

POINTS AND AUTHORITIES

The District Attorney of Alameda County Presents a Weekly Video Survey of
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Week Of	Topic	Guest	30 min
May 6 2019	Partial Verdicts of Acquittal (<i>Peo. v. Aranda</i>)* Discretion to Impose Lesser §12022.53 Enhancements as Alternative to Striking (<i>Peo. v. Morrison</i>)	Carrie Skolnick	General

*** P&A video includes clips of Supreme Court oral argument**

***People v. Aranda* (2019) __ Cal.5th __ [2019 WL 310754]**

Issue: The California Supreme Court decides this question: Should California continue to follow the rule of *Stone v. Superior Court* (1982) 31 Cal.3d 503, which directs a court to accept a partial verdict of acquittal as to a charged offense when a jury indicates it has acquitted on that offense, but is deadlocked on uncharged lesser included offenses. Or, has the rule in *Stone* been abrogated by the United States Supreme Court decision in *Blueford v. Arkansas* (2012) 566 U.S. 599, which concluded that federal double jeopardy principles do not require a court to accept a partial verdict.

Double Jeopardy Principles:

1. Under the United States Constitution and the California Constitution, a person may not be twice placed in jeopardy for the same offense; this double jeopardy principle bars a second prosecution for the same crime after an acquittal or conviction.
2. Even if a jury returns no verdict on a particular charge, retrial is only permitted in limited circumstances; retrial after discharge of a jury without legal necessity violates the protections afforded under both the federal and state constitutional double jeopardy clauses.
3. Although the failure of a jury to *agree* on a verdict is an instance of legal necessity permitting retrial of the defendant, granting an unnecessary mistrial bars retrial under double jeopardy principles.

A. Background

1. The defendant was charged with a single count of murder. At the close of evidence, the court instructed the jury on first degree murder, second degree murder, and voluntary manslaughter. The

jury received “guilty” verdict forms for each offense and a single “not guilty” form.

2. On the third day of deliberations, the jury reported that discussions had become hostile. After consulting with counsel, the court asked the foreperson “how things are going” and if the court could do anything to assist. The foreperson reported the jury was at a stalemate and explained: “*So we’ve basically ruled out murder in the first degree. So then we moved to murder in the second degree. So we worked down to voluntary manslaughter, but there’s still a couple that are still stuck on second degree.*” The foreperson later repeated that some jurors “are stuck on second degree and then went down to voluntary.” But the foreperson said the jury was “working through it” and so deliberations continued.

3. The next court day, defense counsel asked the jury be given a “not guilty” verdict form for first degree murder. The prosecutor objected. The foreperson asked to speak with the court and again reported the jury was at an impasse, explaining that one juror “thinks it’s second degree,” “and then we’ve got two that are on the side of voluntary. And then we’ve got nine that are not guilty.” Outside the foreperson’s presence, the prosecutor expressed his view that the jury was “hopelessly deadlocked.” Defense counsel argued the jury was frustrated but not deadlocked. The court brought the panel into the courtroom to ask if anything would assist them. As they waited for the jury, counsel debated the defense request for a “not guilty” verdict form on first degree murder. The court denied the request, stating: “[T]o change anything makes it seem like we’re directing them as to which way to think, and I don’t want to do that.” After answering some questions about jury instructions, the court ordered the jury to deliberate for the remainder of the day, about 40 minutes. After that time expired, the jury returned, and the foreperson said the numbers had not changed, which the court confirmed was “nine to two to one,” thus no votes for first degree murder. Without any further inquiry of the jury, the court concluded the jury was deadlocked and declared a mistrial.

4. The defense moved to dismiss the first degree murder allegation on double jeopardy grounds. Relying on *Stone*, defendant argued the court’s failure to allow the jury to acquit him of first degree murder barred a retrial on that charge. Defendant also argued double jeopardy barred a trial on second degree murder and voluntary manslaughter as well. The court ultimately dismissed the first degree murder charge but declined to dismiss the lesser offenses.¹ The People unsuccessfully sought reconsideration based upon *Blueford*, which had recently been decided.

