



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

**NO. 02-17-00100-CR
NO. 02-17-00101-CR**

EX PARTE DYJUAN MESHUN
DONISON

FROM THE 297TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NOS. 1461143D, 1490346R

MEMORANDUM OPINION¹

I. INTRODUCTION

Appellant Dyjuan Meshun Donison appeals the trial court's denial of his pretrial writ of habeas corpus asserting a double jeopardy violation after the first trial ended in a mistrial over his objection. In a single point, Donison argues that the trial court abused its discretion by denying his pretrial writ of habeas corpus. We will affirm.

¹See Tex. R. App. P. 47.4.

II. PROCEDURAL BACKGROUND

A grand jury indicted Donison in cause number 1461143D for the offense of evading arrest or detention with a vehicle that occurred on or about June 24, 2016. After the jury was empaneled and sworn, the trial began on January 31, 2017, at 1:37 p.m. The jury heard testimony from three police officers; nine exhibits—three warrants, four photographs, and two dash cam videos—were admitted into evidence; and the proceedings concluded at 4:00 p.m.

The proceedings resumed at 9:00 a.m. on February 1, 2017. The State rested and closed, the defense did not put on evidence, the three-page charge was read to the jury, and the jury heard closing arguments. The jury then began deliberating. The jury recessed for the evening at 5:14 p.m. without reaching a decision.

The jury returned the following morning at 8:30 a.m. At 12:57 p.m., the trial court went on the record and summarized the jury's status:

Court's received another note, Jury Note No. 8. Note from the Jury to the Court: "We the jury are still deadlocked and request a lunch break." Signed by the foreman.

[Defense counsel], do you have a motion?

[DEFENSE COUNSEL]: No.

THE COURT: All right. It's the Court's intention to bring out the jury, ask the jury foreman if any further deliberation would result in a verdict or are they hopelessly deadlocked. And if he says, no, further deliberation would not result in a verdict, then it is the Court's intention to declare a mistrial.

For the record, in a trial that had about three hours of testimony, and that includes playing of the video, the jury went out yesterday at 10:22, it took an hour and a half for lunch and went home at 5:14 -- no, we Allen charged them at 5:14.

Did we Allen charge them at the end of the day?

Upon checks with the court reporter it appears we Allen charged this jury at 2:32 yesterday. They went home at 5:14 after requesting to go home. I had them come back at 8:30 this morning. They have been in continuous deliberations until now, which is now almost 1:00. In addition to that, we have received, prior to this one, seven notes. The [third] one, Jury Note No. [3], came in at 11:49, they requested a break.

Jury Note No. 4 came in at 13:42, 1:42 stating[,] “We have an issue with a juror who refuses to sit in judgment of another person.”

Fifth note came in at [13:45, 1:45], stating[,] “We have a juror who insists on 100 percent certainty on the identity of the driver.”

And by the way, Jury Note No. 1 was at 10:16. They wanted to review the pictures -- and the videos in Jury Note No. 2, which came in at 10:49.

Jury Note No. 6, which came in at 3:31 stated a juror refuses to render a verdict due to a cultural fear of retaliation, quote, “Is there anything that can be done to address this?”

And Jury Note No. 7, which came in at 4:17 yesterday, “We are still not close to reaching a verdict. May we be excused and resume in the morning? It might be helpful to note that the contrary side is refusing to discuss the case.”

I intend to inquire of the foreman if further deliberations might result in a verdict. If he says no, I will declare a mistrial out of manifest necessity.

Will there be an objection to that?

[DEFENSE COUNSEL]: Just note our objection.

THE COURT: Okay.

The trial court then questioned the jury foreperson as follows:

Mr. Foreperson, I need to make an inquiry of you. You sent out Jury Note No. 8, "We, the jury, are still deadlocked and request a lunch break." You have been deliberating for several hours now. I note that you went out at 10:22. You had a couple of breaks[,] and I sent you home last night. In addition to that, you have sent out five of the eight notes[,] which indicate that the jury is having difficulty reaching a verdict.

I need a one-word answer, Mr. Foreperson. If I order you to continue deliberating, will continued deliberation of this jury -- is there any chance it will result in a verdict?

FOREMAN: No.

THE COURT: Okay. Therefore, out of manifest necessity, I declare a mistrial.

