S192538 2nd Petition for Review

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **CHRISTINA ANZALONE,** **Defendant and Appellant.**	Case No. S_____

COPY

Sixth Appellate District, Case No. H035123
Santa Clara County Superior Court, Case No. CC935164
Ron M. Del Pozzo, Judge

SUPREME COURT
FILED
APR 26 2011
Frederick K. Ohlrich Clerk
Deputy

PETITION FOR REVIEW

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COURT RULES

Respondent respectfully petitions for review of the decision of the Court of Appeal for the Sixth Appellate District. The decision, which is attached as Exhibit A, is unreported. The Court of Appeal filed its decision on March 17, 2011. No petition for rehearing was filed. This petition for review is timely. (Cal. Rules of Court, rule 8.500(e).)

ISSUE PRESENTED

When the trial court states to the jury it understands the jury has reached a verdict, asks the foreperson for the verdicts, and has the clerk read the verdicts in the presence of all parties and all jurors, does the court's failure to ask the jury to affirm the verdicts constitute nonforfeitable structural error?

STATEMENT

A. Factual Summary and Verdicts

Appellant threatened to kill the proprietor of a hotel, displaying a knife. Later that day, she assaulted a man with a knife. (Typed opn. at pp. 2-3.)

A jury found appellant guilty of assault with a deadly weapon (Pen. Code, §245, subd. (a)(1)), making a criminal threat (Pen. Code, §422), and misdemeanor brandishing a deadly weapon (a knife) (Pen. Code, §417, subd. (a)(1)). The jury found with respect to the assault that appellant personally used a deadly and dangerous weapon (a knife) within the meaning of Penal Code sections 667 and 1192.7, and with respect to the criminal threat, personally used a deadly and dangerous weapon (a knife) within the meaning of Penal Code section 12022, subdivision (b)(1). (CT 51-54, 138-142, 143-146.)

B. Statutes Related To The Return of Verdicts

Penal Code section 1147 provides:

> When the jury have agreed upon their verdict, they must be conducted into the court by the officer having them in charge. Their names must then be called, and if all do not appear, the rest must be discharged without giving a verdict. In that case the action may be again tried.

Penal Code section 1149 provides:

> When the jury appear they must be asked by the Court, or Clerk, whether they have agreed upon their verdict, and if the foreman answers in the affirmative, they must, on being required, declare the same.

Penal Code section 1163 permits polling of the jury—upon request of a party:

> When a verdict is rendered, and before it is recorded, the jury *may* be polled, *at the request of either party*, in which case they must be severally asked whether it is their verdict, and if any one answer in the negative, the jury must be sent out for further deliberation.

(Emphasis added.)

Penal Code section 1164 provides:

> (a) When the verdict given is receivable by the court, the clerk shall record it in full upon the minutes, and *if requested by any party* shall read it to the jury, and inquire of them whether it is their verdict. If any juror disagrees, the fact shall be entered upon the minutes and the jury again sent out; but if no disagreement is expressed, the verdict is complete, and the jury shall, subject to subdivision (b), be discharged from the case.
>
> (b) 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, and the truth of any alleged prior conviction whether in the same proceeding or in a bifurcated proceeding.

(Emphasis added.)

C. The Proceedings on the Return of the Verdict

The following proceeding occurred in open court:

THE COURT: We're in session in Docket CC935164. Attorneys are present, Mr. Hultgren and his client and DA Ms. Frazier.

Jury has indicated they have a verdict. We'll bring them out. Thank you.

(*JURY PRESENT*)

THE COURT: We're back on the record in the presence of the jury now as well. And *ladies and gentlemen, I understand you've reached a verdict.* Who is the foreperson? Mr. (juror)?

JUROR: Yes sir.

THE COURT: *Hand the verdict forms to the deputy. I'll hand those to the clerk to read the verdict.*

THE CLERK: Superior Court of California Santa Clara County. People of the State of California plaintiff versus Christina Marie Anzalone defendant. Case number CC935164.

The department 39. Count 1, we the jury in the above entitled cause find the defendant Christina Marie Anzalone guilty of a felony to wit: assault with a deadly weapon in violation of Penal Code section 245 subsection A, subsection 1.

Special allegation number 1. We further find the allegation that the said defendant personally used a dangerous or deadly weapon, a knife within the meaning of Penal Code section 667 and 1192.7 to be true. Dated and signed.

Same cause, same action. We the jury in the above entitled cause find the defendant Christina Marie Anzalone guilty of a felony to wit: threats to commit a crime resulting in death or great bodily injury in violation of Penal Code section 422. Special allegation number 1. We further find the allegation that the said defendant personally used a dangerous or deadly weapon, a knife within the meaning of Penal Code section 12022 subsection b, subsection 1 to be true. Dated and signed.

> Same cause, [s]ame action. We the jury in the above entitled cause find the defendant Christina Marie Anzalone not guilty of a misdemeanor to wit: vandalism less than $400 in violation of Penal Code section 594 subsection a slash subsection b, subsection 2, subsection A. Dated and signed.
>
> Same cause, same action. Count 4. We the jury in the above entitled cause find the defendant Christina Mar[ie] Anzalone guilty of a misdemeanor to wit: exhibiting a deadly weapon other than a firearm in violation of Penal Code section 417, subsection a, subsection 1. Dated and signed.
>
> THE COURT: Ladies and gentlemen of the jury, you've now completed your jury service in this case and on behalf of the judges and attorneys and everyone in the court, please accept my sincere thanks for your time and effort that you put into your verdicts in this case.

