

**SUPREME COURT OF ARKANSAS**

No. CR-12-1104

ARJEL GOLD

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered May 23, 2013

APPEAL FROM THE WASHINGTON  
COUNTY CIRCUIT COURT  
[NO. CR-11-1570-1]HONORABLE WILLIAM A. STOREY,  
JUDGEAFFIRMED.**KAREN R. BAKER, Associate Justice**

Appellant Arjel Gold filed this interlocutory appeal from the order of the Washington County Circuit Court denying his motion to dismiss the two charges of rape and one charge of robbery pending against him on grounds of former jeopardy. We hold that the circuit court did not err in denying Gold's motion to dismiss. Accordingly, we affirm.

Gold was charged by felony information with two counts of rape and one count of robbery. At trial, C.M. testified that Gold raped and robbed her on October 9, 2011. Detective Darrell Propps testified that Gold had C.M.'s driver's license and work ID in his coat pocket at the time of his arrest, and that C.M.'s cell phone was found in a box in his home. Gold testified that he had sexual intercourse with C.M., but asserted that it was consensual. Gold further testified that C.M. had asked him to hold her property.

After the jury had deliberated for approximately three and a half hours, the circuit court sent the bailiff to the jury chambers to ask if they had selected a foreperson and to see

if they were progressing. The foreperson informed the bailiff at that time that the jury was deadlocked. The circuit court informed counsel for both Gold and the State that it was calling the jury back into the courtroom. Gold objected, but then rescinded his objection when the circuit court stated that the jury was deadlocked.<sup>1</sup> The jury then entered the courtroom and the circuit court questioned them. The foreperson informed the court that the jury was deadlocked. The circuit court asked where the vote stood. The foreperson stated that the current vote was six and six for one count of rape, one and eleven for the second count of rape, and six and six for the count of robbery.

The circuit court called counsel to the bench and stated its belief that the jury would not reach a verdict. The circuit court then stated that it would speak to the jury for a moment and let them deliberate a little longer. The circuit court then gave the *Allen* instruction and sent the jury back into deliberations.

Approximately one hour later, the circuit court sent the bailiff back to the jury chambers to again inquire if progress was being made. The foreperson informed the bailiff that once again the jury was deadlocked. Over Gold's objection, the circuit court called the jury back into the courtroom. The foreperson stated that the vote had changed on count 1 to eight and four, but the vote on all other counts remained the same. The foreperson stated his belief that the jury was deadlocked, and all other members of the jury affirmed his assessment. The circuit court declared a mistrial and excused the jury. Gold stated his

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<sup>1</sup>Gold was not aware that the circuit court had sent the bailiff in to question the jury and did not become aware of that fact until after the jury had been excused.

objections to the mistrial, arguing that the jury should have been allowed to continue deliberations.

Prior to the retrial, Gold filed a motion to dismiss, asserting that the circuit court erred in declaring a mistrial and that retrying Gold would constitute double jeopardy. After a hearing, the circuit court denied the motion. Gold brought this interlocutory appeal, asserting that the circuit court erred in denying his motion to dismiss because (1) there was no overruling necessity to terminate the former prosecution and (2) the circuit court infringed on his rights by sending the bailiff into the jury room without counsel.

A double-jeopardy claim may be raised by interlocutory appeal because, if a defendant is illegally tried a second time, the right is forfeited. *Williams v. State*, 371 Ark. 550, 268 S.W.3d 868 (2007). This court reviews de novo a circuit court's denial of a motion to dismiss on double-jeopardy grounds. *Shelton v. State*, 2009 Ark. 388, 362 S.W.3d 429. However, the decision to declare a mistrial due to a jury's inability to reach a verdict is discretionary with the circuit court, and that decision will stand absent an abuse of discretion. *Shaw v. State*, 304 Ark. 381, 802 S.W.2d 468 (1991).

The safeguard against being "subject for the same offense to be twice put in jeopardy of life and limb" is guaranteed by the Fifth Amendment to the United States Constitution and by article 2, section 8 of the Arkansas Constitution. Additionally, our legislature has codified this right as an affirmative defense to criminal prosecution. Ark. Code Ann. § 5-1-112(3) (Supp. 2011). Once the jury is sworn, a criminal defendant cannot be tried on the same charge again unless he consented to the trial's termination or it was justified by overruling

necessity. *Phillips v. State*, 338 Ark. 209, 992 S.W.2d 86 (1999).

It is undisputed that Gold did not consent to the mistrial. Therefore, Gold may assert the affirmative defense if there was no overruling necessity to declare the mistrial. An overruling necessity is a circumstance that is forceful and compelling and is in the nature of a cause or emergency over which neither the court nor the attorney has control, or which could not have been averted by diligence and care. *Koster v. State*, 374 Ark. 74, 286 S.W.3d 152 (2008). A deadlocked jury is a circumstance that qualifies as an overruling necessity. *Shaw, supra*.

