1999

State of Utah v. Valden Cram : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	**Case No. 990506-CA**
v.	:	
VALDEN CRAM,	:	**Priority No. 10**
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM ORDER DENYING DEFENDANT'S MOTION TO DISMISS FOLLOWING DECLARATION OF MISTRIAL IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY, STATE OF UTAH, HONORABLE G. RAND BEACHAM PRESIDING

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF THE CASE

Defendant appeals the trial court's denial of his motion to dismiss following the court's declaration of a mistrial on charges of three counts of tax evasion, a second degree felony under Utah Code Ann. §§ 76-8-1101(1)(c) (1999) and 59-1-401(9)(c) (1996). This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(d) (1996).

ISSUE PRESENTED ON APPEAL AND STANDARD OF REVIEW

1. **Should this Court reach defendant's claim that the trial court improperly declared a mistrial where defendant invited the "error" by moving for a mistrial?**

Because the trial court did not rule on this issue, no standard of review applies.

2. **Did the trial court properly declare a mistrial where the jury announced its inability to reach a verdict, received a deadlock instruction, and continued deliberations, but was ultimately unable to reach a verdict?**

"A trial court's decision to grant or deny a mistrial will not be disturbed on appeal absent an abuse of discretion." West Valley City v. Patten, 1999 UT App 149, ¶ 7, 981 P.2d 420, 422.[1] See also State v. Gardner, 217 P. 977 (Utah 1923) ("When a jury in a criminal case reports that an agreement cannot be reached, their discharge is within the sound discretion of the court, whose action will not be interfered with unless an abuse of discretion is alleged and shown"); State v. Castle, 951 P.2d 1109, 1111 (Utah App. 1998)

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The following are set forth in Addendum A:

United States Constitution, amendment V.
Utah Constitution, article I, section 12.
Utah Code Ann. § 76-1-403 (1999).

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[1]In Patten, the case was reassigned to a second judge following the mistrial, and that judge ruled on the defendant's motion to dismiss. This Court reasoned that "because [the second judge] was in no better position than this court to determine the necessity of a mistrial, we review her denial of defendant's motion to dismiss under a correction of error standard." Patten, 1999 UT App, ¶ 7. The narrow factual situation justifying application of the correctness standard in Patten is not present here. Here, the same judge both declared the mistrial and considered the motion to dismiss. Therefore, the correct standard of review is abuse of discretion.

STATEMENT OF THE CASE AND STATEMENT OF FACTS[2]

Defendant was charged on October 24, 1996 with four counts of tax evasion, second degree felonies under Utah Code Ann. §§ 76-8-1101(1)(c) (1999) and 59-1-401(9)(c) (1996) (R. 1-2). One of the counts was dismissed prior to trial (R. 49).

A jury trial took place on August 17-18, 1998 (R. 640-43, 645-46, 846 at 5-183, 802 at 3-237).[3] The jury was excused to begin deliberations at 6:47 p.m. on August 18 (R. 646). At 9:09 p.m., the trial court and counsel went back on the record (R. 646, 802 at 227). The bailiff stated that the jury had "indicated they were unable to reach a decision" (R. 802 at 227). The court proposed giving the jury an Allen charge: an additional instruction which directed the jury to "consult with each other and to deliberate with a view to reaching an agreement, if it can be done without abandoning your individual judgment" (Jury instruction no. 16, R. 690).[4]

Defense counsel stated that while he had no objection to the body of the instruction, "I do have an objection as far as the giving of the instruction to the jury and

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[2]Because the procedural history and facts relevant to the disposition of this appeal are closely intertwined, they are stated in a single section of the State's brief.

[3]The trial transcript for August 17, 1998 is contained in the record volume numbered 846. The trial transcript for August 18, 1998 is contained in the record volume numbered 802.

[4]"An Allen charge takes its name from Allen v. United States, [164 U.S. 492 (1896)]. In Allen, the United States Supreme Court approved a supplemental instruction given to a jury that was having difficulty arriving at a unanimous verdict." State v. Brown, 853 P.2d 851, 861 (Utah 1992).

would ask that the Court declare a hung jury and that there be a mistrial" (R. 802 at 227-28, Addendum B). The trial court asked if there was a basis for the objection "other than [the fact that] that would be your preference?" (R. 802 at 228). Defense counsel's response was at first inaudible on the record, but then he stated "And just the basis that they had indicated they could not reach a verdict" (id.). The prosecutor favored giving the instruction, saying "Two hours isn't an excessively long time. I think we ought to encourage them to try one more time here" (R. 802 at 228)

The trial court reasoned that "the jurors have been deliberating for a few hours. . . . In my view, the time has not been excessive with a two day trial. . . . I would like them to consider one other instruction to see whether it makes any difference. . . . So, I think I will have the bailiff bring them in, read this instruction, and give them some additional time and then see what the result is, if anything" (R. 802 at 228-29). The court recalled the jury, read the instruction, and excused the jury for further deliberations (R. 646, 802 at 229-31).