(2 RT 378-379, emphasis added; see also CT 143-145.)

The verdicts were recorded. (CT 145.)

The court gave predischarge instructions to the jury concerning payment, communications with the parties, and the privacy and the release of personal information about jurors. It then excused the jurors. (2 RT 379-381.) There was no objection to the court's action, nor was there a request by either party to have the jury polled.

D. The Court of Appeal Decision

The Court of Appeal reversed. It found "ample if not overwhelming evidence to support the verdict reflected in the verdict forms" and "nothing in the record to suggest that the jurors did not agree with the verdict when read." (Typed opn. at pp. 7 and 9.) It further found that appellant "was not deprived of a verdict from [her] chosen jury. Rather, that jury deliberated and rendered a verdict, which was read and entered." (*Id.* at p. 9.)

The Court of Appeal held that the trial court's failure to ask the jury or jury foreman to affirm the verdicts as read violated Penal Code section

1149, (*id.* at pp. 7, 10), and that the error was structural. It therefore reversed without conducting harmless error analysis. (*Id.* at p. 7).

The Court of Appeal rejected appellant's further claim that double jeopardy precluded retrial. In that portion of its decision, the Court of Appeal asserted that the error was "trial error":

> The court did not discharge the jury before it reached a verdict, and defendant was not deprived of a verdict from his chosen jury. Rather, that jury deliberated and rendered a verdict, which was read and entered. Although nothing in the record suggests that all of the jurors did not agree with the verdict when it was read, that verdict was defective because the court failed to comply with section 1149 and have the jury orally acknowledge it in open court before being discharged. This was plain reversible trial error.

(Typed opn. at pp. 9-10.)

REASONS FOR GRANTING REVIEW

Review is sought to secure uniformity of decision and to settle an important question of law. Alternatively, review is sought to transfer the matter back to the Court of Appeal to consider the matter in light of controlling legal principles cited in the transfer order of this Court.

The Court of Appeal, without analysis, labels the statutory violation it found "structural error" and reversible per se. It then inconsistently characterizes it as "plain reversible trial error." We are aware of no authority establishing that a procedural error under the statutes regulating the return of verdicts is both structural and trial error as found by the Sixth District Court of Appeal.

The Court of Appeal's conclusion is contrary to decisions of this Court applying harmless error to other technical violations of the statutes in receiving verdicts. (See *People v. Redundo* (1872) 44 Cal. 538 [failure to call names of jurors in violation of then section 414, although an irregularity in receiving the verdict, in no way prejudiced defendant];

People v. Gilbert (1880) 57 Cal. 96 [failure to record verdict before discharge of the jury did not affect the validity of the judgment]; *People v. Smith* (1881) 59 Cal. 601 [same]; *People v. Smalling* (1892) 94 Cal. 112 [discharging jury before recording verdict in violation of statute harmless]; cf. *Stone v. Superior Court* (1982) 31 Cal.3d 503, 511 [cases finding implied verdicts in certain circumstances rebut People's contention that a jury verdict in a criminal case cannot be given effect unless the formal statutory procedures under sections 1149, 1163, and 1164 are followed].)

The Court of Appeal's decision is contrary to Article VI, section 13, of the California Constitution. It provides that "[n]o judgment shall be set aside, or new trial granted, in any cause, . . . for any error as to any matter of procedure, unless, after an examination of the entire cause . . . the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Additionally, the decision below is in conflict with Penal Code sections 1258 and 1404.

I. THE TRIAL COURT'S FAILURE TO HAVE THE JURY AFFIRM THE VERDICTS AS READ IN ITS PRESENCE IF ERROR IS NOT STRUCTURAL ERROR BUT FORFEITABLE STATUTORY ERROR

A. The Claim Was Forfeited

Defendant's claim of error in the taking and recording of the verdicts on which the Court of Appeal reversed was forfeited. The defense did not request that the jury be asked if it had reached a verdict before the verdicts were read. The defense did not request polling of the jury. Nor did the defense object to the recording of the verdicts. Finally, it did not object when the court discharged the jury. Ample time existed in which to object and any error would have been avoided.

In *People v. Saunders* (1993) 5 Cal.4th 580, 591-592, this Court rejected the defendant's claim that he was denied his statutory right to a determination of alleged prior convictions by the same jury that determined

his guilt as provided in Penal Code sections 1025 and 1164, subdivision (b). "An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been, but was not, presented to the lower court by some appropriate method . . . The circumstances may involve such intentional acts or acquiescence as to be appropriately classified under the headings of estoppels or waiver . . . . Often, however, the explanation is simply that it is *unfair to the trial judge and to the adverse party* to take advantage of an error on appeal when it could easily have been corrected at the trial." (*Id.* at p. 590, emphasis in original.)[1]

B. There Was Substantial Compliance with the Statutory Requirements in the Return of the Verdict

The trial court stated, "Jury has indicated they have a verdict. We'll bring them out." (2 RT 378.) The record shows the jury was present in court. Thus, the provisions of section 1147 were met.

