IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28814-5-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
PIERRE D. WEST,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Kulik, C.J. — The double jeopardy clause guarantees that no person will be retried for the same offense following an acquittal. *State v. Wright*, 165 Wn.2d 783, 791, 203 P.3d 1027 (2009) (quoting U.S. Const. amend. V; Const. art. I, § 9). Pierre D. West was charged with 15 crimes against 5 females, including first degree rape, second degree rape, second degree assault, first degree kidnapping, and harassment. A jury convicted him of several charges but could not reach agreement on several others. A mistrial was granted based on juror misconduct. On retrial, over double jeopardy objections, Mr. West was tried on all of the original charges and convicted again of several charges. He contends the double jeopardy clause precluded retrial of those charges for which he was expressly

or impliedly acquitted in the first trial. Our Supreme Court holding in *State v. Daniels*, 160 Wn.2d 256, 156 P.3d 905 (2007) is controlling. The jury was unable to reach a verdict on certain charges, so there is no implied acquittal and, therefore, jeopardy did not terminate.

Accordingly, we affirm Mr. West's convictions.

FACTS

In August 2007, the State charged Mr. West with count 1: second degree rape of ML; count 2: second degree assault of ML; count 3: first degree kidnapping of ML; count 4: harassment of ML; count 5: second degree rape of JD; count 6: first degree kidnapping of JD; count 7: second degree rape of CK-C; count 8: first degree kidnapping of CK-C; count 9: second degree assault of CK-C; count 10: harassment of CK-C; count 11: second degree rape of ET; count 12: harassment of ET; count 13: first degree rape of KP; count 14: first degree kidnapping of KP; and count 15: harassment of KP. Trial took place in May 2009. The jury reached a verdict finding Mr. West guilty of second degree rape, second degree assault (with sexual motivation), and harassment (with sexual motivation) of ML; second degree assault (with sexual motivation) and harassment (with sexual motivation) of CK-C; and second degree rape and harassment (with sexual motivation) of ET. On most of the remaining charges, the jury left the verdict forms blank, writing "not

guilty" only on the verdict form for first degree rape. Clerk's Papers (CP) at 204.

In July 2009, Mr. West moved for a new trial based on juror misconduct. The trial court granted the motion, finding that one of the jurors withheld information that she had met the defendant at a party, later saw media accounts of his arrest, consoled Mr. West's former girl friend regarding his arrest, and continued to sit on the jury after she realized the above facts. The court ordered a new trial.

Before retrial, Mr. West moved to amend the information to exclude certain counts he claimed were barred from retrial by the double jeopardy clause because he was acquitted of those charges in the first trial. The trial court denied the motion, concluding that Mr. West was still under original jeopardy because the granting of his motion for new trial voided the jury verdict by operation of law. The jury reached a verdict of guilty on count 1 (second degree rape of ML), count 2 (second degree assault of ML), count 3 (lesser-included charge of unlawful imprisonment of ML), count 8 (lesser-included charge of unlawful imprisonment of CK-C), and count 11 (second degree rape of ET). Additionally, the jury found by special verdict that Mr. West committed count 2 with sexual motivation. Because counts 1 and 11 qualified as strikes for a persistent offender status, and Mr. West had a prior conviction for a most serious offense, the trial court imposed a life sentence without possibility of early release. Former

RCW 9.94A.030(33)(b)(i) (2006); RCW 9.94A.570.

ANALYSIS

Double Jeopardy. Mr. West contends retrial on all of the original charges after the court granted his motion for a new trial constituted a double jeopardy violation. Specifically, he argues that he should not have been retried on eight charges due to acquittal or implied acquittal of those charges in the first trial.

Similar provisions in the United States and Washington Constitutions prohibit the State from twice putting a person in jeopardy for the same offense. U.S. Const. amend. V; Const. art I, § 9; *State v. Ervin*, 158 Wn.2d 746, 752, 147 P.3d 567 (2006). The double jeopardy clause protects against three governmental abuses: a second prosecution for the same offense after acquittal, a second prosecution for the same offense after a conviction that is final, and multiple punishments for the same offense. *Wright*, 165 Wn.2d at 791; *see Ervin*, 158 Wn.2d at 752-53. For the double jeopardy clause to apply, jeopardy must have previously attached and terminated, and the defendant is placed in jeopardy again for the same offense. *Ervin*, 158 Wn.2d at 752.