At approximately 9:50 p.m., the court and counsel went on the record again after receiving two notes from the jury (R. 802 at 231). The first note read "On State's Exhibit No. 3 Utah Code Annotated 59-10-542 (1953 as amended) we would like to know what that code says."[5] The court conferred with counsel and decided to respond that the

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[5]The jurors' notes and the trial court's responses are handwritten on two 4" by 6" pieces of yellow paper. They are included in the record in an unnumbered brown envelope containing defendant's exhibits, but are not numbered.

reference to the code section on the exhibit was irrelevant and should not be considered by the jury (R. 802 at 231).

The second note read, "If there is proof from State of Utah that income is taxable by Utah law, was it shown in court today?" (R. 802 at 232). The court discussed the note with counsel and decided to respond, "This is a determination for the jury. See instructions 5 and 6." The court then took another recess (R. 802 at 234).

At 10:15 p.m., the court went back on the record with the jury present (R. 246). The court and the jury foreperson had the following discussion:

The Court:	[T]he report I've received through the bailiff is that the jury has been unable to reach a unanimous decision. Is that correct?
Juror Holt:	Yes.
The Court:	All right. Do you think that any additional period of time for deliberation would make any difference?
Juror Holt:	No.
The Court:	All right. All right. And do you have any question that you want to ask about that? There have been a couple of notes passes and some response given, although perhaps not as much response as you had hoped. Any question or –
Juror Holt:	No. (Inaudible)
The Court:	All right. Are those questions that you have not sent out to me so far?
Juror Holt:	Well, yes and no.

The Court:	Yes and no. Okay. All right. I guess I need to make sure I understand then. If there were a couple of questions answered, do you think you could reach a verdict or it would be at least worth deliberating longer or do you think that would just confirm the positions or decisions that the jurors have reached?
Juror Holt:	Well, speaking for myself, it would probably (inaudible).
The Court:	Okay. All right. Counsel, is there any record that you would like to make at this point?
Defense counsel:	I don't have anything, your Honor.
Prosecutor:	No, your Honor.
The Court:	All right. All right. Well, ladies and gentlemen of the jury, I'm not going to require you to stay any longer. I am going to release you from your duties here and excuse you to go home. . . . I'm going to declare that there is a mistrial, that the jury is not able to reach a verdict, and I'll excuse you . . . .Counsel, is there anything else for the record this evening?
Defense counsel:	No, your Honor.

(R. 802 at 234-37, Addendum C).

The trial court scheduled the case for a second jury trial to be held in February 1999 (R. 794). Defendant filed a motion to dismiss, arguing, among other grounds, that the trial court's declaration of a mistrial was not supported by "manifest necessity" (R. 810-820). The trial court denied the motion: "[A]ccording to U.C.A. 76-1-403 and Utah case law on the issue, the mistrial declared in this matter on August 18, 1998 was not an improper termination of the prosecution and resulted because the jury was unable to agree

upon a verdict. The Court further finds a proper record was made at the time the mistrial was declared. . . ." (R. 835, Addendum Defendant).

Defendant filed a timely notice of appeal (R. 837).

SUMMARY OF ARGUMENT

Defendant argues that the trial court improperly declared a mistrial in his first trial. Therefore, he asserts, a retrial would violate his right to be free of double jeopardy, and the trial court therefore erred in refusing to dismiss the charges against him. Defendant acknowledges that he himself requested a mistrial when the jury first reported that it could not reach a unanimous verdict. Since he invited the court to declare a mistrial, he is precluded from attacking it on appeal.