On March 13, 2017, the State re-indicted Donison for the offense of evading arrest or detention with a vehicle in cause number 1490346R. Donison filed a pretrial writ of habeas corpus asserting a double jeopardy violation.

The trial court held a hearing on Donison's pretrial writ of habeas corpus. Donison argued that no manifest necessity existed for the mistrial and that the law presumes that one trial is enough. The State argued that manifest necessity did exist as demonstrated by the jury's notes, which indicated that they were not moving towards reaching an agreement. The trial court stated:

I find that there was no way that this jury was going to reach a verdict based upon the use of the words -- the word "deadlock," the notes that were sent out, and the fact that they had a juror back there that was just refusing to deliberate. I -- I think this person -- it sounds to me like they did not want to go one way or the other. They were refusing to even take a side.

.....

So I find there is a manifest necessity for the declaration of a -
- of a mistrial[,] and I'll deny your motion for -- your double jeopardy
motion.

This interlocutory appeal followed.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING DONISON'S PRETRIAL WRIT OF HABEAS CORPUS ASSERTING A DOUBLE JEOPARDY VIOLATION

In his sole point, Donison argues that the trial court abused its discretion by denying his pretrial writ of habeas corpus asserting a double jeopardy violation after his first trial ended in a mistrial over his objection.

A. Standard of Review

In reviewing a trial court's denial of a pretrial petition for habeas corpus, we must defer to the court's assessment of the facts. *Ex parte Wheeler*, 203 S.W.3d 317, 324 (Tex. Crim. App. 2006). We view the facts in the light most favorable to the court's ruling and will uphold it absent an abuse of discretion. *Id.* Broad deference is appropriate because the trial judge is in the best position to assess the relevant considerations. *Arizona v. Washington*, 434 U.S. 497, 513–14, 98 S. Ct. 824, 834–35 (1978); *Ex parte McMillian*, No. 05-11-00642-CR, 2011 WL 3795727, at *2–3 (Tex. App.—Dallas Aug. 29, 2011, pet. ref'd) (not designated for publication) (stating broad discretion was appropriate because mistrial involved potentially deadlocked jury). We therefore afford almost total deference to the trial court's determination of historical facts that are supported by the record, and to mixed questions of law and fact, when the resolution of those questions turn on evaluations of credibility and demeanor. *Ex parte Peterson*,

117 S.W.3d 804, 819 (Tex. Crim. App. 2003), *overruled in part on other grounds* by *Ex parte Lewis*, 219 S.W.3d 335, 371 (Tex. Crim. App. 2007). If the resolution of the ultimate question turns on an application of the law, we review the determination de novo. *Id.* Reviewing courts must also grant deference to implicit fact findings that support the trial court’s ultimate ruling. *Id.*; *Wheeler*, 203 S.W.3d at 324 n.23.

B. The Law on Double Jeopardy and the Law on Mistrial Based on Manifest Necessity

A defendant may not be twice put in jeopardy for the same offense. U.S. Const. amend. V; Tex. Const. art. 1, § 14; *Arizona*, 434 U.S. at 503, 98 S. Ct. at 829. Jeopardy attaches when the jury is impaneled and sworn. *Crist v. Bretz*, 437 U.S. 28, 35, 98 S. Ct. 2156, 2161 (1978); *Ex parte Perusquia*, 336 S.W.3d 270, 275 (Tex. App.—San Antonio 2010, pet. ref’d).

The trial court may discharge a jury if it cannot agree and both parties consent to the discharge, or the trial court may exercise its discretion and discharge the jury if the jury “has been kept together for such time as to render it altogether improbable that it can agree.” Tex. Code Crim. Proc. Ann. art. 36.31 (West 2006). When a mistrial is declared over a defendant’s objection because the jury is unable to reach a verdict, retrial is barred by double jeopardy unless there was manifest necessity for the mistrial. *Oregon v. Kennedy*, 456 U.S. 667, 672, 102 S. Ct. 2083, 2087 (1982); *Perusquia*, 336 S.W.3d at 275. “Manifest necessity exists when the circumstances render it impossible to arrive at a fair

verdict, when it is impossible to continue with trial, or when the verdict would be automatically reversed on appeal because of trial error.” *Perusquia*, 336 S.W.3d at 275. The trial judge is required to consider and rule out the “less drastic alternatives” before granting a mistrial. *Id.*