The Court then stated, "We're back on the record in the presence of the jury now as well. And Ladies and Gentlemen, I understand you've reached a verdict. Who is the foreperson? Mr. (Juror)?" A juror responded "Yes, sir" and the court directed him, "Hand the verdict forms to the deputy. I'll hand those to the clerk to read the verdict. (2 RT 378.) Thus, addressing the jurors, the court stated it understood they reached a verdict, and when the foreperson identified himself, had the foreperson hand in the verdict forms so that the clerk could read them. We submit that this substantially complied with the requirements of section 1149: "When *the jury appear* they must be asked by the Court, or Clerk, whether they have agreed upon their verdict, and if the foreman answers in the

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[1] By letter, respondent cited *Saunders* to the Court of Appeal before oral argument. (Letter filed February 15, 2011.)

affirmative, they must, *on being required*, declare the same." (Emphasis added.)[2]

In this case, the trial court had the clerk read the verdicts in open court. Under the controlling statutes, *supra*, there is no absolute requirement that the trial court, without request, ask the jurors to affirm the verdicts read in open court as theirs, whether or not that is the usual or even the preferred practice. We submit that there was substantial compliance with the statutory requirements in receiving the verdicts here.

C. Assuming the Court Erred in Failing to Have the Jury Affirm the Verdict, Appellant Suffered No Prejudice

Even if the claim was preserved and there was statutory error, it was neither structural error, as found by the Court of Appeal, nor prejudicial. Article VI, section 13, of the California Constitution provides that "[n]o judgment shall be set aside, or new trial granted, in any cause, . . .for any error as to any matter of procedure, unless, after an examination of the entire cause . . . the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

Penal Code section 1258 requires: "After hearing the appeal, the Court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties." Penal Code section 1404 provides: "Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor

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[2] The Court of Appeal states that respondent misread the record, asserting that the trial "court did not state that it had been informed that the jury had reached a verdict" (although acknowledging this was a reasonable inference) but, instead, "asserted only that it understood that a verdict had been reached." (Opinion at p. 6.) The trial court stated in open court that the "[j]jury has indicated they have a verdict" and in the presence of the jury the trial court stated that it "understood they reached a verdict." (2 RT 378.) We believe the only reasonable inference is that the trial court had been informed that the jury had reached a verdict.

an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right."

Appellant framed the issue in the Court of Appeal as a violation of the due process right to a unanimous jury. But the Court of Appeal recognized that the trial court "did not discharge the jury before it reached a verdict, and defendant was not deprived of a verdict from his chosen jury. Rather, that jury deliberated and rendered a verdict, which was read and entered." (Typed opn. at p. 9.) The Court further recognized that "nothing in the record suggests that all of the jurors did not agree with the verdict when it was read." (*Ibid.*) Instead, the Court of Appeal found the verdict defective because the trial court did not comply with the statutory requirement of section 1149 in receiving the verdict. (*Id.* at pp. 9-10.)

The error identified by the Court of Appeal was a statutory defect, subject to harmless error analysis. It was not "structural" error.

As this Court has explained:

> A structural defect is the type of error "affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself," one that "'transcends the criminal process'" and "def[ies] analysis by 'harmless-error' standards." (*Arizona v. Fulminante* [1991] 499 U.S. [279] at p. 309-311.) Examples of structural defects include total deprivation of the right to counsel at trial (*Gideon v. Wainwright* (1963) 372 U.S. 335); trial before a judge who is not impartial (*Tumey v. Ohio* (1927) 273 U.S. 510); and the giving of a constitutionally defective instruction on reasonable doubt (*Sullivan v. Louisiana* (1993) 508 U.S. [275,] 281-282.)

(*People v. Marshall* (1996) 13 Cal.4th 799, 851, parallel citations omitted.)

"[I]t is the rare case in which [even] a constitutional violation will not be subject to harmless error analysis." (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 282 (conc. opn. of Rehnquist, C.J.).) In *Washington v. Recuenco* (2006) 548 U.S. 212, 218, the Supreme Court reiterated, "Only in rare cases

has this Court held that an error is structural, and thus requires automatic reversal."[3] Indeed, even if instruction on an element of the offense is omitted or erroneous, it is still subject to harmless error analysis. (*Neder v. United States* (1999) 527 U.S. 1, 8-15, 19; *People v. Flood* (1998) 18 Cal.4th 470, 502-503, 506.)

The Supreme Court has addressed the basic underpinning of the harmless error doctrine as applied to constitutional error in these terms:

> In *Chapman v. California*, 386 U.S. 18 (1967), this Court rejected the argument that errors of constitutional dimension necessarily require reversal of criminal convictions. And since *Chapman*, "we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." That principle has been applied to a wide variety of constitutional errors. Our application of harmless-error analysis in these cases has not reflected a denigration of the constitutional rights involved.

(*Rose v. Clark* (1986) 478 U.S. 570, 576-577, citations omitted.)

