ORIGINAL

NO. 09-2208

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 91324

STATE OF OHIO,

Plaintiff-Appellant

-vs-

WILLIAM N. DAVIS,

Defendant-Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION

Counsel for Plaintiff-Appellant

WILLIAM D. MASON
Cuyahoga County Prosecutor

T. ALLAN REGAS (0067336)
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

Counsel for Defendant-Appellee

JOHN F. CORRIGAN
19885 Detroit Road #335
Rocky River, Ohio 44116

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SERVICE 10

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State v. Davis, Cuyahoga App. No. 91324, 2009-Ohio-5217

EXPLANATION OF WHY THIS FELONY CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST

In this case, the Eighth District Court of Appeals has determined that a trial court's failure to inform a witness that she may be able to assert spousal privilege in lieu of testifying is per se reversible error, regardless of whether an objection was made and regardless of whether the testimony given affected the outcome of trial. By doing so, the appellate court created a new standard of law, one not recognized by this or any other appellate court, that equates error in informing a spouse as to privilege under Evid.R. 601(B) to structural error that warrants automatic reversal. This Court, and others, has applied a plain error analysis where a court fails to determine the competency of a testifying spouse under Evid.R. 601(B). The per se reversal in this matter is one that erodes longstanding precedent that dictates the procedure a reviewing court is to follow under Crim.R. 52 under the plain error doctrine.

Not only did the appellate court create a new rule of law in apposition to this Court's clear precedent, it changed the standard of plain error review under Crim.R. 52. This is troublesome to litigants where the rule's requirements have long been interpreted to require a two-part analysis, first, plain error is noticed, and second, the effect of the error upon the outcome is to be determined. However, the Eighth District has employed a per se rule of reversal upon noticing plain error, truncated longstanding precedent from this Court that a reversal of trial based upon plain error is done only where the error affected substantial rights and where that error affected the outcome of the proceedings.

Appellee William Davis was convicted of sexual crimes against two young girls. The State called Appellee's wife to the stand to testify as to the content of taped conversations she had with Appellee while he was detained in the county jail. She testified as to those

conversations, but did not testify that Appellee committed the crimes; on the contrary, she testified Appellant did not commit the crimes. The trial court did not determine the spouse's competency to testify under Evid.R. 601(B) and the appellate court noticed such as being plain error. It reversed the trial on the basis of that error, treating it as structural error in the proceedings. The appellate opinion is void of any analysis as to the impact the spouse's testimony had on the proceedings and does not determine whether or not the testimony would have changed the outcome at trial.

The State submits that this Court should adopt the following Propositions of Law in order to instruct courts in Ohio that a trial court's failure to determine spousal competency to testify under Evid.R. 601(B) is not structural error requiring immediate reversal, but is rather plain error that may be noticed under Crim.R. 52. Further, plain Error pursuant to Crim.R. 52 does not require per se reversal as now practiced by the Eight District Court of Appeals. These Propositions of Law read:

Proposition of Law I

> Where no objection is made to spousal testimony, a court's failure to inform the spouse of competency under Evid.R. 601 is not structural error requiring reversal but may be noticed as plain error.

Proposition of Law II

> The plain error standard of review requires a reviewing court to 1) notice unobjected to and unrecognized error at trial, and 2) determine that, but for the error the outcome at trial would be different.

This court should accept the Propositions of Law set forth in this appeal in order to swiftly reject the appellate court's creation of a new rule regarding Evid.R. 601(B) and its effect upon trials as well as rejecting the truncation of the plain error standard of review under Crim.R. 52

I. Statement of the Case and Facts

Appellee was found guilty of 8 counts of rape of child under the age of thirteen in violation of R.C. 2907.02(A)(1)(b), nineteen counts of rape with force in violation of R.C. 2907.02(A)(2), one count of rape under age of ten with force in violation of R.C. 2907.02(A)(2), and three counts of Gross Sexual Imposition in violation of R.C. 2907.05(A)(4). He was sentenced to life imprisonment for the prolonged period of sexual abuse of his victims, identified herein as D.S. and D.T.

