

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING SEPTEMBER 11, 2015

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State Prosecutor

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State Prosecutor

## THIS WEEK:

### • Double Jeopardy; Jury Verdicts

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### Double Jeopardy; Jury Verdicts

*Washington v. State, A15A0227 (7/16/15)*

Appellant was convicted of possessing a firearm during the commission of a felony and acquitted of malice murder. The trial court also declared a mistrial as to a charge against him for felony murder. He argued that the trial court erred by declaring a mistrial as to the charge of felony murder and, accordingly, that double jeopardy barred a second prosecution such that the trial court should have granted his plea in bar. A divided en banc court remanded for further proceedings.

The record, briefly stated, showed that appellant and a co-defendant were tried together. They were jointly charged on malice murder (Count 1), felony murder (Count 2) and individually charged with possession of a firearm during the commission of a felony. After the close of evidence, the trial court agreed to instruct the jury on the lesser included charge of voluntary manslaughter for both defendants. The jury had many questions and the trial court and counsel attempted to answer them. The jury finally stated that they had reached a verdict as to all counts except Count 2 as to appellant; they were hopelessly deadlocked as to that count. The trial court then had the verdict read by the clerk, except for that particular count against appellant. The trial court then declared a mistrial as to the felony murder count.

Prior to the retrial on the felony murder count, defense counsel noted that the actual

verdict form stated as to the felony murder count against appellant, “not guilty” and had beside it the handwritten words “voluntary manslaughter?” A line was drawn through these handwritten words and, beside them, “mistrial declared” was written in what appears to be different handwriting, along with the initials of the judge. Appellant then filed his plea in bar. The court, without hearing any evidence from the foreperson or any other witnesses, denied the motion.

The Court first noted that appellant did not contend that the trial court erred by disallowing the testimony or affidavits of jurors, but it nevertheless noted that a juror may testify as to whether there was a mistake in entering the verdict onto the verdict form. And prior to the enactment of Georgia’s new Evidence Code, there existed a codification of the common law that permitted jurors to give testimony sustaining, though not impeaching, the verdict that they reached. But, the Court added, “We make no pronouncement today as to whether the common law in this regard has been displaced by the new Evidence Code.”

Second, the retrial of a criminal defendant after a mistrial caused by the inability of the jury to reach a verdict does not constitute double jeopardy when there is a manifest necessity for declaring the mistrial. Indeed, when a jury is hopelessly deadlocked, this constitutes manifest necessity for declaring a mistrial. And the determination of whether the jury is in fact hopelessly deadlocked is a matter somewhat in the discretion of the trial court. But, here, appellant took issue with the trial court’s declaration of a mistrial as to Count 2 of the indictment, felony murder, when, despite communications with the jury that indicated a deadlock as to

Count 2 *in general*, the verdict form signed by the foreperson appeared to show an acquittal for felony murder but indecision as to the lesser-included offense of voluntary manslaughter. Nevertheless, the record reflected that the clerk of court was instructed to skip Count 2 as to appellant when reading the verdict aloud and, after the jury was discharged, the court officially declared a mistrial as to that count. It was this sequence of events that gave rise to appellant's contention that the trial court should not have declared a mistrial as to Count 2 and that, accordingly, the trial court erred in denying his plea in bar when any subsequent prosecution for felony murder is barred by double jeopardy (because the verdict read into the record in open court did not match the verdict as recorded in writing by the jury foreperson). In other words, appellant essentially contended that what was entered into the record was not the jury's true verdict because the verdict form portended to reflect a decision that was contrary to what was read into the record by the clerk of court, at the trial court's direction, before the trial court declared a mistrial—"a contention and factual scenario that appear to be novel in our case law."

But, the Court found, it was impossible to review for error the trial court's denial of appellant's plea in bar because the state of the record prohibited it from determining whether the trial court abused its discretion in declaring a mistrial. Indeed, the Court stated, it was unable to determine whether double jeopardy bars a subsequent prosecution for felony murder because it could not discern from the appellate record at what point the trial judge saw the verdict form. Thus, it could not determine whether the trial judge saw the form before or after deciding to declare a mistrial. Likewise, the Court could not discern whether, if the judge saw the form after the verdict was read into the record, it was before or after the jury had dispersed. Additionally, although it appeared by the handwritten initials that it was the trial judge who marked through the words written by the jury foreperson on the verdict form as to Count 2, and the State appeared to concede this fact, this too was not entirely clear from the record. Thus, the Court held, "we have no choice but to remand this case to the trial court for another hearing on these issues, which will need to be conducted by a judge other than the one who presided over the trial."