On the merits, it is well established that declaration of a mistrial following jury deadlock does not bar retrial. Here, when informed that the jury was unable to agree on a verdict, the trial court instructed the jury members to reconsider the evidence and listen carefully to the views of fellow jurors. When the jury posed questions, the trial judge considered and answered them. The trial court then carefully questioned the jury spokesman to determine whether additional questions remained and whether there was any possibility that the jury could reach a decision. After deciding to declare a mistrial, the court made the reason for its decision explicit in the record. Under Utah law, the trial court appropriately exercised its discretion. Therefore, the court properly declined to dismiss the charges against defendant.

ARGUMENT

POINT I

THIS COURT SHOULD NOT REACH THE MERITS OF DEFENDANT'S CLAIMS BECAUSE HE INVITED THE "ERRORS" HE ATTACKS ON APPEAL

In State v. Dunn, the Utah Supreme Court wrote that "[w]e have held repeatedly that on appeal, a party cannot take advantage of an error committed at trial when that party led the trial court into committing error." 850 P.2d 1201, 1220 (Utah 1993); see also State v. Perdue, 813 P.2d 1201, 1206 (Utah App. 1991) ("[t]he doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal" (citation omitted)).

"Generally, if a defendant seeks a mistrial, he waives any defense he might otherwise assert based upon double jeopardy, even though the prosecution or the court provoked the error." State v. Trafny, 799 P.2d 704, 709 (Utah 1990) (citing State v. Jones, 645 P.2d 656, 657 (Utah 1982)); see also United States v. Jorn, 400 U.S. 470, 557 (1971) ("where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution"); State v. Ambrose, 598 P.2d 354, 357 (Utah 1979)).

Defendant asserts that "mere silence or failure to object to the jury's discharge is not such consent as will constitute waiver of a former jeopardy plea." Appellant's Brief at 10. However, defendant's conduct went beyond mere silence or failure to object; he

himself explicitly requested that the court declare a mistrial.

Although defendant suggests that the jury's questions somehow obviated the basis for his motion for mistrial, the record does not support that contention. Defendant asserts that the jury requested guidance as to "whether the state had proven that defendant had taxable income under Utah law," and that the question indicates that jury was seriously considering the evidence. Appellant's Brief at 11. In fact, the jury asked whether the state had adduced proof that income per se is taxable under Utah law, not whether defendant had taxable income. See supra at 4 n. 5. The question did not indicate that the deadlock could be resolved through further deliberations, and did not portend any approaching consensus. To the contrary; the question reflected the jury's continued, intractably divided state: a jury in disagreement over so fundamental a proposition as whether income is taxable would be unlikely to reach a unanimous verdict on the question of defendant's personal tax liability. Ultimately, of course, the jury was unable to agree on a verdict. Meanwhile, defendant, having made a motion for mistrial, did not withdraw his motion. Therefore, he invited the alleged errors, and should not now be allowed to claim that the trial court erred.

Defendant's reliance on State v. Nilson, 854 P.2d 1029 (Utah App. 1993), in support of his contention that his claims were not waived, is misplaced. In Nilson, this Court held that defense counsel's statement that he did not object to a mid-trial dismissal of charges did not constitute consent to the dismissal. However, Nilson is readily

distinguishable from this case. First, unlike defense counsel here, Nilson's attorney did not affirmatively move the court for a mistrial. Instead, when the victim suddenly and materially changed his testimony, defense counsel stated he did not object to the state's motion to dismiss. Id. at 1029-30. Where Nilson simply acquiesced in the dismissal, here defendant expressly requested a mistrial.

Second, in Nilson, the victim's testimony "unexpectedly changed late in the trial, [and] everyone was caught off guard." Id. at 1032. Here, by contrast, the jury's impasse was obvious for over an hour before the trial court declared a mistrial, during which time the court entertained defendant's motion to dismiss and attempted to break the deadlock by issuing an Allen charge (R. 802 at 230-31). Defendant had more than ample opportunity to anticipate a mistrial and register his change in position.

Third, in Nilson "[i]t quickly became apparent . . . that proceeding further [with Nilson's trial] would result in acquittal." Nilson, 854 P.2d at 1032. No impending acquittal was apparent here. In short, this case is nothing like Nilson. Thus, it requires a different outcome.

Here, defendant moved for a mistrial and did not withdraw his motion. Since the trial court gave him only what he requested, this Court should not disturb its order.