D.S.'s childhood was severely disrupted by her uncle, the appellant. According to her testimony, Appellee began penetrating her vagina at age 9. Her mother noticed blood in the child's underwear at that time. Appellee engaged in vaginal intercourse with his niece from that time until she was in teens. She testified that he would ejaculate on her and then tell her to clean it up. At trial, D.S. itemized in excruciating detail eighteen separate vaginal rapes. While he was molesting D.S., Appellee began grooming his younger niece D.T. by feeling her chest. Alberta Davis testified she is married to Appellee. She testified to discussions with appellant on the recorded jail phones after the case had been brought.

The Eighth District Court of Appeals noted as plain error that the trial court did not determine whether Ms. Davis was competent to testify under Evid.R. 601(B). *State v. Davis*, Cuyahoga App. No. 91324, 2009-Ohio-5217, at ¶28. Although the court noted in its opinion that Ms. Davis, "[T]estified that she had no direct knowledge of the allegations and made several inconsistent statements about whether she believed defendant committed the offenses, " it failed to state the effect this testimony had on the outcome at trial. Id., at ¶ 29. Instead, the trial court cited to this Court's opinions in *State v. Brown*, 115 Ohio St.3d 55, 67, 2007-Ohio-4837 and *State v. Adamson* (1995), 72 Ohio St.3d 431 and declared that

that where a trial court fails to instruct a witness as to spousal competency the trial court has committed reversible error." *Davis*, 2009-Ohio-5217, at ¶28. The appellate court determined that it had no choice but to reverse the judgment of conviction in this case based upon its reading of this Court's precedent. Id., at ¶ 30.

II. Law And Argument

A. The Failure Of A Trial Court To Determine A Spouse's Competency To Testify Under Evid.R. 601(B) Is Not Structural Error Warranting Automatic Reversal.

Proposition of Law I:

> Where no objection is made to spousal testimony, a court's failure to inform the spouse of competency under Evid.R. 601 is not structural error requiring reversal but may be noticed as plain error.

The appellate court sua sponte raised the issue of whether the testimony of the Appellant's spouse resulted in error where the trial court did not advise her of a potential spousal privilege. First, the opinion identifies error where the trial court did not inform Appellee's spouse that she may elect to testify or not pursuant to Evid.R. 601(B), citing *State v. Brown*, 115 Ohio St.3d 55, 67, 2007-Ohio-4837 and *State v. Adamson*, 72 Ohio St.3d 431, 1995-Ohio-199. *Davis*, 2009-Ohio-5217, at ¶28. The analysis under Crim.R. 52 ends there; it does not analyze the impact the testimony had on the outcome of trial. As such, the court equated the error to structural error mandating reversal of every case in which the error occurs. This holding is in direct opposition to the precedent of this Court determining that where a trial court fails to determine the competency of a spouse under Evid.R. 601(B), the error may be noticed as plain error.

Evid.R. 601(A) provides that every person is competent to be a witness, subject to certain exceptions. Evid.R. 901(B) details one of those exceptions as being:

(B) A spouse testifying against the other spouse charged with a crime except when either of the following applies:

(1) a crime against the testifying spouse or a child of either spouse is charged;

(2) the testifying spouse elects to testify.

This Court has held that pursuant to this rule, "" *** must make an affirmative determination on the record that the spouse has elected to testify." *State v. Adamson* (1995), 72 Ohio St.3d 431, 650 N.E.2d 875, syllabus.

However, this Court did not mandate that if a court fails to determine a spouse's competency a reviewing court must reverse the trial regardless of the effect the spouse's testimony. Rather, this court analyzed the error in *Adamson* under the plain error standard of review. The appellate court made an unobjected to and unnoticed error in determining a spouse's competency to testify per se reversible error. This change stands in direct opposition to the plain error analysis employed first by this Court in *Adamson* and more recently in *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837. In *Adamson*, this Court applied plain error analysis to determine the effect of the spouse's testimony on the outcome of the proceedings. Specifically, this Court quoted *State v. Moreland* (1990) 50 Ohio St.3d 58, 62, 552 N.E.2d 894, 899, "Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise." *Adamson*, 71 Ohio St.3d, at 434-45.

