

**IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE**



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FILED: 08/09/2011  
RUTH A. WILLINGHAM,  
CLERK  
BY: GH

THE STATE OF ARIZONA ex rel.	)	
WILLIAM G. MONTGOMERY, Maricopa	)	
County Attorney,	)	1 CA-SA 11-0192
	)	
Petitioner,	)	Maricopa County
	)	Superior Court
v.	)	No. CR2010-102640-001DT
	)	
THE HONORABLE CARI HARRISON,	)	Department E
Judge of the SUPERIOR COURT OF	)	
THE STATE OF ARIZONA, in and for	)	
the County of MARICOPA,	)	<b>DECISION ORDER</b>
	)	
	)	
Respondent Judge,	)	
	)	
BRITTANY J. WILLIAMS,	)	
	)	
Real Party in Interest.	)	
	)	

This special action, filed August 4, 2011, came before Presiding Judge Jon W. Thompson and Judges Daniel A. Barker and Ann A. Scott Timmer. The court has considered Petitioner's Petition for Special Action and Defendant/Real-Party-In-Interest's Response. On August 8, 2011, this court issued a stay of the jury trial in-progress.

Because there is no adequate remedy by appeal, it is ordered accepting jurisdiction of this special action. *Blake v. Schwartz*, 202 Ariz. 120, 122, ¶ 7, 42 P.3d 6, 8 (App. 2002); Ariz. R. Spec. Act. 1(a). We review the trial court's order dismissing a charge for reasons of double jeopardy de novo. *Lemke v. Reyes*, 213 Ariz. 232, 236, ¶10, 141 P.3d 407, 411 (App. 2010).

This is a retrial following a mistrial on count 2, second

degree murder. Jury selection for the retrial began on July 6, 2011, and trial began shortly thereafter. On July 25, 2011, defendant filed a motion to dismiss on the basis of double jeopardy, citing *Gusler v. Wilkinson*, 199 Ariz. 391, 18 P.3d 702 (2001). Specifically, defendant argued on the basis of the prior jury's Note 24 [stating "We have reached a unanimous verdict on the first offense. We have voted on the second charge (Second Degree Murder) and are unable to reach a unanimous decision on all of the lesser charges"] that the jury had reached a decision to acquit on the second degree murder charge. On August 2, 2011, the trial court granted defendant's motion to dismiss the charge of second degree murder and ordered the State to argue only manslaughter and negligent homicide to the jury. In the Petition for Special Action, the state argues that dismissal of the murder charge is not supported by *Gusler* and the trial court erred as a matter of law. We agree.

We note as a preliminary matter that a jury need not decide the greater charge before proceeding to the lesser charges and that a jury note will generally not constitute a verdict under Rule 23.1, Arizona Rules of Criminal Procedure. See *State v. LeBlanc*, 186 Ariz. 437, 438, 924 P.2d 441, 442 (1996); *State v. Kiper*, 181 Ariz. 62, 68, 887 P.2d 592, 598 (1994); Ariz. R. Crim. P. 23.1.

In *Gusler*, the trial judge received a jury note which read "We are deadlocked 7-5--Count 1 Talked about crucial issue for 2 hours--

no movement Not guilty on manslaughter Deadlocked on negligent homicide—What do we do?,” the Supreme Court concluded after the resulting mistrial that retrial on the manslaughter charge was prohibited on double jeopardy grounds. 199 Ariz. at 394-95, ¶¶14-23, 18 P.3d at 705-06. The *Gusler* holding was premised on two key facts: that the jury note specifically indicated a not guilty verdict on manslaughter and that the trial judge concealed that information from counsel, thus preventing counsel from making the necessary inquiries and likely curing the defect prior to the declaration of a mistrial. *Id.* at 395, ¶¶20-23, 18 P.3d at 706. The supreme court found that if the trial judge in *Gusler* had inquired further, the possibility “loom[ed] large” that a verdict on manslaughter would have been disclosed and, thus, there was no manifest necessity for the mistrial. *Id.*

The instant matter differs significantly from *Gusler*. Here, jury Note 24 reads only that the jury was unable to reach a verdict on lesser charges and had “voted” on the murder charge; counsel were fully aware of the content of the note. Further, the jury received an impasse instruction twice (once in writing and once in open court) and continued to deliberate for some time (including sending at least two more questions out) before coming to a final verdict on count 1 and reaching a deadlock on count 2. That the jurors deliberated as to lesser included charges on count 2 did not indicate acquittal as to the murder charge. See *Lemke*, 213 Ariz.

at 241, ¶26, 141 P.3d at 416.

The respondent judge expressed reservations regarding whether the prior judge had sufficiently dealt with the jurors' Note 24. We have reviewed the pertinent transcript and conclude, after reviewing Rule 22.4, Ariz. R. Crim. P., and the accompanying comment, that the prior judge—with full participation by both counsel—offered appropriate instructions to assist the jury in resolving their issues related to count 2. The jury responded by advising that “we have still not been able to reach a unanimous verdict on the second count,” (Note 27) and finally, “we have considered the additional instructions and are still unable to reach a verdict” (Note 29). Under these circumstances, no further inquiry was required, and no verdict, implicit or otherwise, was reached on the murder charge.

It was error to preclude retrial on the murder charge.

**IT IS ORDERED** accepting jurisdiction and granting relief.

**IT IS FURTHER ORDERED** vacating the trial court's dismissal of the 2<sup>nd</sup> degree murder charge and directing the trial court to deny defendant's motion for dismissal.

**IT IS FURTHER ORDERED** lifting the stay of the jury trial.

**IT IS FURTHER ORDERED** that a copy of this order shall be sent to each party appearing herein and to respondent.

/s/

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JON W. THOMPSON, Presiding Judge