5. The People, represented by the Riverside County District Attorney’s Office, appealed the dismissal of the first degree murder charge. The Court of Appeal affirmed and the Supreme Court here in a 7-1 decision, likewise affirmed.

{A mistrial is properly granted for legal necessity when a jury is hung. Here, the jury was hung only on second degree murder and manslaughter and thus the mistrial was proper as to those counts. But since the jury had “factually” acquitted the defendant of first degree murder, the mistrial as to that charge was without legal necessity. Double jeopardy prohibits the defendant from being tried twice

¹ A different judge heard and ruled on the dismissal motions.

for the same offense. Thus as a result of the trial court's erroneous declaration of a mistrial as to first degree murder, the defendant here cannot be retried for that offense.}

B. The Applicable Legal Principles on Partial Verdicts in California and Federal Courts

1. Our California Supreme Court has held that "the trial court is constitutionally obligated to afford the jury an opportunity to render a partial verdict of acquittal on a greater offense when the jury is deadlocked only on an uncharged lesser included offense." (*Stone, supra*, 31 Cal.3d at p. 519.)

2. *Stone* was charged with a single count of murder. The jury was instructed on, and received guilty verdict forms for, first and second degree murder, and voluntary and involuntary manslaughter. It was given a single verdict form for acquittal on all charges, as well as a verdict form for "justifiable homicide." (*Id.* at p. 507.) After seven days of deliberations, the foreman reported in open court that there were no votes for first or second degree murder but various votes for both forms of manslaughter and justifiable homicide. Each juror, in response to court inquiry, stated a belief that the jury was hopelessly deadlocked. (*Ibid.*) The court denied defense counsel's request to accept a partial verdict of acquittal on murder and ordered further deliberations. After another day and a half of deliberations, the foreman again indicated that there were no votes for first or second degree murder and various votes for manslaughter and justifiable homicide. The court declared a mistrial and discharged the jury. (*Id.* at pp. 508-509.)

3. *Stone* reasoned there was no legal necessity for a mistrial as to murder and a partial verdict of acquittal could have been taken. (*Stone, supra*, 31 Cal.3d at pp. 514-519.) The court initially observed that, under our statutory scheme, the prosecutor has discretion to separately charge all lesser included offenses (see Pen. Code, § 954) or to charge only the greater offense (see Pen. Code, § 1159). (*Stone*, at p. 517.) If the included offenses are separately charged, the court must inquire whether the jury has reached a verdict on any of the charged counts and receive any verdicts before discharging the jury. (Pen. Code, §§ 1160, 1164.) *Stone* reasoned that if our statutory scheme requires the taking of partial verdicts when included offenses are charged separately, it would be "anomalous to formulate a rule that prevents a trial court from receiving a partial verdict on a greater offense on which the jury clearly favors acquittal merely because the prosecutor elected to charge only that offense, and left it to the court to instruct on any lesser included offense supported by the evidence." (*Stone*, at pp. 517-518.)

4. The *Stone* rule "protects a defendant from retrial when the jury agrees that the greater offense was not proven but cannot agree on a lesser included offense. Without the rule, a general declaration of mistrial would disguise the fact that the jury agreed the defendant was not guilty of the greater offense, making the defendant subject to retrial on both the greater and lesser offenses." (*People v. Anderson* (2009) 47 Cal.4th 92, 114.)

5. The Supreme Court here also points out that in *People v. Kurtzman* (1988) 46 Cal.3d 322, it clarified that although a jury may consider the charges in any order, "the jury must acquit of the greater offense before returning a verdict on the lesser included offense." (*Id.* at p. 330.) This

procedure is known as “the acquittal-first rule.”