This Court determined that under the facts of the case, the testimony of the spouse negated Adamson's defense in material respects. and found that because of the import of the spousal testimony, reversal was warranted. *Id.* Unlike that decision applying a plain

error review; per se, automatic reversal, as is now the standard within the Eighth District Court of Appeals.

In *Brown*, supra, this Court visited the issue of a trial court's failure to determine the competency of a testifying spouse. In that case, the defendant alleged he suffered ineffective assistance of counsel, arguing counsel did not ascertain whether or not a witness married to the defendant, preventing the witness from having the option to testify. After noting error, this Court analyzed the importance and impact of the alleged spouse's testimony and reasoned that:

> The importance of Wright's [the alleged spouse] testimony to the case against Brown cannot be overstated. Wright is the only one who observed the events of that night. Without her testimony, there would be no firsthand account of Brown's role in the deaths of Toeran and Roan. **The fact that she was not properly found competent to testify severely undermines confidence in the jury's verdict because it calls into question whether, in the absence of her testimony, the jury still would have found Brown guilty of the aggravated-murder charge and thus death-eligible.**"

Id., at ¶ 64. (Emphasis added.)

In this case, the opinion is void of analysis of Ms. Davis's testimony in relation to the effect it had on his convictions. Although the opinion details the testimony presented, it does not address the importance or impact of the testimony on the verdict.

The taped conversations of Appellee and his wife that contain the evidence the prosecution relied upon to support Appellee guilt, e.g., attempting to manipulate the victim's testimony, are admissible regardless of whether Ms. Davis testified. The remainder of the testimony was not material to the determination of guilt. Significantly, the appellate court noted that, "She testified that she had no direct knowledge of the allegations and made several inconsistent statements about whether she believed defendant committed the offenses." *Davis*, 2009-Ohio-91324, at ¶ 29.

Unlike the testimony at issue in *Adamson* and *Brown*, Ms. Davis's testimony was not a "smoking gun" relied upon by the jury to find guilt. That evidence came directly from the victims' themselves. An examination of the entire record disregarding Ms. Davis's testimony reveals that the victims' testimony was sufficient to sustain the conviction, especially where it was corroborated by other testimony. Further the taped conversations that went to Appellee's actions after the case had been brought were admissible. The spousal testimony in this matter was not eyewitness testimony to the crimes; was not the only evidence presented of Appellant's guilt, and it did not serve to negate Appellant's defense. If anything, the spousal testimony aided Appellant's defense in this case.

No other appellate district has created a per se rule of reversal where a spouse's competency to testify was not properly determined. In *City of Mason v. Molinari*, Warren App. No. 06-TRC-00104, 2007-Ohio-5395, the court held that plain error only occurred if the spousal testimony would have changed the outcome of the case. *Id.*, at 4. That court recognized that an application of the plain error doctrine did not end after finding error, but continued in order to determine whether or not an analysis of whether the error was harmless must be taken. Id., see also, *State v. Knox* (Jun. 24, 1997), Franklin App. No. 96APA09-1265, unreported ("Even assuming, however, that the references to defendant's wife were improper, such error was harmless where it is highly probable that the evidence did not contribute to defendant's conviction."); *State v. Hodge*, Franklin App. No. 04AP-294, 2004-Ohio-6980, at ¶ 8-9 (Stating that regardless of whether the spouse was competent to testify, the testimony did not affect the outcome at trial and was not plain error.)

When the record at trial is examined without Ms. Davis's trial testimony, confidence in the verdict in this case is in no way compromised or undermined. Accordingly, had the

appellate court not created a per se rule of reversal, but employed the plain error analysis in accord with this Court's precedent and the practice of other appellate districts, it would not have grounds to reverse this matter. Because of this, the State asks that this Court accept its first proposition of law, summarily reverse the Court of Appeals, and affirm the judgment of convictions in this matter.