In this case, jeopardy attached when the jury was empanelled and sworn. *State v. Robinson*, 146 Wn. App. 471, 478, 191 P.3d 906 (2008). The question is whether jeopardy terminated for any of the original charges when a new trial was ordered after the

verdict. Whether jeopardy continued or terminated is a question of law reviewed de novo. *Daniels*, 160 Wn.2d at 261; *see State v. Goldsmith*, 147 Wn. App. 317, 324, 195 P.3d 98 (2008).

A fundamental rule of double jeopardy jurisprudence is that no person may be retried for the same offense after an acquittal. *Wright*, 165 Wn.2d at 791-92. Acquittal, which terminates original jeopardy, may be either express or implied by conviction of a lesser-included offense. *Id.* at 792; *see Daniels*, 160 Wn.2d at 262. Additionally, "[j]ury silence can be construed as an acquittal and can therefore act to terminate jeopardy." *Daniels*, 160 Wn.2d at 262. But when a jury fails to agree and that disagreement is evident in the record, acquittal is not implied and jeopardy continues. *Id.*

Mr. West contends the "unable to agree" jury instructions given to the jury in his first trial allowed the jury to silently acquit him by leaving the verdict forms blank for some offenses while finding him guilty of lesser offenses. The trial court instructed the jury that if it found Mr. West not guilty of particular offenses or, after full and careful consideration of the evidence, could not agree on a verdict for those offenses, it could render a verdict on certain lesser offenses:

> When completing the verdict forms, you will consider the crime of rape as charged in counts 1, 5, 7, 11, and 13. If you unanimously agree on a verdict on any of these counts, you must fill in the blank provided in the corresponding verdict form the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do

> not fill in the blank provided on the corresponding verdict form.
>
> If you find the defendant not guilty of the crime of rape in any of those counts, *or if after full and careful consideration of the evidence you cannot agree on that crime*, you will consider the lesser crime of third degree rape. If you unanimously agree on a verdict, you must fill in the blank provided in the corresponding verdict form for the lesser offense the words "not guilty" or the word "guilty", according to the decision you reach.

CP at 501-02, Instruction 36 (emphasis added). Similar wording instructed the jury that if, "after full and careful consideration of the evidence," the jury cannot agree on the crimes of first degree kidnapping or second degree assault, it must not fill in the blanks on the corresponding verdict forms and must instead consider the lesser crimes of unlawful imprisonment or fourth degree assault. CP at 502. The jury left the verdict forms blank for counts 3, 6, and 8 (first degree kidnapping) and found Mr. West guilty of the lesser offense of unlawful imprisonment for each of those counts.

Washington courts have adopted the "unable to agree" jury instruction as the correct form when the jury is instructed on both a charged offense and lesser-included offenses or lesser degrees of the charged offense. *State v. Labanowski*, 117 Wn.2d 405, 414-15, 816 P.2d 26 (1991). This instruction "allows a jury to return a verdict on a lesser offense if after full and careful consideration of the evidence it is unable to reach unanimous agreement on the greater charge." *Id.* at 419. One rationale for the "unable to agree" instruction is to promote the efficient use of judicial resources. *Id.* at 420. As

noted in *Labanowski*, when "unanimity is required, the refusal of just one juror to acquit or convict on the greater charge prevents the rendering of a verdict on the lesser charge and causes a mistrial even in cases where the jury would have been unanimous on a lesser offense." *Id.* Retrial after a hung jury burdens the defendant as well as the court system, causing the emotional and financial strain of successive defenses and allowing the State to benefit from "'dress rehearsals.'" *Id.* (quoting *Whiteaker v. State*, 808 P.2d 270, 276 (Alaska Ct. App. 1991)).

Labanowski approved the type of instruction used in this case, one that allows a jury to render a verdict on a lesser offense if the jury either finds the defendant not guilty of the greater offense or, after full and careful consideration of the evidence, cannot agree on a verdict for the greater offense. *Id.* at 424. The question then is whether the jurors' inability to agree on a verdict for the greater offense should be considered an implied acquittal for double jeopardy purposes.

