

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR11-79

AUTRY BASHAM

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered May 25, 2011

APPEAL FROM THE SEBASTIAN
COUNTY CIRCUIT COURT,
GREENWOOD DISTRICT
[NO. CR-2007-145G]

HONORABLE JAMES O. COX,
JUDGE

AFFIRMED

RITA W. GRUBER, Judge

Autry Basham brings this interlocutory appeal from the Sebastian County Circuit Court's order denying his motions to bar his retrial on the charge of first-degree murder. His sole point on appeal is that the circuit court erred in finding that his retrial was not barred by double jeopardy. We affirm.

“A double-jeopardy claim may be raised by interlocutory appeal because if a defendant is tried a second time, the right would have been forfeited.” *Blueford v. State*, 2011 Ark. 8, at 5, 370 S.W.3d 496, 499. The appellate court conducts a de novo review of the circuit court's denial of a motion to dismiss on double-jeopardy grounds and of the ultimate decision by the circuit court that the defendant's protection against double jeopardy was not violated. *Id.* When the analysis involves a mixed question of law and fact, the factual determinations made by the circuit court are given due deference and are not reversed unless clearly erroneous. *Id.*

Basham's trial was held over the course of several days in October 2008. The jury received both a jury instruction on first-degree murder and a transitional instruction that allowed it to consider two lesser-included offenses, second-degree murder and manslaughter. The jury foreman eventually informed the circuit court that the jury could not make a unanimous decision, and the court asked him to write on a piece of paper the status of deliberations. The foreman wrote "11 2nd degree [and] 1 not guilty by mental defect." The jury deliberated another hour, and the foreman again informed the court that there was no unanimous decision. The court declared a mistrial, dismissed the jury, and entered the jury's note into the record. Retrial was eventually set for November 2010.

Basham filed motions to dismiss the first-degree-murder felony information and prosecution, raising double-jeopardy arguments. He noted that the jury was instructed, "If you have a reasonable doubt of the defendant's guilt on the charge of murder in the first degree, you will then consider the charge of murder in the second degree." He pointed to the foreman's announcement of deadlock on the lesser offense, and to the note reflecting the deadlock, as proof that the jury had deliberated and voted on second-degree murder. Based on the transitional instruction and the sequence of events, he asserted that there had been an implicit acquittal on the greater offense. The circuit court denied the motions in a written order of October 20, 2010, finding "that the jury in the original proceeding was unable to reach a verdict and there was no implicit acquittal of the first-degree murder count as a result thereof." Basham repeats on appeal the arguments he made below, asserting that the jury

implicitly acquitted him of first-degree murder by voting on second-degree murder and that the acquittal was entered of record by entry of the jury's note reflecting the vote on the lesser included charge.

In *Blueford*, the jury forewoman informed the circuit court on two occasions that the jury was deadlocked. 2011 Ark. 8, at 3, 370 S.W.3d at 498. Responding to oral questions by the court, she reported that the jury was unanimous against capital murder and first-degree murder, was split "nine for, three against" on manslaughter, and had not voted on negligent homicide. The jury once more resumed deliberations and failed to reach a verdict, and the circuit court declared a mistrial. Neither party objected, and trial was rescheduled. Blueford filed motions asserting that double jeopardy barred retrial on capital and first-degree murder, arguing that the forewoman's announcement in open court that the jury had found him not guilty on those charges amounted to an acquittal. The circuit court denied the motions by a written order that acknowledged the forewoman's oral statement that the jury's vote was unanimous against the charges. The circuit court found that there had been no "findings" or "verdicts" as intended by the law. *Id.* at 4, 370 S.W.3d at 499.

Our supreme court found no merit in Blueford's contention that the circuit court erred in denying his motion to dismiss on double-jeopardy grounds. Citing *Walker v. State*, 308 Ark. 498, 825 S.W.2d 822 (1992), it noted that Arkansas had adopted the majority viewpoint rejecting the concept of a partial verdict when a single charge includes multiple degrees of one offense. The *Blueford* court discussed the issue of double jeopardy arising when the jury is deadlocked and a mistrial is declared:

Both the Fifth Amendment to the United States Constitution and article 2, § 8 of the Arkansas Constitution require that no person be twice put in jeopardy of life or liberty for the same offense. The Double Jeopardy Clause protects criminal defendants from: “(1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.” [Citations omitted.] Thus, once the jury has been sworn and jeopardy attaches, the court can grant a mistrial without barring subsequent prosecution only if there is an “overruling necessity.” See *Smith v. State*, 307 Ark. 542, 545, 821 S.W.2d 774, 776 (1992) (quoting *Wilson v. State*, 289 Ark. 141, 145, 712 S.W.2d 654, 656 (1986)). Under Arkansas law it is well settled that a deadlocked jury is a circumstance that qualifies as an overruling necessity. *Shaw v. State*, 304 Ark. 381, 802 S.W.2d 468 (1991). The decision to order a mistrial due to a jury’s inability to reach a verdict is within the sound discretion of the circuit court, and will be upheld absent an abuse of discretion. *Id.*

Id. at 6–7, 370 S.W.3d at 500.

