

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DONNELL LEWIS ASHLEY,

Defendant-Appellee.

UNPUBLISHED

July 28, 2000

No. 218350

Jackson Circuit Court

LC No. 98-087045

Before: Gage, P.J., and Gribbs and Sawyer, JJ.

PER CURIAM.

Defendant was charged with possession with intent to deliver between 225 and 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii), and possession of marijuana, MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d). The trial court sua sponte instructed the jury concerning respective lesser included offenses of possession of 225 to 650 grams of cocaine, MCL 333.7403(2)(a)(ii); MSA 14.15(7403)(2)(a)(ii), and use of marijuana, MCL 333.7404(2)(d); MSA 14.15(7404)(2)(d). The jury found defendant not guilty with respect to the possession with intent to deliver cocaine charge, but guilty of both possession and use of marijuana. The trial court imposed a sentence of one year in jail, with the sentence suspended after defendant served ninety days, and two years' probation. The prosecutor appeals as of right. We affirm.

The prosecutor contends that the trial court erred in denying his motion for retrial concerning the lesser included possession of cocaine charge because the jury was hung with respect to this count, and double jeopardy therefore does not prevent the retrial. The prosecutor also suggests that retrial remains proper in any event because defendant waived his double jeopardy protection by objecting to the prosecutor's request to poll the jury regarding the lesser possession of cocaine charge.¹ We review de novo the applicability of defendant's constitutional double jeopardy protections. *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999).

¹ The Prosecuting Attorneys Association of Michigan filed an amicus curiae brief raising similar issues.

The federal and Michigan constitutions provide that no person shall twice be put in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15. Double jeopardy protection attaches before a jury trial's conclusion, specifically when the jury has been selected and sworn. *People v Dawson*, 431 Mich 234, 251; 427 NW2d 886 (1988). If the trial is prematurely concluded, a retrial for the offense is prohibited unless the defendant consented to the trial's interruption or a mistrial was declared because of a manifest necessity. One example of manifest necessity is the jury's failure to reach a unanimous verdict. When this occurs and the trial court declares a mistrial, a retrial is not precluded because the original jeopardy has not been terminated. *People v Mehall*, 454 Mich 1, 4; 557 NW2d 110 (1997). If there is no manifest necessity for declaring a mistrial, however, double jeopardy bars retrial as a matter of fairness to a defendant's interests in avoiding multiple prosecutions. *People v Thompson*, 424 Mich 118, 128, n 5; 379 NW2d 49 (1985).

The relevant record does not reveal that at the time the jury rendered its verdict it remained hung regarding the cocaine possession charge. The trial court made no finding of manifest necessity based on a deadlocked jury, and did not declare a mistrial. After the jury began deliberations, it expressed confusion concerning how to proceed through the charges. The jury indicated that it had reached agreement on three of the four charges, and the court responded that the jury need reach only one verdict with respect to each of the two counts. After briefly returning to its deliberations, the jury rendered its verdicts of not guilty of possession with intent to deliver cocaine, and guilty of the two marijuana charges. Although some question was expressed by the prosecutor concerning the cocaine possession offense, the trial court, defense counsel and the prosecutor all stated that the jury apparently found defendant not guilty of cocaine possession.² In response to the prosecutor's subsequent request, the trial court properly polled the jury by inquiring of each juror "whether the verdict announced is that juror's verdict," to which each juror responded affirmatively. MCR 6.420(C). We observe that no provision authorizes the trial court to pose the jurors questions beyond the announced verdict. Because it was not clear that the jury remained deadlocked, we cannot conclude that the trial court erred in failing to declare a mistrial. *Mehall, supra*; *Thompson, supra* at 123.

In light of the absence of manifest necessity for the trial court to declare a mistrial, double jeopardy precludes a retrial of defendant with respect to the cocaine possession charge "as a matter of fairness to . . . defendant's interests in avoiding multiple prosecutions." *Thompson, supra* at 128, n 5. While the prosecutor argues that defendant waived his right to double jeopardy protection by objecting to the specific polling of the jury regarding the cocaine possession count, he fails to provide any convincing authority supporting this position.³

² To the extent that the trial court made a factual determination that the jury found defendant not guilty of the cocaine possession charge, we cannot conclude in light of the available record that the trial court clearly erred. *People v Swirles (After Remand)*, 218 Mich App 133, 136; 553 NW2d 357 (1996).