In evaluating the court’s exercise of its discretion to declare a mistrial based on manifest necessity over objection, we consider the length of time the jury deliberated in light of the nature of the case and the evidence presented. *Husain v. State*, 161 S.W.3d 642, 645 (Tex. App.—San Antonio 2005, pet. ref’d) (citing *Patterson v. State*, 598 S.W.2d 265, 268 (Tex. Crim. App. [Panel Op.] 1980)). Specifically, we consider “the type and complexity of the evidence, whether expert testimony is involved, the number of witnesses, the number of exhibits . . . , the complexity of the charge, whether the jury moved towards agreement during the period of deliberation, and the nature and extent of communication from the jury.” *Torres v. State*, 961 S.W.2d 391, 393 (Tex. App.—Houston [1st Dist.] 1997, pet. ref’d) (quoting *Galvan v. State*, 869 S.W.2d 526, 528 (Tex. App.—Corpus Christi 1993, pet. ref’d)). The trial court’s communications with the jury are also significant in evaluating the court’s exercise of discretion. *Husain*, 161 S.W.3d at 645.

C. Analysis

Here, the case was not complex. It took less than two and a half hours for the three police officers to testify and for nine exhibits to be admitted into evidence. The jury did not move toward agreement during their deliberations as

evidenced by their many notes. Shortly after the jury returned from lunch on their first day of deliberations, they sent out Jury Note No. 4 stating that there was one juror who refused to sit in judgment of another. Approximately three minutes later, Jury Note No. 5 stated that there was a juror who was insisting on 100% certainty on the identity of the driver. In response, the trial court gave the jurors an *Allen* charge, which urged the jurors to refer to the court's charge and to continue their deliberations. See *Perusquia*, 336 S.W.3d at 276 (explaining that an *Allen* charge, which is less drastic than declaring a mistrial, is "a supplemental charge given to a deadlocked jury that directs the jurors to examine the submitted questions with candor and decide the case if the jurors can conscientiously do so"). The jury continued its deliberations but sent a sixth note about a juror who feared retaliation; the trial court gave another *Allen* charge. In a seventh note, the jurors stated that they were still not close to reaching a verdict and asked to be excused for the evening. The next morning, jurors deliberated for over four and a half hours before they sent in their eighth note, which stated that they were deadlocked. In response to that note, the trial court called the jury into the courtroom and questioned the foreperson whether there was any chance that continued deliberations would result in the jury reaching a verdict. After the foreperson answered "no," the trial court declared a mistrial based on a finding of manifest necessity.

The record in this case affirmatively shows that the trial court considered and employed the following less drastic alternatives before declaring a mistrial:

(1) the trial court gave the jury more than one *Allen* charge in response to its notes; (2) the trial court allowed the jury to recess and resume deliberations the following day; and (3) upon receiving the eighth note, which specified that the jury was “deadlocked,” the trial court verified with the jury foreperson that the jury could not reach a verdict even if allowed more time beyond the eleven and a half hours of deliberations that it had already engaged in. Thus, the trial court here did employ less drastic alternatives to declaring a mistrial, to no avail. We cannot say that the trial court’s failure to implement additional, unidentified alternatives to declaring a mistrial constituted an abuse of discretion. See *Ex parte Rodriguez*, 366 S.W.3d 291, 299 (Tex. App.—Amarillo 2012, pet. ref’d) *Perusquia*, 336 S.W.3d at 277. Viewing the record in the light most favorable to the trial court’s ruling, considering the eleven and a half hours the jury deliberated in light of the non-complex nature of the case, considering the two and a half hours of evidence presented, and considering the multiple communications between the trial court and the jury, we hold that the trial court did not abuse its discretion by finding manifest necessity existed to declare a mistrial over Donison’s objection and that this manifest necessity barred application of double jeopardy to these facts. See *Rodriguez*, 366 S.W.3d at 299; *Perusquia*, 336 S.W.3d at 277. Accordingly, we overrule Donison’s sole point.

IV. CONCLUSION

Having overruled Donison's sole point, we affirm the trial court's order denying "Defendant's Pretrial Writ of Habeas Corpus for Double Jeopardy Violation."

/s/ Sue Walker
SUE WALKER
JUSTICE

PANEL: WALKER, KERR, and PITTMAN, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: October 19, 2017