The Supreme Court does recognize that "some errors necessarily render a trial fundamentally unfair. The state of course must provide a trial before an impartial judge, with counsel to help the accused defend against the State's charge. Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally

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[3] In a footnote, it cited these rare instances – *Gideon v. Wainwright* (1963) 372 U.S. 335 (complete denial of counsel); *Tumey v. Ohio* (1927) 273 U.S. 510 (biased trial judge); *Vasquez v. Hillery* (1986) 474 U.S. 254 (racial discrimination in selection of grand jury); *McKaskle v. Wiggins* (1984) 465 U.S. 168 (denial of self-representation at trial); *Waller v. Georgia* (1984) 467 U.S. 39 (denial of public trial); and *Sullivan v. Louisiana* (1993) 508 U.S. 275 (defective reasonable doubt instruction). (*Washington v. Recuenco*, 548 U.S. at p. 218, fn. 2.)

fair." (*Rose v. Clark, supra*, 478 U.S. at pp. 577-578, citations omitted.) However, the errors to which harmless error analysis does not apply

> are the exception and not the rule. [Citation.] Accordingly, if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis. The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed. As we have repeatedly stated, "the Constitution entitles a criminal defendant to a fair trial, not a perfect one."

(*Id.* at pp. 578-579.)

"The harmless error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence [citation], and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. Cf. R. Traynor, *The Riddle of Harmless Error* 50 (1970) ('Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it')." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681; accord, *Arizona v. Fulminante* (1991) 499 U.S. 279, 308; *Rose v. Clark, supra,* 478 U.S. at p. 577.)

In this case, the trial court stated it understood the jury reached a verdict and asked the foreman to give the verdict forms to the bailiff. The verdicts were then read in open court in the presence of all the jurors. None of the jurors indicated at any time they had not reached a verdict or that the verdicts read in court were not their verdicts, and there was nothing in the record to show that the verdicts were incomplete, inconsistent, or defective.

Under such circumstances any violation of the statute was state trial error, subject to harmless error analysis, not structural error.

The Court of Appeal found that it could not determine if the error was harmless because "it is not possible for us to know whether the foreperson would have acknowledged the verdict; and if so, whether defendant would have requested that jurors be individually polled; and if polled, whether all of the jurors would have endorsed the verdict as his or her verdict." (Typed opn. at p. 7.) The Court's analysis is based on conjecture and speculation, not a reasonable examination of the record. After the jury indicated it had a verdict and the court had it brought into the courtroom, the court specifically addressed the jurors, stating it understood they reached a verdict, asked for the foreperson, then had the foreperson hand the verdicts to the bailiff, so that the verdicts could be handed to the clerk to read. The clerk read those verdicts, in the presence of all the jurors, including the foreperson, and all parties. The Court of Appeal acknowledges that "there is nothing in the record to suggest that the jurors did not agree with the verdict when read . . . ." (Typed opn. at p. 7.)[4] Hence, there is no reasonable basis to suggest that the foreperson would not have acknowledged the verdicts.

While polling the jurors is a prophylactic protection of the constitutional right to a unanimous verdict, polling itself is a statutory right and only operative upon request of a party. Nothing in the statutes requires the court to ask the parties, on the record, if they wish the jury to be polled. "The polling of the jury is a right available only upon the request of either party . . . A failure to make a proper request imposes no burden upon the

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[4] The jury had been instructed that its "verdict on each count and any special findings, that's the allegations, must be unanimous. This means that, to return a verdict, all of you must agree to it." (2 RT 278.)

court to poll the jury, nor in the absence of such a request does a failure to so poll constitute a denial of a constitutional right." (*People v. Lessard* (1962) 58 Cal.2d 447, 452; see *People v. Masajo* (1996) 41 Cal.App.4th 1335, 1340 [even under federal law, the right to poll the jury is not of constitutional dimension, finding harmless the failure of the court to individually poll the jurors]; see also Pen. Code, §1163 ["When a verdict is rendered, and before it is recorded, the jury *may* be polled, *at the request of either party*. . . ," emphasis added.) Indeed, even when a jury is incompletely polled and defense counsel makes no objection, the claim of error may be found to be forfeited on appeal. (See *People v. Wright* (1990) 52 Cal.3d 367,415, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 458-459 [issue of failure to individually poll one of the 12 jurors waived by failure to object].) Further, failure to request individual polling would not support a claim of ineffective assistance of counsel in the absence of a showing of prejudice. (*People v. Coddington* (2000) 23 Cal.4th 529, 656, disapproved on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13 [to establish prejudice record must reflect dangers polling seeks to avoid actually occurred].)

Neither counsel requested that the jury be polled. The record shows no inadequacy of counsel as there was nothing to suggest any juror would have disavowed the verdict. Indeed, the Court of Appeal recognized that the evidence supporting the verdicts here were "ample if not overwhelming." (Typed opn. at p. 7.)

