

FILED

FEB 09, 2012

**In the Office of the Clerk of Court
WA State Court of Appeals, Division III**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 29894-9-III
)	
Petitioner,)	
)	
v.)	Division Three
)	
JAMES L. COLBERT,)	
)	
Respondent.)	UNPUBLISHED OPINION

Korsmo, J. — The trial court declared a mistrial *sua sponte* over the objections of the parties. The court subsequently denied motions to dismiss from both parties. The State obtained review from this court, arguing that a retrial will violate double jeopardy principles. We agree and reverse.

FACTS

James L. Colbert was charged with vehicular homicide. On the second day of jury trial, the parties learned that certain electronic measurements in the State’s possession had not been turned over to the defense despite multiple requests. The failure to disclose was

apparently unintentional; the requested measurements were in a strange format that the prosecutor thought was “gibberish.”

The defense moved for a dismissal, arguing that if it had earlier possession of the data, its expert could have demonstrated that Mr. Colbert was not the driver. In the alternative, the defense would proceed with trial by presenting its case. The trial court found that the error was unfair to Mr. Colbert, and declared a mistrial over his objection. The court’s explanation was that the defense expert needed time to examine the data in order to prepare the defense. The court reserved ruling on the motion to dismiss pending further briefing.

After receiving the briefing, the court denied Mr. Colbert’s motion to dismiss. Once a second trial was scheduled, the State moved to dismiss the case on double jeopardy grounds. That motion was also denied. This court granted the State’s motion for discretionary review.

ANALYSIS

The only issue presented is whether a second trial would subject Mr. Colbert to double jeopardy.

It is fundamental that a defendant cannot be placed in jeopardy twice for the same offense. U.S. Const. amend. V; Wash. Const. art. I, § 9. One “valued right” protected by

double jeopardy principles is the right of a defendant to have the charges against him or her resolved by a particular tribunal. *Wade v. Hunter*, 336 U.S. 684, 689, 93 L. Ed. 974, 69 S. Ct. 834 (1949). Where a jury is discharged without rendering a verdict and without the consent of the defendant, retrial is constitutionally impermissible unless the trial ended due to a “manifest necessity.” *State v. Wright*, 165 Wn.2d 783, 793, 203 P.3d 1027 (2009). Manifest necessity exists where “extraordinary and striking” circumstances indicate that substantial justice cannot be obtained without discontinuing the trial. *State v. Juarez*, 115 Wn. App. 881, 889, 64 P.3d 83 (2003).

Reviewing courts have determined several guidelines for consideration of a mistrial. *State v. Melton*, 97 Wn. App. 327, 332, 983 P.2d 699 (1999). These include: (1) whether the trial court acted hastily, or gave both parties an opportunity to explain their positions, (2) whether it carefully considered the defendant’s interest in a single proceeding, and (3) whether it considered less drastic alternatives. *Id.*

Here, the record shows that the trial court did not give the parties an opportunity to discuss the merits of a mistrial, nor did it carefully consider Mr. Colbert’s interest in a single proceeding. On the contrary, it quickly declared a mistrial once it determined that there had been a significant discovery violation.

Ordinarily, where the defense is surprised by evidence in violation of CrR 4.7, the

appropriate remedy is a continuance in order to permit the defense to examine the evidence. *E.g.*, *State v. Hutchinson*, 135 Wn.2d 863, 881, 959 P.2d 1061 (1998); *State v. Linden*, 89 Wn. App. 184, 195-196, 947 P.2d 1284 (1997), *review denied*, 136 Wn.2d 1018 (1998). Where the State's error is of a serious enough nature, a mistrial or dismissal may be appropriate. *Hutchinson*, 135 Wn.2d at 881. While we agree with the trial court that the defense expert needed time to examine the data, a continuance would have achieved that goal without resorting to the drastic remedy of a mistrial.¹ Since an alternative, less drastic remedy was available, there was no manifest *necessity*. A second trial would therefore place Mr. Colbert in double jeopardy. Accordingly we reverse and remand for dismissal.

Reversed.

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.

Korsmo, J.

WE CONCUR:

¹ If defense counsel does not request a mistrial when one would be merited, the trial court can confirm with counsel on the record that the defense is foregoing a mistrial and/or address the issue post-verdict rather than interfere with the constitutional right to have the case decided by the chosen jury.

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Kulik, C.J.

Brown, J.