6. The People here argued that *Stone* has been overruled by the United States Supreme Court decision in *Blueford v. Arkansas*, which held that the federal double jeopardy clause does *not* require a court to accept a partial verdict of acquittal with respect to a greater offense. *Blueford* was charged in Arkansas state court with a single count of capital murder. The jury received verdict forms for that offense and for included offenses of first degree murder, manslaughter, and negligent homicide. It was given a single acquittal form. After jurors declared an impasse during deliberations, the foreperson reported that the jury was “*unanimous against*” capital and first degree murder but deadlocked on manslaughter. (*Blueford, supra*, 566 U.S. at p. 603.) The trial court ordered further deliberations. The defense requested verdict forms be provided, permitting the jury to acquit Blueford of capital and first degree murder. The trial court refused. The jury remained deadlocked, and the court declared a mistrial. (*Id.* at p. 604.)

7. In the United States Supreme Court, Blueford argued the foreperson’s report indicating the jury was “unanimous against” capital and first degree murder constituted an acquittal for double jeopardy purposes. (*Blueford, supra*, 566 U.S. at p. 603.) The Supreme Court rejected the claim. The Court reasoned the foreperson’s report “was not a final resolution of anything. When the foreperson told the court how the jury had voted on each offense, the jury’s deliberations had not yet concluded. . . . The fact that deliberations continued after the report deprives that report of the finality necessary to constitute an acquittal on the murder offenses.” (*Id.* at p. 606.) “It was therefore possible for Blueford’s jury to revisit the offenses of capital and first-degree murder, notwithstanding its earlier votes. And because of that possibility, the foreperson’s report prior to the end of deliberations lacked the finality necessary to amount to an acquittal on those offenses, quite apart from any requirement that a formal verdict be returned or judgment entered.” (*Id.* at p. 608.)

8. As to the issue of legal necessity for the mistrial, Blueford argued the court was obligated to take some action, “whether through partial verdict forms or other means, to allow the jury to give effect to those votes, and then consider a mistrial only as to the remaining charges.” (*Blueford, supra*, 566 U.S. at p. 609.) Again, the Supreme Court in *Blueford* disagreed: “We have never required a trial court, before declaring a mistrial because of a hung jury, to consider any particular means of breaking the impasse—let alone to *consider* giving the jury new options for a verdict. As permitted under Arkansas law, the jury’s options in this case were limited to two: either convict on one of the offenses, or acquit on all. The instructions explained those options in plain terms, and the verdict forms likewise contemplated no other outcome.” (*Id.* at pp. 609-610.)

C. *Stone* Remains the Correct Statement of California Law

1. Our Supreme Court in this *Aranda* decision states that *Blueford* does not end the inquiry. Although the Fifth Amendment does not require the taking of partial verdicts, neither does it forbid the practice. *Blueford* noted Arkansas law precluded the taking of partial verdicts. The Supreme Court in *Blueford* reasoned the court did not abuse its discretion by not adding a third option (the taking of partial verdicts) not otherwise contemplated by state law. (*Blueford*, at pp. 609-610.) *Blueford* was

thus silent as to whether a state may require the taking of partial verdicts under its own laws.

2. In this *Aranda* appeal, the People primarily argue that because *Stone* relied exclusively upon the federal Constitution, and *Blueford* clarified that federal double jeopardy principles do not require the taking of partial verdicts, then *Stone* has implicitly been overruled by *Blueford*. But the Supreme Court here said an examination of *Stone* reflects it relied on its understanding of both federal *and* state constitutional principles. The Supreme Court here in *Aranda* states: “At most, *Stone* did not differentiate between the federal and state double jeopardy clauses. Its discussion of both federal and state authorities largely assumed the two clauses were coextensive, at least as to this issue.”

3. The Supreme Court cites cases in which it has construed the state double jeopardy clause to be more protective than the federal double jeopardy clause. The Supreme Court states: “[N]othing in the reasoning of *Blueford*, decided 30 years after *Stone*, suggests we should now abandon our long-established precedent. *Stone* observed that “[o]ne of the primary purposes of the double jeopardy protection is to prevent successive prosecutions for the same offense” (*Stone, supra*, 31 Cal.3d at pp. 514-515), and concluded that a procedure to accept a partial acquittal on a greater offense was necessary to prevent “seriously infringing on the defendant’s double jeopardy interest in avoiding retrial for offenses on which he has been factually acquitted.” (*Id.* at p. 518.)”

4. Further, the Supreme Court in *Aranda* states: “A defendant’s double jeopardy rights should not ‘turn on the formality of whether he was charged in separate counts with the greater offense and the lesser included offense, or was charged in a single count with only the greater offense.’” (*Id.* at p. 518.) The Court said it is well established that the prosecutor’s method of charging a defendant does not affect a defendant’s double jeopardy rights. “As a matter of state constitutional law, *Stone*’s reasoning supports the taking of partial verdicts regardless of how the prosecution charges the case.”

5. The Supreme Court in *Aranda* remarked: “The *Stone* rule, allowing verdicts of acquittal for a greater offense when the jury unanimously agrees, is fully consistent with a statutory scheme that generally requires a jury to announce when it agrees and requires the court to accept verdicts.”

D. The People’s Argument That Partial Verdicts Are Coercive

1. The Supreme Court here refers to the People’s statement that “some states have declined to require the acceptance of partial verdicts under their state double jeopardy provisions for fear of jury coercion.” The Supreme Court here notes, however, that “[a]bsent some indication of deadlock only on an uncharged lesser included offense, the suggested procedures in *Stone* do not come into play.” (*People v. Marshall* (1996) 13 Cal.4th 799, 826.)

2. The Supreme Court emphasizes that a court has no duty to inquire as to the possibility of a partial verdict unless the jury has given some affirmative indication that it has acquitted on a greater offense but deadlocked only on a lesser offense. The Supreme Court states: “We reject the People’s suggestion that an inquiry in that circumstance is necessarily coercive. In the face of the jury’s own report, an inquiry merely allows the court to clarify whether the jury has actually reached a final

decision on a greater offense or whether further deliberations may prove fruitful. It is within the court's sound discretion whether the circumstances warrant further inquiry and, thereafter, the presentation of additional verdict forms."

E. The Trial Court Improperly Declared a Mistrial as to the First Degree Murder

1. The Supreme Court concludes: "The foreperson's statements reflected the jury had come to a unanimous decision on first degree murder and, therefore, was not deadlocked on that charge, thus rendering the trial court's declaration of a mistrial premature and outside the normal rule allowing 'retrial following discharge of a jury that has been unable to agree on a verdict.' "

2. The Supreme Court said, "There is a reason we have statutes that formalize the receipt of a verdict, affirmation by the entire panel, and polling before the verdict is recorded. [Citations.] Standardized instructions provide a framework for securing a formal response from the jury to facilitate receipt of partial verdicts. (See CALCRIM Nos. 640-643, 3517-3519.) [¶] Courts should be mindful of [Penal Code] section 1164, subdivision (b), which expressly requires that 'no jury shall be discharged until the court has verified on the record that the jury has either reached a verdict or has formally declared its inability to reach a verdict on all issues before it, including, but not limited to, the degree of the crime or crimes charged.' . . . The court failed to do so here with respect to first degree murder."

3. As a result, the defendant in this *Aranda* case may not be retried for first degree murder, but may be tried again on the lesser offenses of second degree murder and voluntary manslaughter, since the jury remained deadlocked on those counts.

***People v. Morrison* (2019) __ Cal.App.5th __ (2019 WL 1567753)**

Holding: In addition to striking firearm enhancement imposed under Penal Code section 12022.53(d), the trial court also has the discretion to impose a lesser firearm enhancement under Penal Code section 12022.53(b) or (c).

A. Background

1. The defendant was convicted for first degree premeditated murder, and the jury found true a firearm enhancement under Penal Code section 12022.53(d). He was sentenced for both the murder count and the firearm enhancement in September 2017.

2. On December 6, 2017, the defendant filed a request to recall the based on recent amendments to section 12022.53 that gave the court the discretion, effective January 1, 2018, to strike a firearm enhancement under its provisions. The court held a hearing on January 3, 2018 in which it recalled the sentence but denied the request to strike the firearm enhancement. Instead the court reimposed the

original sentence of 50 years to life, consisting of 25 years to life for the murder count and 25 years to life for the firearm enhancement.

B. Section 12022.53

1. “Section 12022.53 sets forth the following escalating additional and consecutive penalties, beyond that imposed for the substantive crime, for use of a firearm in the commission of specified felonies: a 10-year prison term for personal use of a firearm, even if the weapon is not operable or loaded (subd. (b)); a 20-year term if the defendant ‘personally and intentionally discharges a firearm’ (subd. (c)); and a 25–year–to–life term if the intentional discharge of the firearm causes ‘great bodily injury’ or ‘death, to any person other than an accomplice’ (subd. (d)).”

2. For these enhancements to apply, the requisite facts must be alleged in the information or indictment, and the defendant must admit those facts or the trier of fact must find them to be true.” (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1124–1125.)

3. Section 12022.53, subdivision (f) provides, “Only one additional term of imprisonment under this section shall be imposed per person for each crime. If more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment”

C. Analysis: Trial Court’s Discretion as to Section 12022.53 Enhancements

1. On October 11, 2017, a month after the defendant was sentenced, Governor Brown signed Senate Bill 620, which amended sections 12022.5 and 12022.53 to provide trial courts with the discretion to strike a firearm enhancement or finding. Senate Bill 620 added the following language to both statutes: “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.”

2. “In a case where the jury had also returned true findings of the lesser enhancements under section 12022.53, subdivisions (b) and (c), the striking of an enhancement under section 12022.53, subdivision (d) would leave intact the remaining findings, and an enhancement under the greatest of those provisions would be mandatory unless those findings were also stricken in the interests of justice.” (p.*2.)

3. The question in this case arises because enhancements under Penal Code sections 12022.53, subdivision (c) and (c) were not also alleged. As the Court of Appeal posited the issue: “May the court impose one of those lesser enhancements in lieu of the greater enhancement under section 12022.53, subdivision (d) if the court finds it is in the interests of justice to do so?”

4. Case law has recognized that the court may impose a “lesser included” enhancement that was not charged in the information when a greater enhancement found true by the trier of fact is either legally inapplicable or unsupported by sufficient evidence. “Since the court could impose an uncharged enhancement under section 12022.53, subdivision (b) or (c) in lieu of an enhancement

under section 12022.53, subdivision (d) if it was unsupported by substantial evidence or was defective or legally inapplicable in some other respect” . . . “[w] see no reason a court could not also impose one of these enhancements after striking an enhancement under section 12022.53, subdivision (d), under section 1385.”

5. The Court of Appeal concludes: “The court had the discretion to impose an enhancement under section 12022.53, subdivision (b) or (c) as a middle ground to a lifetime enhancement under section 12022.53, subdivision (d), if such an outcome was found to be in the interests of justice under section 1385.”

6. The matter here was thus remanded for resentencing because “[a]lthough the court stated adequate reasons for declining to strike the lifetime enhancement under section 12022.53, subdivision (d), the record does not reflect whether it understood that it could impose a lesser enhancement under section 12022.53, subdivision (b) or (c) instead.”

7. In an effort to limit the number of remand scenarios, The Court of Appeal states that question of whether the court may elect to impose uncharged lesser firearm enhancements “only arises in cases where those enhancements have not been charged in the alternative and found true.” The Court of Appeal also states: “Additionally, the ‘lesser firearm enhancement’ issue only arises when the court has been asked to strike a greater enhancement under section 12022.53, making it unreasonable to infer . . . that in many cases the issue was not mentioned simply because the parties thought an exercise of discretion unlikely.”

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to the P&A author, Mary Pat Dooley, at (510) 272-6249, marypat.dooley@acgov.org.

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