The decisions cited by the Court of Appeal as support for its decision are distinguishable. Each involved defects, mistakes, or inconsistencies with respect to the verdicts themselves, or the absence of a juror or party. In *People v. Thornton* (1984) 155 Cal.App.3d 845, the clerk read the verdict form finding defendant *not guilty* of the charged offense, and after the jury affirmed this as its verdict, the verdict was recorded, and the jury

was excused. It was later discovered that the jury had signed a second verdict form finding defendant *guilty* of the lesser included offense. However, there was no reading, acknowledgement, or recordation of this verdict. The trial court reconvened the excused jury the next day to read and record the verdict. *Thornton* held it beyond the court's power to reconvene the discharged jury, and, hence. the only verdict was the one rendered before the discharge of the jury. *Thornton* acknowledged this Court's holdings that nonprejudicial departures from statutory procedures do not require the rejection of a defective verdict. (See *People v. Gilbert* (1880) 57 Cal. 96, *People v. Smith* (1881) 59 Cal. 601, *People v. Smalling* (1892) 94 Cal. 112). *Thornton* distinguished those decisions because the verdicts in those cases were read, recorded, and acknowledged. (*Thornton*, *supra*, 155 Cal.App.3d at p. 857.)

In *People v. Hendricks* (1987) 43 Cal.3d 584, a special circumstance murder case in which defendant pleaded not guilty by reason of insanity, the jury found defendant guilty as charged, and set the penalty at death. On the day for sentencing, the parties reminded the court that a sanity hearing had not been conducted after the guilt phase, as required by statute. Over defendant's objection, the court reconvened a new jury to decide sanity. That jury deadlocked and a mistrial was declared. The trial court, over defendant's objection, then reconvened the original jurors who had been discharged five months earlier for a new sanity hearing. This Court reversed on the ground that "once the court loses control over the jurors, it is without jurisdiction to call them together again." (*Id.* at p. 597.)

In *People v. Lankford* (1976) 55 Cal.App.3d 203 (disapproved on another ground in *People v. Collins* (1976) 17 Cal.3d 687, 694), the verdict was signed and dated before one of the original jurors had been replaced by an alternate. However, the verdict was orally acknowledged in court by the eleven original jurors and the alternate. In that context, the Court of Appeal

stated that the "oral declaration of the jurors endorsing the result is the true return of the verdict." (*Id.* at p. 211.)

In *People v. Mestas* (1967) 253 Cal.App.2d 780, the jury's signed and dated verdict forms purported to find the defendant both guilty and not guilty of the offense. The *Mestas* court found the trial court did not err in immediately sending the jury back for further deliberations, and allowing them to return and acknowledge only the guilty verdict. It was in this context that the *Mestas* court stated that the oral declaration by the jurors unanimously endorsing a given result is the true return of the verdict. (*Id.* at p. 786.)

In *People v. Traugott* (2010) 184 Cal.App.4th 492, 500, one of the 12 jurors was absent when the verdicts were read. Penal Code section 1147 specifically provides that if all jurors do not appear in court after the jury agrees on a verdict, "the rest must be discharged without giving a verdict" and the action may be again tried.

No such deficiency as occurred in those cases is present here. Instead, there was at most a technical violation of a state statute, which was not prejudicial, like the failure to call juror names in *People v. Redundo, supra*, 44 Cal. 538 and the discharge of the jury before recording the verdicts in *People v. Gilbert, supra*, 57 Cal. 96; *People v. Smith, supra*, 59 Cal. 601, and *People v. Smalling, supra,* 94 Cal. 112. (See *People v. Epps* (2001) 25 Cal.4th 19, 29 [court need not consider the dual federal harmless error standards because the right to jury trial on prior conviction allegations is purely a creature of state statutory law; because the error was purely one of state law, the state harmless error test applies].)

Under the circumstances of the instant case, where the court addressed the jury, stating it understood they reached a verdict, asked the foreperson to hand in the verdicts, and had those verdicts read in open court in the presence of all jurors and parties, any error by the court in not asking the

foreman or jury after the verdicts were read to affirm it was their verdict was harmless.

CONCLUSION

Accordingly, respondent respectfully requests that review be granted.

Dated: April 26, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 4,960 words.

Dated: April 26, 2011

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Attorney General of California

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Attorneys for Respondent

EXHIBIT A

SEE CONCURRING OPINION

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CHRISTINA MARIE ANZALONE, Defendant and Appellant.	H035123 (Santa Clara County Super. Ct. No. CC935164)

I. STATEMENT OF THE CASE

A jury convicted defendant Christina Marie Anzalone of assault with a deadly weapon, making a criminal threat, and brandishing a deadly weapon and further found that she personally used a knife in committing the assault and making the threat. (Pen. Code, §§ 245, subd. (a)(1), 422, 417, subd. (a)(1), 667, 1192.7, 12022, subd. (b)(1).)[1] The court sentenced her to a term of 4 years 8 months.

On appeal from the judgment, defendant claims she was denied her right to a complete, valid, and unanimous verdict. She claims the court erred in admitting a prior assault for purposes of impeachment, failing to sanitize it, and providing inadequate instructions on its consideration by the jury. Last, she claims the court erred in imposing

[1] The jury acquitted defendant of misdemeanor vandalism. (Pen. Code, § 594, subd. (a)(b)(2)(A).)

All unspecified statutory references are to the Penal Code.

a full term enhancement on the threat conviction and failing to stay the term for brandishing.

We conclude that there was no valid verdict in this case and reverse the judgment.

II. FACTS

On February 22, 2009, around 5:00 p.m., Atul Patel, who ran the Hedding Inn motel in San Jose, was at his desk when defendant came in and asked to speak to Leon Wallace, who lived there. Patel said he was not there. She then asked to go to his room, but Patel said she was not allowed there. Defendant accused him of lying and left. A few minutes later, she returned, pushed Patel's computer over, and threatened to "hurt" and "kill" him. She was holding a knife, and Patel was afraid that she would use it because she appeared to have been drinking. He called 911, and she left.