POINT II

THE TRIAL COURT PROPERLY DECLARED A MISTRIAL BECAUSE THE JURY WAS UNABLE TO REACH A VERDICT

Defendant argues that the record does not satisfactorily demonstrate the basis for the trial court's declaration of a mistrial. Appellant's Brief at 20. He claims that the court discharged the jury in an unduly rapid and "perfunctory" manner, and states that the record does not indicate that the jury was deadlocked after it received responses to its questions. Appellant's Brief at 17. Since, he asserts, his trial was prematurely terminated, constitutional guarantees against double jeopardy bar his retrial. Appellant's Brief at 14, 20.

Contrary to defendant's arguments, the record proves that the jury was deadlocked, and that the trial court conscientiously attempted to remedy the situation by giving further instructions and guidance. When that failed, the court carefully inquired of the jury spokesman whether anything could be done to end the stalemate. Only after the court established that the jury's disagreement could not be remedied did the court find that a mistrial was necessary. The constitutional protections against double jeopardy and Utah's statute incorporating them require no more.

Jeopardy attaches in a criminal trial when a jury has been sworn and impaneled. State v. Castle, 951 P.2d 1109, 1112 (Utah App. 1998). The premature termination of a trial may trigger the defendant's constitutional guarantee against double jeopardy,

precluding a second trial on the charges. West Valley City v. Patten, 1999 UT App 149, ¶ 8, 981 P.2d 420, 422. The double jeopardy guarantee and its exceptions are codified at Utah Code Ann. § 76-1-403 (1999). Castle, 951 P.2d at 1112. The statute provides that when a court prematurely terminates a defendant's trial, reprosecution is permitted only in cases of "legal necessity."[6] In relevant part, the statute provides that legal necessity is present when "the court finds and states for the record that the termination is necessary because . . . (iv) the jury is unable to agree on a verdict . . . ." Utah Code Ann. § 76-1-403 (1999).

Utah's appellate courts require compliance with three criteria in determining whether manifest necessity exists for a mistrial:

> First, a trial court must give an explanation for its decision and discuss "possible curative alternatives to a mistrial," giving the appellate court a "basis from which to conclude whether the court engaged in the 'scrupulous exercise of judicial discretion' required when dealing with the important [double jeopardy] rights." Second, a trial court must enter findings of fact supporting its decision, making "the exercise of its discretion in this situation a matter of record." Finally, a trial judge may not declare a mistrial "so abruptly . . . that defendant's counsel ha[s] no opportunity to object." If a trial court fails to follow any of these mandates, "a defendant may successfully claim former jeopardy on appeal."

Patten, 1999 UT App 149, ¶ 11 (quoting Ambrose, 598 P.2d at 360).

"The trial judge's decision to declare a mistrial when he considers the jury deadlocked is . . . accorded great deference by a reviewing court." Arizona v.

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[6]"Legal necessity" is synonymous with the federal "manifest necessity" standard. Patten, 1999 UT App 149, ¶ 10.

Washington, 434 U.S. 497, 510 (1978). "[T]he rationale for this deference in the 'hung' jury situation is that the trial court is in the best position to assess all the factors which must be considered in making a necessarily discretionary determination whether the jury will be able to reach a just verdict if it continues to deliberate." Id. at 832 n. 28. "If retrial of the defendant were barred whenever an appellate court views the 'necessity' for a mistrial differently from the trial judge, there would be a danger that the latter, cognizant of the serious societal consequences of an erroneous ruling, would employ coercive means to break the apparent deadlock. Such a rule would frustrate the public interest in just judgments." Id. at 509-10.

The trial court's decision in this case deserves the "great deference" the Supreme Court considers warranted in cases of mistrial stemming from jury deadlock because the court followed Patten and Ambrose to the letter. **First**, when informed of the deadlock, the trial court read the jury an Allen instruction, reminding them of their function and encouraging them to listen earnestly to their fellow jurors and deliberate with open minds. When the jury's disagreement persisted, the trial court thoughtfully entertained questions from the jury. When the jury still could not reach a verdict, the court pointedly inquired whether further questions remained and whether there was any hope that, with additional information, the jury could arrive at a decision. Only when repeatedly assured that the problem could not be resolved did the court relent. The record proves that the trial court conscientiously "engaged in the 'scrupulous exercise of judicial discretion'" required

under Patten and Ambrose. Patten, 1999 UT App 149, ¶ 11. **Second**, the trial court entered an explicit finding on the record that the jury was unable to reach a verdict (R. 802 at 236). **Finally**, the trial court's declaration of a mistrial was not abrupt. The mistrial was pending for over an hour before the judge granted defendant's mistrial motion (R. 646). Throughout that time, as argued in Point I, defendant not only failed to object, he requested the mistrial. Supra at 3-6, 8-10. Clearly, defendant was not caught off guard by the trial court's action.

