no error.

F. THE TRIAL COURT PROPERLY FOUND THAT DEFENDANT HAD CONSENTED TO THE DECLARATION OF A MISTRIAL BECAUSE DEFENDANT DID NOT AFFIRMATIVELY OBJECT THERETO.

Defendant contends that he did not “freely consent” to the trial court’s declaration of a mistrial. Defendant argues that he was not afforded the opportunity to object to the trial court’s actions on the basis of double jeopardy, yet the record reflects that the defendant and his counsel were present in the courtroom and participating in the process. This was not defendant’s trial counsel’s first trial, so the trial court reasonably inferred that once the presiding juror declared in open court that the jury would be unable to return unanimous decisions, defendant’s counsel knew that a double jeopardy objection could be made on the record, yet the record contains no such action by defendant’s counsel. Where was defendant’s own objection? Nothing prevented defendant from announcing his objection to the court. Ambushing a court has never been an accepted method of trial procedure or practice. The trial court was entirely justified in relying upon the actions of the defense counsel

and the defendant as manifesting defendant's implied consent to the order of a mistrial because no timely objection was made. The trial court committed no error in finding that defendant had impliedly consented to the declaration of a mistrial based upon defendant's failure to timely object.

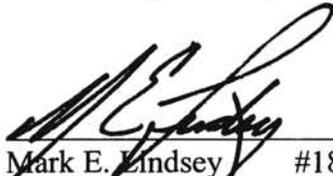
V.

CONCLUSION

For the reasons stated above the trial court's order denying the defendant's motion to dismiss should be affirmed and the case remanded for trial.

Dated this 10<sup>TH</sup> day of April, 2012.

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