There is no mechanical formula for determining when discharge of the jury is proper. *Beard v. State*, 277 Ark. 35, 639 S.W.2d 52 (1982). We have upheld a circuit court's decision to declare a mistrial when the jury has deliberated for less time than the jury deliberated in this case. *See id.* (jury deliberated for forty-five minutes before mistrial was declared with no *Allen* charge); *Shaw*, 304 Ark. 381, 802 S.W.2d 468 (jury deliberated three and a half hours before being given the *Allen* charge and thirty minutes after the *Allen* charge was given).

In *Beard*, we cited the commentary to ABA Standard for Criminal Justice section 15.135, which states:

The question is whether the jury was required to deliberate an unreasonable length of time or was threatened with the prospect of such unreasonably lengthy deliberations . . . The reasonableness of the deliberation depends on such factors as the length of the trial, the nature or complexity of the case, the volume and nature of the evidence, the presence of multiple counts or multiple defendants, and the jurors' statements to the court concerning the probability of agreement.

Despite Gold's contention to the contrary, this was not a complex trial. There were only three charges; two charges of rape and one charge of robbery. The trial lasted two and

a half days, including jury selection and the jury's deliberations. The State called as witnesses C.M., the police officer who interviewed C.M., the nurse who performed the examination on C.M., the detective who arrested Gold, Gold's supervisor, and C.M.'s sister. Gold called the police officers, two forensic specialists, an acquaintance of Gold, and an acquaintance of C.M. who had seen her on the night in question. Gold also testified. Photographic evidence of the scene of the alleged rape and photographs of C.M.'s bruising were also entered into evidence. However, the question for the jury to decide was, essentially, whether they believed Gold's testimony that the sexual intercourse was consensual or C.M.'s testimony that it was not.

In addition, there is ample support for the circuit court's conclusion that the jury was unable to reach a verdict. The foreperson of the jury stated to the bailiff that the jury was deadlocked. The circuit court called the jury back into the courtroom and asked if the jury was deadlocked. The foreperson stated on the record that the jury was deadlocked and that the votes were unlikely to change. The circuit court then gave the jury the *Allen* instruction and sent them back into the jury room. An hour later, the circuit court called the jury back to the courtroom. The foreperson again stated on the record that the jury was deadlocked and the individual jurors all agreed.

Gold contends that, because the vote on one of the charges changed between the first and second time the jury was called back into the courtroom, the jury was still deliberating. Gold also presented the affidavit of the jury foreperson, in which he stated that he believed that further deliberation may have yielded a verdict on at least one count, and that the jury

never reached a point where they felt the need to “independently” report a deadlock to the court.

This affidavit by the foreperson conflicts with his statements on the record in the courtroom. In the courtroom, the foreperson stated that the jury was deadlocked and that further deliberations would not be helpful. The other jurors then affirmed this statement. The circuit court is in the best position to assess the circumstances and make the decision of whether to declare a mistrial. *Shaw, supra*. We cannot say that, considering the totality of the circumstances, the circuit court abused its discretion in declaring a mistrial in this case on the grounds that the jury was deadlocked. *Shaw, supra*.

Gold also asserts that the circuit court erred in denying his motion to dismiss because the circuit court violated his rights under the United States Constitution and the Constitution of Arkansas by sending the bailiff into jury chambers without the presence of counsel. Gold contends that these ex-parte communications with the jury violated his due-process rights under the Fifth and Fourteenth Amendments to the United States Constitution and article 2, section 8 of the Constitution of Arkansas and his rights to personal presence and representation of counsel under the Sixth Amendment to the United States Constitution and article 2, section 10 of the Constitution of Arkansas. In addition, he contends that the communications violated Arkansas Code Annotated section 16-89-125(e) and Arkansas Supreme Court Administrative Order No. 4.

We agree that the circuit court erred in sending the bailiff into the jury chambers and the record does not disclose a reason for the circuit court having done so in this case. Our

case law, and case law from the Eighth Circuit, is clear that ex-parte communication with the jury is improper, and presumptively prejudicial. *Bledsoe v. State*, 344 Ark. 86, 39 S.W.3d 760 (2001); *United States v. York*, 830 F.2d 885 (8th Cir. 1987). In this case, these errors are even more egregious because it appears that the bailiff may have engaged in inappropriate discussion with the jury concerning the evidence. The foreperson's affidavit stated that, during deliberations, he had knocked on the door to request telephone records. The bailiff then informed the jury that those records were unavailable because they had not been entered into evidence.

However, though the circuit court erred in sending the bailiff into the jury chambers, Gold's remedy for this error is a new trial, not dismissal of the charges on grounds of former jeopardy. See *Tarry v. State*, 289 Ark. 193, 710 S.W.2d 202 (1986)(reversing and remanding for a new trial due to ex-parte communication by the circuit court with the jury.) Because Gold is to receive a new trial, he has received the relief to which he is entitled. *Green v. State*, 2011 Ark. 92, 380 S.W.2d 368. Thus, the circuit court did not err in denying appellant's motion to dismiss.

Affirmed.

*Tony Pirani*, Washington County Public Defender, for appellant.

*Dustin McDaniel*, Att'y Gen., by: *Vada Berger*, Ass't Att'y Gen., for appellee.