The *Blueford* court rejected the appellant’s argument that he was acquitted on capital and first-degree murder by virtue of the jury’s being given the transitional instruction and announcing in open court that it had found him not guilty of those charges. Our supreme court noted previous cases that, without addressing the implication of a transitional instruction, examined the effect of such an oral announcement:

Both the United States Supreme Court and this court have recognized that a trial ending in a hung jury is not the equivalent of an acquittal for purposes of establishing former jeopardy. See *Richardson v. United States*, 468 U.S. 317, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984) (explaining that trial court’s declaration of a mistrial because of a hung jury was not an event that terminated the original jeopardy to which the defendant was subjected); see also *Prince v. State*, 304 Ark. 692, 805 S.W.2d 46 (1991). Moreover, it is axiomatic that a judgment is not valid until entered of record. See *Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003). We further stated in *Bradford* that a judgment rendered in open court is not controlling until entered or filed of record. *Id.* The mere reading of the jury’s verdict in open court does not constitute an acquittal. *Id.* Further, a jury’s verdict may be amended before it is entered of record, before the jury has separated, and after a poll of each juror reveals that each understands the effect of the verdict. *Barnum v. State*, 268 Ark. 141, 594 S.W.2d 229 (1980).

Id. at 7–8, 370 S.W.3d at 500.

The *Blueford* court also acknowledged our statutory provision that an acquittal occurs when the “former prosecution resulted in a determination of not guilty.” Ark. Code Ann. § 5-1-112(1)(B)(i) (Repl. 2006). The court concluded that at Blueford’s trial, neither the giving of the transitional instruction nor the forewoman’s announcement in open court of not guilty on capital and first-degree murder negated the principle of law that a judgment is not valid until entered of record. Therefore, it rejected Blueford’s argument that a formal verdict of acquittal was unnecessary.

Basham asserts that the present case is unlike *Blueford* because the jury in his trial not only announced in open court the status of its deliberations, but also responded in writing to the circuit court’s request for information on their deliberations. He asserts that the jury’s note of its divided vote on second-degree murder reflected that the jury found him not guilty of first-degree murder before it deliberated the lesser charge. He concludes that the note constitutes an implicit acquittal of the charge, and that the entry of the note into the record rendered it “controlling for purposes of jeopardy.”

To support his argument of implicit acquittal, Basham relies upon *Green v. United States*, 355 U.S. 184 (1957), where the jury at the first trial was authorized to find Green guilty of first-degree murder or, alternatively, of second-degree murder. The jury found him guilty of second-degree murder. On appeal the conviction was reversed and the case remanded. Although the appeal did not involve the charge of first-degree murder, Green was tried a second time on that charge. The trial court rejected the defense of double jeopardy,

which he raised at the outset of the second trial; he was convicted of first-degree murder and received the death penalty. The Supreme Court held that the second trial for first-degree murder placed Green in jeopardy twice for the same offense.

Basham asserts that, as in *Green*, the jury refused to convict him of the first-degree murder charge. We agree with the State that *Green* is not analogous because this case did not involve a final verdict resulting from an announcement, written or oral, that the jury had found Basham guilty of second-degree murder. A “verdict of acquittal” bars a subsequent prosecution and ends a defendant’s jeopardy; when a defendant has been acquitted by a verdict “duly returned and received,” the verdict is final. *Ball v. United States*, 163 U.S. 662, 671 (1896).

Both *Blueford v. State, supra*, and *Barnum v. State, supra*, noted that a jury retains power to amend a verdict before it is entered of record, before the jury has been dismissed, and after a poll of each juror reveals that each understands the effect of the verdict. Upon reaching a verdict, the jury must be conducted into court by the bailiff, their names called by the clerk, and the foreman must declare their verdict. Ark. Code Ann. § 16-89-126(a) (Repl. 2005). Here, no such formal proceeding occurred before the jury’s dismissal.

Basham’s trial ended in a mistrial without a final verdict entered in the record, and there was no actual verdict of acquittal. Neither the transitional jury instruction nor the jury’s written status report of the vote on the lesser-included charge negates the requirements for a formal verdict. We find no merit to Basham’s arguments that the jury’s note reflecting its vote on the lesser-included offense of second-degree murder constitutes an implicit acquittal

Cite as 2011 Ark. App. 384

on the charge of first-degree murder, and that entry of the jury's note into the record rendered it controlling for the purpose of jeopardy on first degree. We affirm the circuit court's denial of Basham's motions to bar retrial on first-degree murder on double-jeopardy grounds.

Affirmed.

GLOVER and HOOFFMAN, JJ., agree.