³ The prosecutor merely cites several cases for the proposition that one who contributes to the occurrence of an error in the trial court may not on appeal challenge this error. We fail to comprehend the applicability of this principle to the facts of this case.

We further reject the prosecutor's contention that the affidavits of several jurors indicating the jury's nonunanimity regarding the cocaine possession charge⁴ represented a proper basis for the trial court to declare a mistrial and order a retrial concerning this count. While the prosecutor cites *Routhier v Detroit*, 338 Mich 449, 452; 61 NW2d 593 (1953), for the proposition that "[t]he attached affidavits were properly admitted in this case" to clarify the jury's verdict, we find *Routhier* clearly distinguishable from the instant case. In another criminal case in which the prosecutor sought to amend or alter the jury's verdict after the trial court had discharged the jury, specifically relying on *Routhier*, *supra*, this Court explained the inapplicability of *Routhier* in the criminal context:

In *Routhier*, a jury had returned a judgment of \$5,000 for the plaintiff in an automobile negligence suit. The following day the judge called the jury back, and the polling of the jury on its recall revealed that one juror had not agreed to the verdict. The trial court then declared a mistrial. The Michigan Supreme Court approved the procedure adopted by the trial judge on appeal.

Routhier does not, in our opinion, apply to a criminal proceeding, however. Both the dictates of the double jeopardy clause and the differing nature of the criminal process mandate this conclusion. The double jeopardy clause clearly enunciates a policy of finality in criminal proceedings in favor of the defendant. Although public policy might weigh heavily in favor of a similar policy in civil causes, there is no constitutional provision which likewise requires such a result. [*People v Rushin*, 37 Mich App 391, 394-395; 194 NW2d 718 (1971).]

The *Routhier* panel also quoted *People v Pizzino*, 313 Mich 97, 105; 20 NW2d 824 (1945), for the proposition that "to allow jurors to impeach their verdict with affidavits 'would open the door for tampering with the jury subsequent to the return of their verdict.'" *Rushin*, *supra* at 395-396. We conclude that once the trial court discharged the jury, the prosecutor was precluded from attempting to amend or impeach the jury's verdict. *Id.* at 398.

The prosecutor also cites *People v Gabor*, 237 Mich App 501; 603 NW2d 840 (1999), as support for the notion that a trial court may recall a jury after its poll and dismissal. In *Gabor*, the jury erroneously returned a guilty verdict of first- and second-degree criminal sexual conduct (CSC) despite that the defendant was charged only with fourth-degree CSC. The trial court excused the jury after it read the erroneous verdicts, but recalled the jury several minutes later, at which time it reread the verdicts, finding the defendant guilty of fourth-degree CSC. *Id.* at 502-503. This Court ultimately approved the jury's recall, concluding that "a rule of reasonableness" permitted recall of the jury to render the proper verdict where it was apparent from the record that despite the foreperson's misstatement the verdict form clearly indicated that the jury found the defendant guilty of the fourth-

⁴ The prosecutor produced the affidavits of four jurors, each including the following relevant language: "[T]he jury did not arrive at a verdict on the lesser included offense for Count I, possession of cocaine. For this charge, the jury voted 11-1 to convict. We did not specifically say as much because we were not asked."

degree CSC charges. *Id.* at 503-504. Unlike *Gabor*, however, the instant case does not involve a clear record indication of the jury's intent beyond that expressed by the jury's foreperson.

Because no manifest necessity in the form of a hung jury is apparent from the trial record, we conclude that double jeopardy bars defendant's retrial with respect to the cocaine possession charge. *Mehall, supra*.

Affirmed.

/s/ Hilda R. Gage
/s/ Roman S. Gribbs
/s/ David H. Sawyer