Later that day, defendant encountered Richard Malott and his wife Kimberly at the City Team Ministries. The Malotts had gone there to eat, but Kimberly left after a short time. Outside, defendant started talking to her. When Richard came out, he told Kimberly to come to their truck to leave. Defendant said she was not finished talking to her, she started swearing at him, accused him of abusing Kimberly, and then "chest butt[ed]" him. He started walking away and then turned around. Defendant threw a bagel and an open knife at him. The knife hit him in the chest. He picked up the knife and went to his truck. Kimberly joined him seconds later. As they tried to leave, defendant blocked their way and then grabbed the antennae, which broke off as Richard drove away.

A police officer was across the street during the incident. He testified that, immediately after the incident, defendant was too angry and drunk to be interviewed.

The Defense

Defendant testified that she was intoxicated when she went to the Hedding Inn motel. She said that she pushed over Patel's computer because he had lied to her and had falsely told police that she was breaking into a room. She said she may have threatened

to return but did not threaten to hurt or kill him. She denied taking her knife from its clip on her sweatshirt or opening it.

Defendant said she went to the City Team Ministries to get some food from people she knew who were leaving because she was not allowed inside. She started talking to Kimberly. Richard came out and verbally abused Kimberly. Defendant then started yelling at him and trying to provoke a fight. Her knife was clipped to her sweatshirt, and as she railed against him and waived her arms, the knife flew off and skidded to the ground. Richard then picked it up and went to his truck. She followed and demanded that he return it.

III. UNANIMOUS VERDICT

Defendant contends she was denied the right to complete, valid, and unanimous verdict because the court discharged the jury without an oral endorsement in open court that it had reached a unanimous verdict.

Background

On October 7, 2009, after final argument and instructions, the jury retired to deliberate. On October 8, the jury reported that it had reached a verdict. After the jurors returned to the courtroom, the court stated, "I understand you've reached a verdict" and then asked, "Who is the foreperson? Mr. (Juror)?" That juror responded, "Yes." The court received the verdict forms from the foreperson and handed them to the clerk, who read them. When the clerk finished, the court stated, "Ladies and gentlemen of the jury, you've now completed your jury service in this case and on behalf of the judges and attorneys and everyone in the court, please accept my sincere thanks for your time and effort that you put into your verdicts in this case." The court gave jurors additional instructions concerning payment, communications with the parties, and the privacy and the release of personal information about jurors. The court concluded, "Again, I can't thank you enough for your attention during this trial. I never say this, I'll say you're one of the best juries I've ever had as far as being prompt, attentive to the evidence. [¶] We

notice that, we all notice it here and we talked about it and I appreciate your service. You are now excused for at least one year and if you want to talk to the attorneys, they will be out in about three minutes in the hall, otherwise you can leave . . . "

Applicable Statutes and Legal Principles

Under the California Constitution, a defendant in a criminal case has a fundamental right to a unanimous jury verdict. (*People v. Collins* (2001) 26 Cal.4th 297, 304; *People v. Russo* (2001) 25 Cal.4th 1124, 1132; *People v. Jones* (1990) 51 Cal.3d 294, 305; see Cal. Const., art. I, § 16.)[2]

Section 1149 provides: "When the jury appear they *must* be asked by the Court, or Clerk, whether they have agreed upon their verdict, and if the foreman answers in the affirmative, they *must*, on being required, declare the same." (Italics added.)

Section 1163 provides: "When a verdict is rendered, and before it is recorded, the jury may be polled, *at the request of either party*, in which case they must be severally asked whether it is their verdict, and if any one answers in the negative, the jury must be sent out for further deliberation." (Italics added.)

Section 1164, subdivision (a) provides in relevant part, "When the verdict given is receivable by the court, the clerk shall record it in full upon the minutes, *and if requested by any party* shall read it to the jury, and inquire of them whether it is their verdict. If any juror disagrees, the fact shall be entered upon the minutes and the jury again sent out; but if no disagreement is expressed, the verdict is complete, and the jury shall . . . be discharged from the case." (Italics added.)

It is settled that the written verdict forms do not by themselves constitute the verdict; rather, it is the oral acknowledgement of the verdict reflected in the verdict forms

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[2] Article I, section 16 of the California Constitution provides, in relevant part, "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict. . . . [¶] . . . [¶] In criminal actions in which a felony is charged, the jury shall consist of 12 persons. . . ."