B. The Appellate Decision Truncates Longstanding Precedent and Creates a New Standard of Review Of Plain Error Under Crim.R. 52

Proposition of Law II reads:

> The plain error standard requires a reviewing court to 1) notice unrecognized error, and 2) determine that, but for the error, the outcome at trial would be different.

In this case, the appellate court truncated the plain error rule, finding that this Court has held that the testimony of a spouse given without a trial court determining the spouse's competency is per se reversible error. This Court has not so held and the appellate court has misread both Crim.R. 52 and this Court's precedent in order to create a new, truncated analysis under Crim.R. 52 that equates plain error to structural error.

Plain error is set defined in the Criminal Rules of Procedure as being either harmless error or error that affects substantial rights. Crim.R. 52 defines the error as being:

> A) Harmless error
> Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.
>
> (B) Plain error
> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

This Court explained Crim.R. 52 and the procedure an appellate court is to take when noticing plain error:

> Thus, Crim.R. 52(A) sets forth two requirements that must be satisfied before a reviewing court may correct an alleged error. First, the reviewing court must determine whether there was an "error" i.e., a "[d]eviation from a legal rule." *United States v. Olano* (1993), 507 U.S. 725, 732-733, 113 S.Ct. 1770, 123 L.Ed.2d 508. Second, the reviewing court must engage in a specific analysis of the trial court record-a so-called "harmless error" inquiry-to determine whether the error "affect[ed] substantial rights" of the criminal defendant. This language has been interpreted to "mean[ ] that the error must have been prejudicial: It must have affected the outcome of the [trial] court proceedings." (Emphasis added.) *Id.* at 734, 113 S.Ct. 1770, 123 L.Ed.2d 508.

State v. Fisher, 99 Ohio St.3d 127, 789 N.E.2d 222, 2003-Ohio-2761, at ¶7.

In implementing this analysis, this Court has stated:

> Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise.

State v. Moreland (1990), 50 Ohio St.3d 58, 62, 552 N.E.2d 894, 899 (Citing, *State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804, paragraph two of the syllabus; *State v. Greer* (1988), 39 Ohio St.3d 236, 252, 530 N.E.2d 382, 401.)

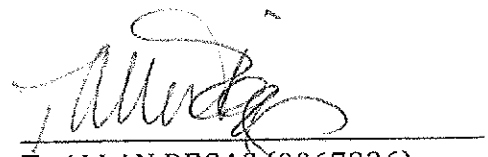
The appellate court sua sponte identified unobjected to and unnoticed error. Its analysis under Crim.R. 52 ends there; the court does not analyze the impact the testimony had on the outcome of trial or determine whether or not Appellee was prejudiced by the error. The appellate court has changed the standard of review pf plain error. Its change stands in direct opposition to the analysis employed by this Court in both *Adamson* and *Brown*, cases directly cited as authority in its opinion.

The truncation of the plain error analysis has not been made by other courts following *Adamson* or *Brown*. The law from this Court is clear. Review of plain error requires both a finding of unnoticed and unobjected to error and a finding that the error affected the outcome of trial. In this matter, the appellate opinion rejects that analysis and has truncated the rule, eliminating harmless error. This Court did not mandate such drastic measure in its opinions in *Adamson* and *Brown* and the appellate opinion in this

matter cannot do so either. For these reasons the State asks that this Court accept the State's second Proposition of Law.

Respectfully submitted,

WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR



BY: _____
T. ALLAN REGAS (0067336)
Assistant Prosecuting Attorney
1200 Ontario Street, 9th Floor
Cleveland, Ohio 44113
216.443.7800

SERVICE

A copy of the foregoing Memorandum in Support has been mailed this 7 day of December 2009, to John F. Corrigan, 19885 Detroit Road #335, Rocky River, Ohio 44116.