In 2007, *Daniels* held that a similar "unable to agree" instruction did not result in an implied acquittal of the greater offense when the jury left the verdict on the greater offense blank and found the defendant guilty of the lesser offense. *Daniels*, 160 Wn.2d at 259-60. *Daniels* distinguished verdicts with "unable to agree" instructions from those situations where a jury convicts on some counts, is merely silent on others, and is

discharged without the consent of the accused. *Id.* at 263 (quoting *Selvester v. United States*, 170 U.S. 262, 269, 18 S. Ct. 580, 42 L. Ed. 1029 (1898)). Discharge after juror silence is equivalent to acquittal, the court explained, because the record gives no adequate legal cause for discharge of the jury, and "'any further attempt to prosecute would amount to a second jeopardy.'" *Id*. (quoting *Selvester*, 170 U.S. at 269). Such is not the case, however, when a disagreement is formally entered on the record. *Id.* Because a jury is presumed to follow the court's "unable to agree" instructions, the jury that leaves a verdict form blank and renders a guilty verdict on a lesser offense has indicated that it was unable to agree on the greater offense. *Id*. at 264 (quoting *Ervin*, 158 Wn.2d at 757). Thus, no acquittal operates to terminate jeopardy. *Id.* at 264-65.

Less than one month before *Daniels* was filed, the Ninth Circuit held that a Washington jury's silence on an attempted murder charge and conviction for a lesser alternative offense amounted to an implied acquittal on the attempted murder charge that barred retrial on that charge after the case was remanded for a new trial. *Brazzel v. Washington*, 491 F.3d 976, 985 (9th Cir. 2007). The court gave the jury the standard "unable to agree" instruction that directed it to consider the lesser alternative offense "if after full and careful consideration of the evidence" it could not agree on the greater offense. *Id.* at 979-80. Although noting that retrial is permitted when a mistrial is

declared due to an irreconcilably hung jury, *Brazzel* held that a jury's mere inability to agree "does not satisfy the high threshold of disagreement required for a hung jury and mistrial to be declared." *Id*. at 984. In other words, a blank verdict form for attempted murder did not indicate that the jury was hopelessly unable to agree on that crime; therefore, retrial for attempted murder would amount to double jeopardy. *Id.* at 985.

Mr. West contends this court must follow *Brazzel* rather than *Daniels.* But the Washington Supreme Court considered the *Brazzel* holding on reconsideration of *Daniels* and adhered to its original decision. *See State v. Daniels*, 165 Wn.2d 627, 628-29, 200 P.3d 711, *cert. denied*, 130 S. Ct. 85 (2009).[1] We are bound to follow controlling authority by our Supreme Court. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984); *State v. O'Connell*, 137 Wn. App. 81, 91, 152 P.3d 349 (2007). Accordingly,

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[1] The original *Daniels* decision was authored by Justice Sanders and was unanimous. After reconsideration, Justice Sanders parted with the majority and filed a dissent in the second *Daniels* opinion, joined by Justices Alexander and Stephens. Justice Chambers also filed a dissent. The dissenting justices all cited *Brazzel* favorably and would hold that a jury's simple failure to agree does not rise to the level of a mistrial that continues jeopardy. *Daniels*, 165 Wn.2d at 635-36 (Sanders, J., dissenting), 643-44 (Chambers, J., dissenting). As Justice Sanders stated, "Although *Brazzel* is not, strictly speaking, controlling precedent on this court, prudence suggests this court's decisions should attempt to mirror that of the federal courts for the sake of judicial economy. We should not deny a defendant relief otherwise available by walking across the street to the federal courts." *Id*. at 634 n.10 (Sanders, J., dissenting). In January 2010, the United States District Court granted a writ of habeas corpus in *Daniels*, citing *Brazzel* and holding that retrial of the petitioner would violate her right to be free from double jeopardy. *Daniels v. Pastor*, No. C09-5711BHS, 2010 WL 56041 (W.D. Wash.).

under the controlling precedent of *Daniels*, the jury's inability to reach a verdict on the charges of first degree kidnapping (counts 3, 6, and 8) did not terminate jeopardy, allowing retrial on these counts. Additionally, the jury stated on the record that it could not reach a verdict on counts 5 or 7 (second degree rape), count 14 (first degree kidnapping), or count 15 (harassment), and declared that additional time deliberating would not be of benefit. Because the jury's failure to agree on any of these charges is evident in the record, acquittal is not implied. *Daniels*, 160 Wn.2d at 262.