Defendant implies that "in light of the length of the trial and the volume and complexity of the evidence," the jury had not deliberated long enough when the trial court sent them home. Appellant's Brief at 15-17. However, he does not attempt to calculate any minimum length of time the jury should have deliberated. But in any event, this was not a lengthy or complex case. Only four witnesses – a Utah Tax Commission investigator, defendant's former employer, a tax return preparer, and defendant – testified (R. 846 at 19, 118, 129; 802 at 92). The jury received only 15 instructions in addition to the Allen charge (R. 668-88). Although the trial consumed two days, much of that time was spent in jury selection and argument of motions outside the jury's presence.[7]

In the end, the jury deliberated more than three hours (R. 646). Because the issues were few and the amount of evidence before the jury was relatively small, the trial court

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[7]For example, on the first day of trial, the jury did not hear any evidence until 1:51 p.m. and was excused at 4:27 p.m. (R. 642-43). On the second day, the jury did not hear any evidence until 1:15 p.m. (R. 802 at 90).

properly determined that amount of time spent in deliberations was long enough to conclude that the jury could not agree. See, e.g., People v. Price, 821 P.2d 610, 695 (Cal. 1991) ("Whether the jury has had sufficient time to deliberate, and whether there is no reasonable probability of a verdict, are determinations committed to the sound discretion of the trial court."), cert. denied, 506 U.S. 851 (1992); Jones v. State, 540 N.E. 2d 1228, 1229 (Ind. 1989) (trial court has discretion to determine whether declaration of a mistrial is appropriate in hung jury situation).

Defendant maintains that the court's "cursory" inquiry of the jury foreperson was inadequate to satisfy the manifest necessity standard. Appellant's Brief at 19-20. He suggests that the court should have questioned the jurors individually to verify that the jury was truly deadlocked. Appellant's Brief at 18-19. However, defendant has stated no basis to conclude that questioning the jurors individually would have eliminated the necessity for a mistrial, and none is evident in the record. Likewise, defendant has not asserted that any prejudice resulted from the trial court's failure to question each juror. See Arizona v. Washington, 434 U.S. at 516 n. 35 (mistrial order was supported by "'high degree' of necessity" where "respondent [did] not attempt to demonstrate specific prejudice from the mistrial ruling, other than the harm which always accompanies retrial" (citation omitted)).

In any event, Utah law has never imposed a requirement that each juror must be questioned individually before a trial court can declare a mistrial. Since the trial court already occupies an advantaged position to determine whether a mistrial is proper, no such requirement is necessary or desirable. See Castle, 951 P.2d at 1113 (appellate court defers to trial court's decision to declare a mistrial because "[w]e are wholly unable to glean from the typewritten record 'body language' factors that may have weighed heavily in the judge's decision . . . which can only be observed by one present in the courtroom"); see also State v. Dykstra, 656 P.2d 1137, 1140 (Wash. App.) (while polling of individual jurors is not necessarily precluded, "the court has the discretion to rely on the representations of the foreman"), review denied, 99 Wash. 2d. 1014 (Wash. 1983).

CONCLUSION

This Court should affirm the trial court's order denying defendant's motion to dismiss.

RESPECTFULLY SUBMITTED this 31st day of March, 2000.

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MAILING CERTIFICATE

I hereby certify that on this 31st day of March, 2000, I mailed, postage prepaid, two accurate copies of the foregoing Appellee's Brief to:

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Catherine M. Johnson

ADDENDA

ADDENDUM A

AMENDMENT V

[Criminal actions — Provisions concerning — Due process of law and just compensation clauses.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sec. 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

76-1-403. Former prosecution barring subsequent prosecution for offense out of same episode.

(1) If a defendant has been prosecuted for one or more offenses arising out of a single criminal episode, a subsequent prosecution for the same or a different offense arising out of the same criminal episode is barred if:

(a) The subsequent prosecution is for an offense that was or should have been tried under Subsection 76-1-402(2) in the former prosecution; and

(b) The former prosecution:

(i) resulted in acquittal; or

(ii) resulted in conviction; or

(iii) was improperly terminated; or

(iv) was terminated by a final order or judgment for the defendant that has not been reversed, set aside, or vacated and that necessarily required a determination inconsistent with a fact that must be established to secure conviction in the subsequent prosecution.

(2) There is an acquittal if the prosecution resulted in a finding of not guilty by the trier of facts or in a determination that there was insufficient evidence to warrant conviction. A finding of guilty of a lesser included offense is an acquittal of the greater offense even though the conviction for the lesser included offense is subsequently reversed, set aside, or vacated.

(3) There is a conviction if the prosecution resulted in a judgment of guilt that has not been reversed, set aside, or vacated; a verdict of guilty that has not been reversed, set aside, or vacated and that is capable of supporting a judgment; or a plea of guilty accepted by the court.

(4) There is an improper termination of prosecution if the termination takes place before the verdict, is for reasons not amounting to an acquittal, and takes place after a jury has been impanelled and sworn to try the defendant, or, if the jury trial is waived, after the first witness is sworn. However, termination of prosecution is not improper if:

(a) The defendant consents to the termination; or

(b) The defendant waives his right to object to the termination;

(c) The court finds and states for the record that the termination is necessary because:

(i) It is physically impossible to proceed with the trial in conformity with the law; or

(ii) There is a legal defect in the proceeding not attributable to the state that would make any judgment entered upon a verdict reversible as a matter of law; or

(iii) Prejudicial conduct in or out of the courtroom not attributable to the state makes it impossible to proceed with the trial without injustice to the defendant or the state; or

(iv) The jury is unable to agree upon a verdict; or

(v) False statements of a juror on voir dire prevent a fair trial.

ADDENDUM B

Counsel, if you will make sure that you can be contacted by telephone if you're not here in the courthouse. Just let the clerk know what number to use to call you.

We'll then recess and return when the jury is finished deliberating. Anything? Any questions?

MR. PRISBREY: No.

THE COURT: Okay. The Court is in recess.

(Court recess).

THE COURT: The Court is back on the record now to speak to counsel concerning the report from the bailiff that the jurors have asked about -- I guess it's best to say what happens if they don't reach agreement or -- maybe I'd better just let you report exactly what was said to you because I'm not paraphrasing it well.

THE BAILIFF: The jury indicated they were unable to reach a decision. They were instructed just to stand by and the Court will be consulted. (Inaudible).

THE COURT: All right. Thank you. I have discussed with counsel an additional instruction that I have in my standard set but I don't give routinely because it's an instruction that has to do with a jury that's having difficulty reaching a verdict.

Counsel have seen the instruction. Do you want to make any comments regarding that instruction and the suggestion that it be given to the jury to see if they can reach a verdict?

MR. PRISBREY: No. I don't have any objection to the body of the instruction. In chambers, we discussed the case that that

was based on. But I do have an objection as far as the giving of the instruction to the jury and would ask that the Court declare a hung jury and that there be a mistrial.

THE COURT: Okay. Any particular basis other than that? That would be your preference?

(No verbal response on tape).

THE COURT: Knowing, of course, the time is a little bit after 9:00, the jurors have been deliberating for a few hours. Not long, I supposed, by some standards. Perhaps long by other standards. I don't know.

MR. PRISBREY: And just the basis that they had indicated they could not reach a verdict.

THE COURT: Okay. All right. Mr. Meyers, do you have any comment?

MR. MEYERS: The State favors giving them the instruction. Two hours isn't an excessively long time. I think we ought to encourage them to try one more time here.

THE COURT: Okay. In my view, the time has not been excessive with a two-day trial. The instruction is fairly routine coming from ABA standards reported in the Utah case law.

I would like to at least see if this makes any difference, my reading the instruction. But I don't intend to have the jurors locked up or try to force them to reach a verdict if they're not able to do that.

I would like them to consider one other instruction to see whether it makes any difference. Of course, none of us have any idea

ADDENDUM C

MR. MEYERS: "Please, see instructions 5 and 6."

MR. PRISBREY: Yeah.

THE COURT: Okay. Do you want to see those before they go back in?

MR. MEYERS: No.

THE COURT: All right. We'll stop the record at this point and continue.

(Court recess).

THE COURT: We're again back on the record. The members of the jury are returned to the courtroom. The parties are present. The attorneys are present.

Let me ask first of all who was selected as the chairperson of the jury?

(No verbal response on tape).

THE COURT: Mr. Holt?

JUROR HOLT: Yes.