_____
Assistant Prosecuting Attorney

NOV 17 2009

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91324

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WILLIAM N. DAVIS

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-500668

BEFORE: Sweeney, J., Stewart, P.J., and Boyle, J.

RELEASED: October 1, 2009

JOURNALIZED:

NOV 17 2009

CA 91324

T. ALLAN REGAS
ASST. COUNTY PROSECUTOR
8TH FLOOR JUSTICE CENTER
1200 ONTARIO STREET
CLEVELAND, OH 44113

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ATTORNEY FOR APPELLANT

John F. Corrigan
19885 Detroit Road, Suite 335
Rocky River, Ohio 44116

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
BY: Brent C. Kirvel
Assistant Prosecuting Attorney
1200 Ontario Street
Cleveland, Ohio 44113

FILED AND JOURNALIZED
PER APP.R. 22(C)

NOV 17 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

ANNOUNCEMENT OF DECISION
PER APP.R. 22(B) AND 26(A)
RECEIVED

OCT 01 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

JAMES J. SWEENEY, J.:

Defendant-appellant, William N. Davis ("defendant"), appeals his convictions for multiple sex offenses. After reviewing the facts of the case and pertinent law, we reverse and remand for a new trial.

On September 17, 2007, defendant was charged with 31 counts of rape and gross sexual imposition involving his two nieces, D.T.1[1] and D.T.2. According to D.T.1, defendant sexually molested her from 1999, when she was nine years old, until 2005, when she was 15 years old. According to D.T.2, defendant began to molest her in 2006 when she was eight or nine years old.

These allegations came to light in the fall of 2006, when D.T.1 told her mother that defendant had sexually abused her for six years. A subsequent investigation led to defendant's indictment. On February 20, 2008, a 12-person jury was impaneled without alternates, and court was adjourned. When court re-convened the next day, February 21, 2008, Juror 6 told the court that she was the victim of a domestic violence assault earlier that week, and again the previous night, and was treated for injuries. She felt that she was unable to complete her service because of the stress of the incident.

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[1]The parties are referred to herein by their initials or title in accordance with this Court's established policy regarding non-disclosure of identities of juveniles.

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The prosecution moved the court to discharge Juror 6 pursuant to R.C. 2945.36, stating that it was prepared to go forward with the case if defendant agreed to try it to a jury of 11. Defendant indicated that he had no objection to discharging Juror 6 and going forward with 11 jurors. The court then expressed concern about proceeding because if the case ran into the following week, there was a possibility of running out of jurors. Specifically, the court stated the following:

"That is the concern of the Court because I don't want this case not to be prosecuted because of running out of jurors. And we can certainly anticipate since we don't have alternates because we went through our entire venire yesterday and we are down to 11 if we excuse juror number 6, and then if any one of our jurors cannot be present Monday for any reason, I would anticipate - I don't know, I'm just guessing - speculating, that you would then move the Court to dismiss this case, to mistry this case and have your client discharged from all of the counts against him.

"Since we can anticipate that there - that if there's any additional problems we are minus jurors. I don't know that I'm so willing to proceed with 11 jurors instead of 12."

The court then asked defense counsel whether, if Juror 6 was discharged, he would agree to the entire jury being discharged without prejudice to the prosecution under R.C. 2945.36. Defense counsel objected.

The court then excused Juror 6 from jury service under R.C. 2945.36(A). Next, the court discharged the remaining jury with no prejudice to the State pursuant to R.C. 2945.36 and 2945.29. The court rescheduled the trial for March 3, 2008. A second jury was sworn in, and on March 7, 2008, this jury found defendant guilty of six counts of rape of a child under 13 years of age in violation of R.C. 2907.02(A)(1)(b); 13 counts of rape by force in violation of R.C. 2907.02(A)(2); one count of gross sexual imposition by force in violation of R.C. 2907.05(A)(1); and three counts of gross sexual imposition of a child under 13 years of age in violation of R.C. 2907.05(A)(4). On March 12, 2008, the court sentenced defendant to life in prison.

Defendant now appeals, raising three assignments of error for our review:

"I. The defendant was twice put in jeopardy for the same offenses contrary to the Fifth Amendment to the U.S. Constitution and Article I, Section 10 of the Ohio Constitution when after jeopardy having attached, the court denied appellant's request to try his case to a jury of eleven, dismissed the sworn panel, and impanelled [sic] a second jury.

"II. The appellant was denied a fair trial when evidence was admitted that appellant had a general propensity to molest young females when he was on trial for rape and GSI of two of his nieces.

"III. Appellant was prejudiced by ineffective assistance of counsel."

Pursuant to the Double Jeopardy Clauses of the U.S. and Ohio Constitutions, no person shall be put in jeopardy twice for the same crime. Fifth Amendment to the U.S. Constitution; Article I, Section 10 of the Ohio Constitution. "Where a criminal defendant has invoked the right to a trial by jury, jeopardy does not attach so as to preclude subsequent criminal proceedings until the jury is impaneled and sworn. * * * [I]nsofar as the Double Jeopardy Clause precludes successive criminal prosecutions, the proscription is against a *second criminal trial* after jeopardy has attached in a *first criminal trial*." *State v. Gustafson* (1996), 76 Ohio St.3d 425, 435 (emphasis in original).

Once jeopardy has attached, the issue of whether there can be a subsequent prosecution after a mistrial has been declared depends on whether a retrial falls within an exception to the Constitutional bar of double jeopardy. "In cases where a mistrial has been declared without the defendant's request or consent, double jeopardy will not bar a retrial if (1) there was a manifest necessity or a high degree of necessity for ordering a mistrial, or (2) the ends of public justice would otherwise be defeated." *City of Cleveland v. Wade* (Aug. 10,

2000), Cuyahoga App. No. 76652, citing *Sidney v. Little* (1997), 119 Ohio App.3d 193, 196-97. "An order of the trial judge declaring a mistrial during the course of a criminal trial, on motion of the State is error and contrary to law, constituting a failure to exercise sound discretion, where, taking all the circumstances under consideration, there is no manifest necessity for the mistrial, no extraordinary and striking circumstances and no end of public justice served by a mistrial, and where the judge has not made a scrupulous search for alternatives to deal with the problem." Id., citing *State v. Schmidt* (1979), 65 Ohio App.2d 239, 244-45.

Revised Code 2945.29 governs the court's course of action when jurors become unable to perform duties: "If, before the conclusion of the trial, a juror becomes sick, or for other reason is unable to perform his duty, the court may order him to be discharged. In that case, if alternate jurors have been selected, one of them shall be designated to take the place of the juror so discharged. If, after all alternate jurors have been made regular jurors, a juror becomes too incapacitated to perform his duty, and has been discharged by the court, a new juror may be sworn and the trial begin anew, or <u>the jury may be discharged and a new jury then or thereafter impaneled</u>." (Emphasis added.) Additionally, R.C. 2945.36 states that a "trial court may discharge a jury without prejudice to the prosecution: (A) For the sickness or corruption of a juror or other accident or

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calamity; * * * The reason for such discharge shall be entered on the journal."

A trial court is vested with broad discretion in deciding whether to grant or deny a mistrial. *State v. Sage* (1987), 31 Ohio St.3d 173. The instant case presents a unique set of facts in that defendant, the State, and the court all agreed that Juror 6 should be discharged. However, defendant did not agree that, pursuant to R.C. 2945.36, the court should discharge the entire jury and start anew. Rather, defendant argues on appeal that he had an unequivocal constitutional right to proceed with 11 jurors, and that the court's declaring a mistrial was neither manifestly necessary nor imperative.

