STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 21, 2000
v	No. 209513 Recorder's Court
REGINALD JOHN LETT, Defendant-Appellant.	LC No. 96-008252

Before: Jansen, P.J., and Collins and J. B. Sullivan*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to consecutive terms of sixteen to forty years in prison for the second-degree murder conviction and two years in prison for the felony-firearm conviction. Defendant appeals as of right and we reverse.

This case arose from the August 29, 1996, shooting death of Adesoji Latona at a party store in the city of Detroit. The victim and his girlfriend, Djuana Bradley, were going to a drive-in movie and stopped at a party store on the way. The victim, a taxi driver, was driving them in his taxi. When they pulled up to the store, three people were outside the store in the parking lot. As the victim approached the store, one of the men in the parking lot confronted him and said, "You're the motherfucker that threw me out of your cab." The victim continued into the store and the man who had confronted the victim also entered the store about two to three minutes later. Bradley also entered the store, and stated that the victim and the man began to argue and the victim pushed the man. Other men had also entered the store, with one man trying to break up the fight. Bradley testified that defendant attempted to hit the victim and then pulled out a gun. Bradley ran to the back of the store and heard two gunshots.

Two other men (Frank Kelly and Darryl Walker) who were with defendant that evening at the party store testified at their preliminary examinations, which testimony was admitted at trial because they were not located for trial, that Homer Jones got into the argument with the victim. Both men stated that

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

the victim initially pushed Jones. Kelly attempted to get Jones out of the store, and pushed the victim in the chest when he heard a gunshot. Kelly ran out of the store and realized that his middle finger was shot off.

Defendant gave a police statement. He admitted that he was at the party store at the time with some friends. Defendant stated that when the victim pushed his friend in the store, defendant went outside and retrieved a gun from another friend who was in a car. Defendant stated that he reentered the store with the gun, fired it once into the air, and then ran out of the store.

The medical examiner testified that the victim suffered two gunshot wounds: one to the head (left eye) and one to the right side of the chest. Both wounds were fatal and a police officer testified that the bullets were fired from a nine millimeter gun.

Defendant was originally charged with first-degree murder and felony-firearm. He was tried before Judge Helen E. Brown in the Recorder's Court for the City of Detroit in June 1997. After four days of trial, the trial court instructed the jury on June 12, 1997, and the jury began its deliberations at 3:24 p.m. The jury was excused at 4:00 p.m. and resumed its deliberations the following morning. At 12:44 p.m. on June 13, 1997, the parties reconvened with counsel present and the following occurred:

> THE COURT: Let's bring the jury out.
>
> THE DEPUTY: Would you take your seats in the jury box, please?
>
> (At about 12:45 p.m. - jury returned)
>
> THE COURT: You may be seated.
>
> Is the jury present and properly seated, counsel?
>
> [PROSECUTOR]: Yes, your Honor.
>
> [DEFENSE COUNSEL]: Yes, Judge.
>
> THE COURT: I received your note asking me what if you can't agree? And I have to conclude that that that is your situation at this time. So, I'd like to ask the foreperson to identify themselves, please?
>
> [The foreperson states her name.]
>
> THE COURT: Okay, thank you. All right. I need to ask you if the jury is deadlocked; in other words, is there a disagreement as to the verdict?
>
> THE FOREPERSON: Yes, there is.
>
> THE COURT: All right. Do you believe that it is hopelessly deadlocked?

THE FOREPERSON: The majority of us don't believe that –

THE COURT: (Interposing) Don't say what you're going to say, okay?

THE FOREPERSON: Oh, I'm sorry.

THE COURT: I don't know want to know what your verdict might be, or how the split is, or any of that. Thank you. Okay? Are you going to reach a unanimous verdict, or not?

THE FOREPERSON: (No response)

THE COURT: Yes or no?

THE FOREPERSON: No, Judge.

THE COURT: All right. I hereby declare a mistrial. The jury is dismissed.

(At about 12:48 p.m. - jury discharged)

Thereafter, defendant was retried before Judge Thomas W. Brookover on charges of first-degree murder and felony-firearm. The jury convicted defendant of second-degree murder and felony-firearm on November 20, 1997.

Defendant first argues that he was denied his constitutional right against being placed in double jeopardy for a single offense because the trial court's initial decision to declare a mistrial was without defendant's consent and was not manifestly necessary.

Initially, we note that defendant did not raise this issue below. Therefore, the issue has been "forfeited." Under our Supreme Court's recently enunciated standard for "forfeited" constitutional error, defendant must prove that plain error occurred and that the plain error affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We believe that defendant has met this burden.

