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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0861**

State of Minnesota,
Respondent,
vs.

Tanner McCormack and Tyler Justin McCormack,
Appellants.

**Filed July 21, 2009
Affirmed; motions denied
Minge, Judge**

Hennepin County District Court
File No. 07031017, 07031025

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Considered and decided by Stauber, Presiding Judge; Minge, Judge; and Larkin, Judge.

UNPUBLISHED OPINION

MINGE, Judge

On appeal from the district court's denial of appellants' motion to dismiss charges of fourth-degree assault, appellants argue that the charges are barred by double jeopardy. Because the district court did not abuse its discretion by declaring a mistrial based on a finding of manifest necessity and double jeopardy does not bar retrial, we affirm.

FACTS

Appellants Tanner and Tyler McCormack were both charged with fourth-degree assault resulting from a conflict with off-duty Minneapolis police officers. A consolidated jury trial commenced on January 7, 2008. During deliberations, the jury sent several notes to the district court. One note dated January 16 asked the district court about substantive issues. The district court referred the jury to the previously provided jury instructions. An additional January 16 note from the jury stated: "We are deadlocked with no foreseeable change. What are your further directions?" The district court responded, in writing, to continue deliberations "with a view to reaching an agreement" if the jury could do so "without violence to any juror's individual judgment."

A note dated January 17, 2008 stated:

Some members of the jury saw ([and] some read) an article in the paper and heard that article referred to on the radio. How does this impact the proceedings as a jury?

....

We are still at an impass[e], please advise.

Ultimately, the district court judge brought the jury back into the courtroom to assess the situation.¹

Before bringing the jury into open court, the district court summarized the procedure he would follow in determining whether or not to instruct the jury to continue deliberating despite their two communications that they were at an impasse. The district court indicated that he would ask the foreperson and each member of the jury if he or she believed that further deliberation would be helpful, and, if there was any equivocation, the district court would instruct the jury to continue deliberating.

The January 17 transcript states that both appellants, their attorneys, and the prosecutor were in the courtroom before the jury returned. On January 17, in open court, appellants' counsel recounted that, at approximately 3:45 p.m. on the previous day, the jury had been instructed to continue deliberating and that, at approximately 11:30 a.m. on January 17, 2008, the jury transmitted another note indicating that it was at an impasse. Appellants had an opportunity to challenge the district court's intention to determine whether the jury was truly deadlocked. Appellants' counsel stated it would be "preferable" if the jury could reach a verdict and emphasized that appellants were not waiving their right to a double-jeopardy challenge. Appellants raised no objection to the process proposed by the district court. Furthermore, appellants did not present any

¹ Initially, the only records available to this court of the interactions between the district court and the jury during deliberations were the notes passed between the jury and the district court. No transcript of the trial proceedings or of events prior to January 17, 2008 was requested, nor was a proposed statement of the proceedings prepared pursuant to Minn. R. Civ. App. P. 110.03. After oral argument, the parties agreed to having the January 17, 2008 transcript prepared and submitted, and this court agreed to accept it.

argument as to why the jury should continue deliberating if it remained at an impasse or present any alternative course for the district court to consider before discharging the jury.

In open court and on the record, the district court questioned the jury foreperson. The district court specifically asked whether or not he believed there was any possibility of reaching a verdict. The foreperson stated that he wished to speak with the members of the jury before answering the district court's question. The district court then sent the jury back into the jury room to discuss the district court's question. Again, there was no objection raised to this process.

At approximately 3:00 p.m., the jury sent another note to the district court which stated "[w]e have conducted additional deliberations and we are still at an impass[e]." The jury was then called into the courtroom, and the district court asked each member of the jury, beginning with the foreperson, if they believed that there was any purpose in having any further deliberations. Each of the jurors responded by agreeing with the foreperson's conclusion that there was no purpose in further deliberations. The district court concluded that further deliberations would be "pointless," and the district court discharged the jury.

Appellants moved to dismiss the complaint, arguing that further prosecution was barred by the double-jeopardy clause. The district court denied the motion but found that appellants had adverse defenses, and ordered that the two cases be severed and set for separate trials. In ordering the retrial, the district court reaffirmed its conclusion that there was no possibility that further deliberations would have been helpful to the jury

and, on that basis, found that manifest necessity was present and that retrial was appropriate. This appeal follows.

DECISION

I.