Mr. West contends *Daniels* is distinguishable because the jury here was further instructed that it could not find him guilty of unlawful imprisonment unless it first agreed that he was not guilty of kidnapping. The instruction he cites, however, is not inconsistent with the "unable to agree" instruction. Instruction 37 states in part that if, after full and careful deliberation, the jury is not satisfied beyond a reasonable doubt that Mr. West is guilty of any or all of the counts of first degree kidnapping, then the jury "will consider whether the defendant is guilty of the lesser crime of unlawful imprisonment on any of the above counts on which you find the defendant not guilty." CP at 504. Contrary to Mr. West's interpretation, the instruction does not require the jury to find Mr. West not guilty of first degree kidnapping before it may consider the lesser offense of unlawful imprisonment. It merely requires the jury to consider the lesser

offense if it finds him not guilty of the greater offense. Thus, instruction 37 supplements instruction 36, which directs the jury to consider the lesser offense if, after full and careful consideration of the evidence, it cannot agree on a verdict for the greater offense.

Although Mr. West was not impliedly acquitted of the four counts of first degree kidnapping, two counts of second degree rape, and one count of harassment that the jury left blank on the guilty verdict forms, he was actually acquitted of one charge: count 13, the first degree rape of KP. Consequently, jeopardy terminated on count 13 and retrial on that charge constituted double jeopardy. *Wright*, 165 Wn.2d at 791-92. Mr. West was not prejudiced by this error, however, because he was not convicted of first degree rape or any other offense against KP on retrial. *See Morris v. Mathews*, 475 U.S. 237, 245-46, 106 S. Ct. 1032, 89 L. Ed. 2d 187 (1986) (retrial after a defendant is tried for a jeopardy-barred offense is required only when the defendant shows a reliable inference of prejudice). Under the controlling precedent of *Daniels* and *Wright*, retrial on the remaining original charges did not violate the principles of double jeopardy.

Unanimous "No" to the Special Verdict. Mr. West next contends for the first time on appeal that the jury was incorrectly instructed on retrial that it must unanimously agree to answer "no" to the special verdict finding that he committed count 2, second degree assault of ML, with sexual motivation. Instruction 54 states:

If you find the defendant guilty of any of these charged crimes, you will

> then use the special verdict form provided for that charged crime and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer any special verdict form "yes". You must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

CP at 378. The jury found Mr. West guilty of second degree assault in count 2 and further that he committed count 2 with sexual motivation.

In *State v. Bashaw*, 169 Wn.2d 133, 147, 234 P.3d 195 (2010), the Washington Supreme Court held that a special verdict instruction requiring unanimity to find the absence of a special finding is erroneous. *Bashaw* also held that this instruction error is not harmless. *Id.* Because the error does not constitute a manifest error of constitutional rights, however, this court may refuse review. RAP 2.5(a)(3).

Generally, this court may refuse to review any issue that was not raised in the trial court. RAP 2.5(a). One exception is made for manifest errors affecting constitutional rights. RAP 2.5(a)(3). Mr. West contends the instruction error here is of constitutional magnitude. But the right to nonunanimous rejection of a sentence enhancement is neither constitutional nor manifest. *State v. Nunez*, 160 Wn. App. 150, 162-63, 248 P.3d 103 (2011) (petition for review filed March 25, 2011). As noted by this court in *Nunez*, there is no textual support in the Washington Constitution for nonunanimous acquittal of a

special verdict. *Id.* at 159-60. Moreover, *Bashaw*, 169 Wn.2d at 146 n.7, recognized that it is the common law, not the constitution, that allows juries to reject sentence enhancements less than unanimously. *Nunez*, 160 Wn. App. at 162.

Accordingly, Mr. West's allegation of instruction error is not manifest constitutional error entitled to review for the first time in this appeal. RAP 2.5(a).

We decline review of this error raised for the first time on appeal.

Cumulative Error. Finally, Mr. West contends cumulative error requires a third trial on those charges for which jeopardy has not terminated. Under the cumulative error doctrine, the defendant bears the burden of proving that an accumulation of error effectively denied him a fair trial. *State v. Yarbrough*, 151 Wn. App. 66, 97-98, 210 P.3d 1029 (2009). Only one of Mr. West's 15 charges was improperly retried in the second trial, and he was not prejudiced by this error because he was not convicted of that charge or any lesser charge related to that victim. Consequently, he does not show cumulative error.

We affirm the convictions.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kulik, C.J.

WE CONCUR:

Sweeney, J.

Brown, J.