THE COURT: All right. And the report I've received through the bailiff is that the jury has been unable to reach a unanimous decision. Is that correct?

JUROR HOLT: Yes.

THE COURT: All right. Do you think that any additional period of time for deliberation would make any difference?

JUROR HOLT: No.

THE COURT: All right. All right. And do you have any question that you want to ask about that? There have been a couple of

notes passed and some response given, although perhaps not as much response as you had hoped. Any question or --

JUROR HOLT: No. (Inaudible).

THE COURT: All right. Are those questions that you have not sent out to me so far?

JUROR HOLT: Well, yes and no.

THE COURT: Yes and no. Okay. All right. I guess I need to make sure I understand then. If there were a couple of questions answered, do you think you could reach a verdict or it would be at least worth deliberating longer or do you think that would just confirm the positions or decisions that the jurors have reached?

JUROR HOLT: Well, speaking for myself, it would probably (inaudible).

THE COURT: Okay. All right.

Counsel, is there any record that you would like to make at this point?

MR. PRISBREY: I don't have anything, your Honor.

MR. MEYERS: No, your Honor.

THE COURT: All right. All right.

Well, ladies and gentlemen of the jury, I'm not going to require you to stay any longer. I am going to release you from your duties here and excuse you to go home.

You have been diligent in your efforts and the parties and I appreciate your efforts and your diligence and your commitment to doing this type of duty.

This service is certainly not compensated for by the small amount that you're paid. I suppose the only thing I can tell you about that is it's a whole lot better now than it was before the first of July when the statute changed. But it still, I know, doesn't compensate for the disruption of your lives and the work that you're called upon to perform.

But I'm going to declare that there is a mistrial, that the jury is not able to reach a verdict, and I'll excuse you and release you from your admonition. That will mean that you are now free to discuss the case with anyone that you want to talk to about the case.

There may be people who are very interested in speaking to you. And if you want to discuss the case and your deliberations, feel free to do that. If you don't want to discuss it, you're also free to make that decision and just inform anyone who wants to talk to you that you'd rather not talk about it.

I've never had it happen, but I still always try to make the offer to members of a jury that if you have difficulty avoiding someone in particular who just insists on trying to talk to you and you don't want to talk about your service here, feel free to call the courthouse and talk to me about it and I'll see if there's anything that ought to be done. Again, that's never happened. So, I don't expect it will. But I'd like to at least make that offer in the unlikely event that you had some difficulty with that.

In addition, if there are any questions you'd like to ask me or ask the attorneys after the Court adjourns here, I'd be happy to meet

attorneys anytime you want to. If you don't want to wait or if you don't have any questions, that certainly is understandable. That's entirely up to you.

But thank you again for your participation and your effort and your service in this regard. You are all now excused.

Counsel, is there anything else for the record this evening?

MR. PRISBREY: No, your Honor.

THE COURT: All right. Then the Court will stand adjourned until tomorrow.

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ADDENDUM D

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IN THE FIFTH JUDICIAL DISTRICT COURT, STATE OF UTAH
WASHINGTON COUNTY, STATE OF UTAH

STATE OF UTAH,	
Plaintiff,	**ORDER**
v.	
VALDEN CRAM,	CASE NO. 961501097
Defendant,	JUDGE G. RAND BEACHAM

On Monday, February 1, 1999, a hearing was held before the Honorable Judge G. Rand Beacham on the above captioned case regarding Defendant's Motion to Dismiss. Defendant was present and represented by counsel Aaron J. Prisbey. Assistant Attorney General Wade S. Winegar represented the State. After hearing argument from both counsel, the Court makes the following findings and order:

The Court hereby finds that according to U.C.A. 76-1-403 and Utah case law on the issue, the mistrial declared in this matter on August 18, 1998 was not an improper termination of the prosecution and resulted because the jury was unable to agree upon a verdict. The Court further finds a proper record was made at the time the mistrial was declared and thus orders as follows:

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss be denied.

Dated this 10 day of February, 1999.

G. Rand Beacham
District Court Judge

Approved as to form

_____

Aaron J. Prisbey
Counsel for Defendant

Certificate of Service

I certify that on the 5th day of February, 1999, I sent or caused to be sent, by First Class Mail and Fax, a true and accurate copy of the foregoing Order to the following:

Aaron J. Prisbey
1071 east 100 South Bldg. D, Suite 3
St. George, Utah 84770

Shayla Stephens