The first issue is whether the protection against double jeopardy bars retrial of a case after a mistrial is declared on the basis of a deadlocked jury. Both the United States and Minnesota constitutions contain double-jeopardy clauses that guarantee a criminal defendant may not be tried more than once for the same crime. U.S. Const. amend. V (“No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb”); Minn. Const. art. I, § 7 (“No person shall be . . . put twice in jeopardy of punishment for the same offense”).² Jeopardy attaches as soon as the jury is sworn. *State v. Fuller*, 374 N.W.2d 722, 726 (Minn. 1985).

Both the United States Supreme Court and the Minnesota Supreme Court have held that the double-jeopardy clause does not bar a retrial over a defendant’s objection and after the termination of a trial without a verdict if there is a finding that “manifest necessity” required the mistrial. *Arizona v. Washington*, 434 U.S. 497, 505, 98 S. Ct. 824, 830 (1978); *State v. Gouleed*, 720 N.W.2d 794, 800 (Minn. 2006). A district court’s reasonable belief that the jury will be unable to reach a unanimous verdict is the classic reason for a mistrial and the “prototypical example” of manifest necessity. *Oregon v.*

² In *State v. Fuller*, the Minnesota Supreme Court declined, on the facts of the case, to interpret the Minnesota Constitution’s double-jeopardy provision more broadly than the United States Supreme Court’s interpretation of the federal standard. 374 N.W.2d 722, 727 (Minn. 1985).

Kennedy, 456 U.S. 667, 672, 102 S. Ct. 2083, 2087 (1982); *State v. Yeboah*, 691 N.W.2d 87, 91 (Minn. App. 2005), *review denied* (Minn. Apr. 19, 2005). When there is a finding of manifest necessity, the Minnesota Supreme Court has specifically held that “[r]etrial following the discharge of a hung jury . . . does not violate double jeopardy.” *State v. Clifton*, 701 N.W.2d 793, 801 (Minn. 2005).

We conclude that a determination that a jury is deadlocked provides an adequate basis for finding a manifest necessity for declaring a mistrial and that a subsequent retrial does not violate the double-jeopardy clause of either the Minnesota or the United States constitution.

II.

The second issue is whether appellants’ retrial should be barred by double jeopardy on the ground that the district court erred in finding a manifest necessity. The application of the constitutional protection against double jeopardy is reviewed de novo. *State v. Leroy*, 604 N.W.2d 75, 77 (Minn. 1999).

The double-jeopardy clause bars retrial over a defendant’s objection after the termination of a trial without a verdict unless “manifest necessity” required the mistrial “or the ends of public justice would otherwise be defeated.” *Gouleed*, 720 N.W.2d at 800. Generally, “[a] high degree of necessity—not absolute necessity—must exist before a mistrial is appropriate.” *State v. Long*, 562 N.W.2d 292, 296 (Minn. 1997). As previously stated, a district court’s reasonable belief that the jury will be unable to reach a unanimous verdict is the classic reason for a mistrial and the “prototypical example” of manifest necessity. “Reviewing courts give great deference to a trial court’s declaration

of a mistrial when a jury is deadlocked.” *Yeboah*, 691 N.W.2d at 91. Despite this deferential standard, this court must satisfy itself that “the trial judge exercised ‘sound discretion’ in declaring a mistrial.” *Washington*, 434 U.S. at 514, 98 S. Ct. at 835. Nothing in our caselaw requires that the presiding judge announce his determination of manifest necessity at or prior to the actual discharge of the jury.

Appellants challenge the district court’s finding of manifest necessity on two grounds: (a) that it did not make the finding until after it had discharged the jury; and (b) that it did not consider alternatives that might have enabled the jury to overcome the apparent deadlock. The record indicates that (1) the jury repeatedly indicated it was at an impasse; (2) the district court instructed the jury to continue deliberating despite an initial indication that the jury was at an impasse; (3) after repeated indications of juror deadlock, the district court specifically inquired of each member of the jury whether further deliberations would be helpful; (4) prior to discharging the jury, the district court concluded that there was no possibility that further deliberations would be productive; (5) the appellants and their attorneys were in the courtroom during these proceedings and addressed the district court regarding their intent to raise a double-jeopardy objection to any retrial; (6) no one requested or identified any further steps the district court could take to overcome the perceived jury deadlock; and (7) the district court stated subsequently that it found that manifest necessity supported the dismissal of the jury.