in open court that constitutes a complete verdict. (*People v. Hendricks* (1987) 43 Cal.3d 584, 597; *People v. Traugott* (2010) 184 Cal.App.4th 492, 500 (*Traugott*); *People v. Green* (1995) 31 Cal.App.4th 1001, 1009 (*Green*); *People v. Lankford* (1976) 55 Cal.App.3d 203, 211, disapproved on other grounds in *People v. Collins* (1976) 17 Cal.3d 687, 694, fn. 4; *People v. Mestas* (1967) 253 Cal.App.2d 780, 786.) "[T]he right to an oral affirmation of the verdicts by the jurors is not a mere procedural formality. Even if each of the jurors voted to convict a defendant during deliberations, jurors may equivocate or change their vote when called upon in open court." (*Traugott, supra,* 184 Cal.App.4th at p. 501; *Chipman v. Superior Court* (1982) 131 Cal.App.3d 263, 266; e.g., *Green, supra,* 31 Cal.App.4th 1001 [although jury announced it had reached a verdict, in court one juror equivocated, and jury sent back for further deliberations]; *People v. Superior Court (Thomas)* (1967) 67 Cal.2d 929 [mistrial upheld after one juror equivocated when asked about verdict].) Thus, without an oral acknowledgement of unanimity, there is simply no verdict. (*Traugott, supra,* 184 Cal.App.4th 492, 500; *People v. Thornton* (1984) 155 Cal.App.3d 845, 858 (*Thornton*); see 6 Witkin & Epstein, Cal.Criminal Law (3d ed. 2000) Criminal Judgment, § 44, p. 71.)

However, the requirement of an oral acknowledgement does not mean that the court must poll each juror. Rather, the foreperson of the jury may speak collectively for the jury and provide the requisite oral acknowledgement. (*People v. Wiley* (1931) 111 Cal.App. 622, 625; *Stalcup v. Superior Court* (1972) 24 Cal.App.3d 932, 936, disapproved on other grounds in *People v. Dixon* (1979) 24 Cal.3d 43, 53.) If the foreperson does so and a party questions whether the verdict was unanimous, then that party may request that the jurors be individually polled. (See §§ 1163, 1164.) However, "[t]he polling of the jury is a right available only upon the request of either party. [Citation.] A failure to make a proper request imposes no burden upon the court to poll the jury, nor in the absence of such a request does a failure to so poll constitute a denial of a constitutional right." (*People v. Lessard* (1962) 58 Cal.2d 447, 452.) Whereas the

complete failure to orally acknowledge a written verdict in open court would normally invalidate the verdict (*Thornton, supra*, 155 Cal.App.3d at pp. 856-860), individual polling errors do not require reversal in the absence of a showing of prejudice. (*People v. Masajo* (1996) 41 Cal.App.4th 1335, 1339-1340.)

Discussion

Attorney General argues that there was a sufficient collective acknowledgement of the verdict. According to the Attorney General, the trial court "stated it had been informed the jury reached a verdict, and asked for the foreman who acknowledged they reached a verdict." She refines this rather awkward description of what happened, alternatively stating that "[u]pon being asked, the jurors collectively affirmed this was their verdict." The Attorney General opines that it is reasonable to assume that "jurors would not sit there in silence if in fact that was not their verdict." Thus, she argues that if defendant had doubts about whether the verdict was unanimous, it was incumbent on her to request individual polling, which she did not do.

The Attorney General misreads the record. The court did not state that it had been informed that the jury had reached a verdict. Although that is a reasonable inference, the court asserted only that it understood that a verdict had been reached. The record does not suggest how the court came by its understanding.

Moreover, and contrary to the Attorney General's reading, the foreperson did not expressly acknowledge the verdict in open court; nor was the foreperson asked to do so. As quoted above, the court's assertion about the verdict was not a question but an affirmative statement. The only question the court asked was *who* the foreperson was, and whether it was a particular juror. The person the court referred to answered that question, saying "Yes, sir." The Attorney General reads the foreperson's "yes" as the requisite oral acknowledgement. However, we find this reading to be unreasonable, and we reject it.

We note that after the juror acknowledge being the foreperson, the court moved on to other matters, and although the clerk read the written verdict forms, the court did not then ask the foreperson to acknowledge the verdict. The court simply advised jurors about other matters and discharged them.[3]

In sum, we conclude that although the jury deliberated and rendered a verdict, which was read in court, the lack of oral acknowledgement by the jurors individually or by the foreperson rendered the jury's verdict incomplete, defective, and invalid. And, without a valid verdict, there can be no valid judgment. Furthermore, this defect is structural and not subject to harmless-error analysis. Although there is ample if not overwhelming evidence to support the verdict reflected in the verdict forms, and although there is nothing in the record to suggest that the jurors did not agree with the verdict when read, it is not possible for us to know whether the foreperson would have acknowledged the verdict; and if so, whether defendant would have requested that jurors be individually polled; and if polled, whether all of the jurors would have endorsed the verdict as his or her verdict.

The court in *Thornton, supra*, 155 Cal.App.3d at page 860 expressed our situation this way: "[W]e are faced with error of constitutional proportions whose actual prejudicial effect is insusceptible of calculation. There is no false humility in recognizing that we lack the omniscience that would enable us to say that no juror in this case would have impeached the guilty verdict form had defendant been afforded his right to *timely* test each juror in open court. We cannot say that they were not influenced by outside

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[3] At oral argument, the Attorney General argued that taken together, (1) the court's understanding that a verdict had been reached, (2) its receipt of the verdict forms from the foreperson, and (3) the reading of the verdict by the clerk on the record constitutes substantial compliance with section 1149. We disagree and fail to see how they represent the functional equivalent of an *oral* acknowledgement or substantial compliance with section 1149.

forces encountered after discharge. We, therefore, have no choice but to find the errors prejudicial per se."

IV. DOUBLE JEOPARDY

We asked the parties to consider whether a retrial would be barred by constitutional protections against double jeopardy if the judgment were reversed, an issue not raised by defendant. At oral argument, the parties disagreed. Defendant argued that retrial would be barred because the court dismissed the jury without a verdict and without necessity or consent. The Attorney General argued that retrial would not be barred because the court's failure to secure an oral acknowledgment of the verdict simply constitutes reversible trial error. We agree with the Attorney General.

The state and federal constitutions prohibit placing a person in jeopardy more than once for the same offense. (U.S. Const., 5th Amend.; Cal. Const. art. I, § 15.) "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." (*Green v. United States* (1957) 355 U.S. 184, 187-188.)

The defendant is in jeopardy where, as here, he or she is placed on trial for an offense; on a valid indictment or information or other accusatory pleading; before a competent court; and with a competent jury, duly impaneled, sworn, and charged with the case. (See *Jackson v. Superior Court* (1937) 10 Cal.2d 350, 352, 355.)

Once jeopardy has attached, any unjustified discharge of the jury before it reaches a verdict gives rise to the defense of double jeopardy. A discharge is unjustified unless it is with the defendant's consent or for recognized reasons of strict necessity. (*Curry v. Superior Court* (1970) 2 Cal.3d 707; see 1 Witkin & Epstein, Cal. Criminal Law (3d ed.

2000) Defenses, § 119, p. 464; Pen. Code, § 1141.) This rule "prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict." (*Green v. United States, supra,* 355 U.S. at p. 188; e.g., *Jackson v. Superior Court, supra,* 10 Cal.2d at p. 357 [mistrial for error or misconduct over defendant's objection]; *People v. Arnett* (1900) 129 C. 306 [defective verdict accepted by the court]; *Paulson v. Superior Court* (1962) 58 Cal.2d 1 [premature discharge due to apparent jury deadlock].) Thus, the "discharge of the jury without a verdict is equivalent in law to an acquittal and bars a retrial, unless the defendant consented thereto or legal necessity required it." (*Curry v. Superior Court, supra,* 2 Cal.3d at p. 712.)

On the other hand, it is well settled that "if the defendant obtains reversal of a conviction on appeal based on trial errors other than insufficiency of the evidence, [the defendant] is subject to retrial." (*People v. Hernandez* (2003) 30 Cal.4th 1, 6 (*Hernandez*).) In *Hernandez, supra,*30 Cal4th 1, the court evaluated the rule precluding retrial after an unnecessary mistrial is declared and the defendant is deprived of a verdict from his or her chosen jury. The court concluded that this rule is inapplicable when a juror is improperly discharged and a reconstituted jury renders a verdict. (*Id.* at pp. 8-9.) Although the verdict could not stand because of the improper discharge of the juror, the court reasoned that the double jeopardy bar was not applicable because the "defendant's chosen jury was not discharged but instead, with the substitution of a preselected alternate juror, remained intact until a verdict was rendered." (*Id.* at p. 9.)

We conclude that retrial is not barred in this case. The court did not discharge the jury before it reached a verdict, and defendant was not deprived of a verdict from his chosen jury. Rather, that jury deliberated and rendered a verdict, which was read and entered. Although nothing in the record suggests that all of the jurors did not agree with the verdict when it was read, that verdict was defective because the court failed to comply

with section 1149 and have the jury orally acknowledge it in open court before being discharged. This was plain reversible trial error.

In our view, the circumstances here are more akin to those in *Hernandez* than to the unjustified discharge of the jury before it has reached and delivered a verdict. Accordingly, we find applicable the general rule that reversal on appeal for trial error, other than for insufficiency of the evidence, does not bar retrial.

IV. DISPOSITION[4]

The judgment is reversed.

[4] Given our disposition, we consider it unnecessary to address defendant's other claims of error.

RUSHING, P.J.

I CONCUR:

ELIA, J.

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PREMO, J., Concurring

I concur. I write separately only to express my disappointment at having to reverse the judgment over such an elementary issue. "[I]t is a matter of regret that occasion for it should ever have arisen." (*People v. Smalling* (1892) 94 Cal. 112, 117.) It is a simple enough matter to ask the question, "Is that your verdict." While it seems a small thing, the failure to ask the question deprives any equivocating juror of the opportunity to express his or her reservations. Nor is it appropriate to interpret the jury's silence as assent since there was no question to which the jury could have assented, silently or otherwise. "The record clearly shows that irregularities existed in the manner in which [the verdict was] returned into court; irregularities occasioned without necessity, and which could have been easily avoided. In cases of felony . . . the only correct procedure is to adhere strictly to the statute. Any other course is a dangerous innovation, which generally results in a miscarriage of justice." (*Id.* at p. 120.)

Premo, J.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Anzalone**

No.: **S**_____

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On April 26, 2011, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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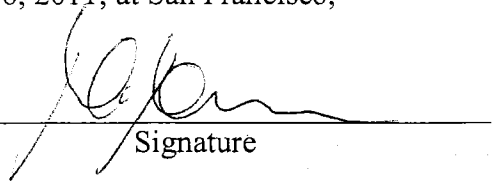
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 26, 2011, at San Francisco, California.

M. Argarin
Declarant



Signature

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