A person may not be twice placed in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15. In a jury trial, jeopardy attaches at the time the jury is selected and sworn. *People v Mehall*, 454 Mich 1, 4; 557 NW2d 110 (1997). If the trial is concluded prematurely, a retrial for that offense is prohibited unless the defendant consented to the interruption or a mistrial was declared because of a manifest necessity. *Id.*

First, it is without dispute that defendant did not consent to the mistrial. The trial court declared the mistrial sua sponte and there is absolutely no indication in the record that defendant consented to this action. See *People v Johnson*, 396 Mich 424, 432; 240 NW2d 729 (1976) (mere silence or the failure to object to the jury's discharge is not consent). Thus, we must consider whether the mistrial was declared because of manifest necessity.

"One circumstance that constitutes a manifest necessity is the jury's failure to reach a unanimous verdict." *Mehall, supra,* p 4; accord *People v Dawson,* 431 Mich 234, 252; 427 NW2d 886 (1988) (the charged offense may be retried where the mistrial was declared because of a hung jury); *People v Thompson,* 424 Mich 118, 128; 379 NW2d 49 (1985) (retrial after a mistrial caused by jury deadlock does not violate the state or federal constitutions). Although this rule has a long and well-established history, there are limitations regarding the trial court's finding of whether the jury was actually deadlocked. Noting that it has "constantly adhered to the rule that a retrial following a 'hung jury' does not violate the Double Jeopardy Clause," the United States Supreme Court has stated that a trial court may discharge a *genuinely* deadlocked jury and require the defendant to submit to a second trial. *Richardson v United States,* 468 US 317, 324; 104 S Ct 3081; 82 L Ed 2d 242 (1984). Additionally, a reviewing court must be satisfied that the trial court exercised "sound discretion" in declaring a mistrial because of a hung jury. *Arizona v Washington,* 434 US 497, 514; 98 S Ct 824; 54 L Ed 2d 717 (1978); see also *United States v Simpson,* 94 F3d 1373, 1377 (CA 10, 1996). Similarly, our Supreme Court has stated that the double-jeopardy guarantee does not bar retrial where the trial court has reasonably concluded that the jury is unable to agree on a verdict. *People v Hall,* 396 Mich 650, 654; 242 377 (1976); accord *People v Sterling,* 154 Mich App 223, 235; 397 NW2d 182 (1986); *People v Harvey,* 121 Mich App 681, 689-690; 329 NW2d 456 (1982); *People v Riemersma,* 104 Mich App 773, 779; 306 NW2d 340 (1981).

Recognizing that the doctrine of double jeopardy does not preclude retrial after the discharge of a jury because of inability to agree, our Supreme Court has stated that the inquiry "turns upon determination whether the trial judge was entitled to conclude that the jury in fact was unable to agree." *People v Duncan,* 373 Mich 650, 660-661; 130 NW2d 385 (1964). This has lead to the accepted rule that a trial court must consider reasonable alternatives before sua sponte declaring a mistrial and the court should make explicit findings, after a hearing on the record, that no reasonable alternative exists. *People v Hicks,* 447 Mich 819, 841 (Griffin, J.), 847 (Cavanagh, C.J.); 528 NW2d 136 (1994); *People v Benton,* 402 Mich 47, 61; 260 NW2d 77 (1977) (Levin, J.); *People v Rutherford,* 208 Mich App 198, 202; 526 NW2d 620 (1994); *People v Little,* 180 Mich App 19, 23-24; 446 NW2d 566 (1989); *People v Dry Land Marina,* 175 Mich App 322, 327; 437 NW2d 391 (1989).

In the present case, we must determine whether the trial court reasonably concluded that the jury was deadlocked. Based on the record before us, we are forced to conclude that the court did not reasonably declare a mistrial. The trial court declared a mistrial without a hearing or discussion of any alternatives. No deadlock jury instructions were given much less even considered by the trial court. See CJI2d 3.12. The jury had deliberated only four or five hours in a capital murder case following four days of trial testimony. There was clearly a reasonable alternative in this case, that is, to give the jury a deadlock jury instruction and send it back for further deliberation. See, e.g., *Hicks, supra,* pp 843-844; *Benton, supra,* pp 61-62; *Rutherford, supra,* p 203; *Little, supra,* pp 27-30.

Because a reasonable alternative existed in this case, an alternative never given consideration by the trial court, the trial court did not engage in a scrupulous exercise of discretion in sua sponte declaring the mistrial. *Hicks, supra,* p 829, citing *United States v Jorn,* 400 US 470, 485; 91 S Ct 547; 27 L Ed 2d 543 (1971). Put another way, it was not manifestly necessary for the trial court to have declared

a mistrial given the shortness of the jury's deliberation and the court's failure to give a deadlock jury instruction. In fact, the trial court never even found on the record that the jury was genuinely deadlocked. Given these circumstances, we are compelled to conclude that retrial violated defendant's rights against double jeopardy as guaranteed by the United States and Michigan Constitutions. Therefore, defendant's convictions are reversed.

Because of our resolution of this issue, we need not address the other issue raised by defendant.

Reversed.

/s/ Kathleen Jansen
/s/ Jeffrey G. Collins
/s/ Joseph B. Sullivan