We recognize that in reviewing a district court’s exercise of discretion “in determining whether the mistrial was manifestly necessary, one thing we consider is whether the [district] court adequately assessed less drastic alternatives.” *Long*, 562

N.W.2d at 296 (reviewing a mistrial based on the prosecution’s failure to disclose a taped police interview of the defendant). The presiding judge was in a position to observe the jury and the dynamics of the case. It could determine the likelihood of success of alternative strategies and the risk that pushing the jury to reach a verdict would compromise the individual judgment of the jurors. *See State v. Jones*, 556 N.W.2d 903, 912 (Minn. 1996) (holding the district court is not permitted to coerce a jury towards a unanimous verdict or to allow a jury to believe that a “deadlock” is not a viable conclusion). But counsel did not suggest any alternative strategies to break the deadlock.

Based on this record, we conclude that the district court did not abuse its discretion in dismissing the jury due to a deadlock and in finding that this constituted a manifest necessity requiring the declaration of a mistrial. We further conclude that the district court is not required to make its manifest-necessity finding prior to discharging the jury as opposed to articulating that finding in a subsequent memorandum. Finally, we conclude that the constitutional protection against double jeopardy does not preclude a retrial of appellants.

III.

The third issue is whether a retrial should be barred based on juror misconduct. In support of the claim of juror misconduct, appellants cite the note from the jury foreperson indicating that some members of the jury saw an article in the paper and heard the report referred to on the radio. The rules of criminal procedure provide: “If it is determined that material disseminated outside the trial proceedings raises serious questions of possible prejudice, the court may on its initiative and shall on motion of either party

question each juror, out of the presence of the others, about the juror's exposure to that material." Minn. R. Crim. P. 26.03, subd. 9. The district court has discretion to inquire if the district court believes that outside materials may have influenced the jury. *Id.* If, in contrast, the defense requested that the district court inquire about potential influence of outside materials, the district court must conduct an inquiry on the record. *See State v. Richards*, 552 N.W.2d 197, 210 (Minn. 1996).

The record that has been provided to this court indicates that appellants never requested that the district court make inquiries regarding the potential outside influence on jurors. At oral argument, appellants indicated that there may have been in-chambers proceedings that were not made part of the record. However, appellants had an opportunity to supplement the record to reflect those proceedings under Minn. R. Civ. App. P. 110.03. Without a further record, we cannot presume error. *Noltimier v. Noltimier*, 280 Minn. 28, 29, 157 N.W.2d 530, 532 (1968). Nor do we grant relief on the basis of assertions unsupported by evidence in the record. *State v. Gilles*, 279 Minn. 363, 365, 157 N.W.2d 64, 66 (1968). However, even if this court were to presume error, we conclude that such error would be harmless because the presumptive remedy for prejudicial juror misconduct would be a mistrial and retrial. Due to the deadlocked jury, that remedy has already been granted in this case.

IV.

The fourth issue is whether posttrial governmental contact with jurors constituted misconduct and bars retrial. Appellants argue that, after the trial, the prosecution engaged in a "vexatious or harassing" investigation of a juror. At appellants' request, the

district court file contains the transcript of a posttrial judicial-contempt proceeding against a juror who pleaded guilty to lying about her criminal history during voir dire. Nothing in the record suggests, nor were there any allegations by appellants, that the prosecution had contact with the juror prior to the declaration of mistrial by the district court. Appellants have presented no argument showing how this posttrial investigation relates to the juror deadlock or undermines the district court's determination that manifest necessity supported a mistrial. To the extent any matter related to the contempt proceedings has any continuing significance in this proceeding, it should be raised incident to a retrial.³

V.

Appellants submitted multiple motions to supplement the record with material about the contempt proceedings against one of the jurors and a motion to strike portions of the respondent's brief. That juror issue has just been discussed. We deny appellants' motions to supplement the record because the matter is not properly before this court, it was not raised in the district court, and it is outside our consideration of double jeopardy.⁴

³ Appellants also petitioned for a writ of prohibition and/or mandamus which initiated a separate appellate proceeding and is not considered here.

⁴ At oral argument, counsel for appellants commented that the entire proceeding was unfair due to biases in the judicial system and speculated in a written submission that the district court judge, now deceased, had a pro-prosecution outlook because his spouse was employed by a member of the Minneapolis City Council who had substantial responsibilities for working with the police department. To the extent judicial bias is an issue, court rules provide a process to request removal or recusal of judges and to make a proper record incident to such motions. No such action was taken here. We do not consider the unsupported bias allegations as issues on appeal.

Furthermore, because we did not consider the alleged unsupported arguments within respondent's brief in reaching our decision, we deny the motion to strike as immaterial.

Affirmed; motions denied.

Dated: