

Anthony Duerson appeals his convictions of Receiving Stolen Auto Parts,¹ as a class C felony, and Driving While Suspended,² a class A misdemeanor. He presents the following restated issue for review: Was Duerson's right not to be placed in jeopardy twice for the same offense violated when he was retried following a mistrial?

We affirm.

On July 8, 2008, the State charged Duerson with class D felony receiving a stolen auto (Count 1) and class A misdemeanor driving while suspended (Count 2). Thereafter, on September 24, the State filed two additional counts, class C felony receiving stolen auto parts (Count 3) and class D felony receiving stolen auto parts (Count 4), as well as its notice of intent to seek an enhanced penalty based upon a prior conviction for auto theft. The following day, Duerson filed an objection to the additional counts and a motion to strike. Specifically, Duerson argued that Count 4 was duplicative of Count 1 and that Count 3 was an improper amendment because it prejudiced his substantial rights.

On October 1, the trial court held a hearing on Duerson's objection and motion to strike. The State agreed to strike Count 1 as duplicative. The State further agreed with the trial court that Count 4 was simply a lesser included offense of Count 3. At the conclusion of the hearing, the parties and the court agreed that Duerson would be tried in a bifurcated trial on only two counts, Amended Count 1 (formerly Count 3) and Count 2. Duerson, however, still objected to the enhancement. The trial court took the remaining objection under

¹ Ind. Code Ann. § 35-43-4-2.5(c) (West, PREMISE through 2008 2nd Regular Sess.).

² Ind. Code Ann. § 9-24-19-2 (West, PREMISE through 2008 2nd Regular Sess.).

advisement, noting that a ruling would not be needed until after the first phase of the trial and, then, only if the jury found Duerson guilty of the lesser included, class D felony offense. The trial court further indicated that a twelve-member jury would be impaneled due to the pending class C felony charge.

Duerson's first trial commenced on October 7, 2008. The trial court ultimately declared a mistrial. This was due to the fact that only ten jurors had been selected from the forty-five member jury venire. After swearing in the ten jurors selected by the parties, the court excused the jury for lunch to discuss the matter further with the parties. The court indicated that there were not enough jurors selected to proceed on the C felony. Thus, the court stated, "I think we'll have to declare a mistrial, send the jurors home, and then I don't know, I think that that suffices with regard to the Defendant's speedy trial motion since we convened a jury." *Transcript* at 130. Duerson did not raise an objection to declaring a mistrial. Rather, defense counsel simply proceeded to discuss with the trial court when the new trial could be set to stay within the speedy trial deadline. Upon reconvening after lunch, the trial court dismissed the jury.³

³ The court explained the situation to the jury as follows:

Ladies and gentlemen of the jury, I'll make an assumption that you can all count and if you look around you, we've got ten of you. In some cases in Indiana, we can try a case with six. In other cases, we're required to have at least twelve. This is one of the cases that requires at least twelve. We checked into a couple other options, that's why I didn't talk to you before lunch and the other options will not work, so we don't have enough jurors to finish the case. So that's declared a mistrial which means we do not proceed.... We had a number of perfect storm things that kind of came together at once. We had eleven jurors, I think, that were excused before we got here. Some of them we couldn't find. We had a higher number than normal of people who couldn't continue because of family obligations, not speaking English, those kinds of things, and having some feelings about the case which would not permit them to proceed. And so we ended up with ten of you.... This is the first time this has happened to

Two days after the mistrial, Duerson filed a motion seeking discharge on the basis that a retrial was barred by double jeopardy principles as outlined in Ind. Code Ann. § 35-41-4-3 (West, PREMISE through 2008 2nd Regular Sess.).⁴ At a hearing on October 20, 2008, the trial court denied Duerson’s motion for discharge. In so doing, the court noted that the class C felony charge was pending at the first trial because the court had not yet ruled upon the objection filed by the defense. In light of the pending class C felony charge, the court found that it was impossible to proceed with the first trial because there were not enough jurors. *See* I.C. § 35-41-4-3(a)(2)(ii).

The second trial in this case commenced on October 21, 2008. The jury found Duerson guilty, in a bifurcated proceeding, of receiving stolen auto parts, as a class C felony, and driving while suspended, a class A misdemeanor. Duerson now appeals.

“Once jeopardy has attached, the trial court may not grant a mistrial *over a*

me in twenty years.... So anyway, we do not have sufficient people to continue. So you are excused.

Transcript at 133.

⁴ I.C. § 35-41-4-3 provides:

(a) A prosecution is barred if there was a former prosecution of the defendant based on the same facts and for commission of the same offense and if:

* * *

(2) the former prosecution was terminated after the jury was impaneled and sworn . . . , unless (i) the defendant consented to the termination or waived, by motion to dismiss or otherwise, his right to object to the termination, (ii) it was physically impossible to proceed with the trial in conformity with law, (iii) there was a legal defect in the proceedings that would make any judgment entered upon a verdict reversible as a matter of law, (iv) prejudicial conduct, in or outside the courtroom, made it impossible to proceed with the trial without injustice to either the defendant or the state, (v) the jury was unable to agree on a verdict, or (vi) false statements of a juror on voir dire prevented a fair trial.

(b) If the prosecuting authority brought about any of the circumstances in subdivisions (a)(2)(i) through (a)(2)(vi) of this section, with intent to cause termination of the trial, another prosecution is barred.

defendant's objection unless 'manifest necessity' for the mistrial is found." *Brown v. State*, 703 N.E.2d 1010, 1015 (Ind. 1998) (quoting *Arizona v. Washington*, 434 U.S. 497 (1978)) (emphasis supplied). In the instant case, however, it is clear that Duerson did not object to the declaration of the mistrial and discharge of the jury.⁵ Therefore, Duerson waived his right to raise a double jeopardy claim by failing to timely object to the discharge of the jury. *See Manns v. State*, 459 N.E.2d 436, 437 (Ind. Ct. App. 1984) ("[t]o preserve the issue he must have acted prior to the jury's discharge and separation. His failure to do so waived the double jeopardy issue"). *See also Jester v. State*, 551 N.E.2d 840 (Ind. 1990); *Ried v. State*, 610 N.E.2d 275 (Ind. Ct. App. 1993), *summarily affirmed by*, 615 N.E.2d 893 (Ind. 1993).

Judgment affirmed.

NAJAM, J., and VAIDIK, J., concur.

⁵ On appeal, Duerson asserts that no manifest necessity existed because "[o]ther actions could have been taken by the trial court short of declaring a mistrial and retrying the case with a second jury." *Appellant's Brief* at 12 (generally listing several options). We are not persuaded by Duerson's argument in this regard. Moreover, we observe that there is no indication in the record that he made these suggestions at his first trial when the court indicated its inclination to declare a mistrial.