As support for his proposition that he was entitled to proceed with 11 jurors, defendant cites *State v. Baer* (1921), 103 Ohio St. 585. Defendant misreads the case law. *Baer*, stands for the proposition that a criminal defendant's right to trial by jury may be waived. At the time *Baer* was decided, a jury was composed of 12 men, and today, Crim.R. 23(B) states that "[i]n felony cases juries shall consist of twelve." The Ohio Supreme Court held that "this right may be waived, and accused persons may, <u>with the approval of the court</u>, consent to be tried by a jury composed of less than twelve men." Id. at paragraph two of syllabus (emphasis added). Thus, *Baer* concludes that a case *may* go forward with 11 jurors; nothing in Ohio jurisprudence concludes that a case *must* go forward with 11 jurors. Although in the instant case defendant and

the State consented to the 11-person jury, they did not have court approval. See, also, *U.S. v. Ramos* (C.A. 6, 1988), 861 F.2d 461, 466 (holding that the"decision to excuse a juror, and to continue with eleven remaining members of the jury, pursuant to the dictates of [Fed.] Rule 23(b), was within the sound discretion of the trial court").

We now turn to whether there was a manifest need to try the case before a second jury. According to the record, the court found that: discharging Juror 6 left 11 jurors to hear the case; there were no alternate jurors because the parties used all their juror challenges; the jurors were on their second to last day of service, and at least two people stated they would not be able to serve into the next week; the State anticipated resting its case Monday of the following week; and if additional jurors had to be discharged, defense counsel may move for a mistrial.

Taking R.C. 2945.36 into consideration, the court made the following findings:

"Specifically, with respect to 2945.36 for what cause a jury may be discharged, the trial court may discharge a jury without prejudice to the prosecution, Subsection A, for the sickness or corruption of a juror, or other accident or calamity.

"This qualified. Last night, [Juror 6] was assaulted. She was knocked down. She hit her head. She was taken by ambulance to a hospital.

"She testified as to feeling poorly with an unsolicited - that was an unsolicited response.

"I would certainly consider being the victim of this type of an assault, especially since it seemed to be so troubling to her that it happened in a public place to qualify as a calamity.

"The fact that she was treated with emergency care, taken to a hospital, is suffering pain and doesn't wish to be here qualified under 2945.36(A) as a reason that this Court may discharge a jury without prejudice to the prosecution."

In reviewing the facts of the jury discharge in light of the statutory and case law surrounding double jeopardy, we cannot say that the court abused its discretion in determining there was a manifest necessity for a second jury. By declaring a mistrial at an early stage of the proceedings, the court attempted to thwart the possibility of a mistrial after evidence had been presented and testimony given. In the instant case, opening statements were not yet made, and the risk of proceeding with 11 jurors and no alternates outweighed any possible prejudice to defendant by impaneling another jury.

Admittedly, whether to discharge the jury is a close call under the facts of this case. However, "[w]hen applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court." *In re Jane Doe 1* (1991), 57 Ohio St.3d 135, 137-38. The trial court acted within its discretion by discharging the jury; therefore, double jeopardy does not bar defendant's retrial.

Accordingly, defendant's first assignment of error is overruled.

Sua sponte, we raise the issue of whether defendant's wife, Alberta Patricia Davis, chose to testify voluntarily at trial. Evid.R. 601(B) states that a person is incompetent to be a witness testifying against his or her spouse, unless, inter alia, he or she elects to testify. In *State v. Brown*, 115 Ohio St.3d 55, 67, 2007-Ohio-4837, the Ohio Supreme Court held the following: "Once it has been determined that a witness is married to the defendant, the trial court must instruct the witness on spousal competency and make a finding on the record that he or she voluntarily chose to testify. Failure to do so constitutes reversible plain error." See, also, *State v. Adamson* (1995), 72 Ohio St.3d 431, 434 (holding that under Evid.R. 601(B), "a spouse remains incompetent to testify until she makes a deliberate choice to testify, with knowledge of her right to refuse. * * * [T]he judge must take an active role in determining competency, and make an affirmative determination on the record that the spouse has elected

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to testify. Just because a spouse responds to a subpoena and appears on the witness stand does not mean that she has elected to testify.")

In the instant case, the defendant's wife testified on behalf of the State against defendant. She testified that she had no direct knowledge of the allegations and made several inconsistent statements about whether she believed defendant committed the offenses. Eventually, the court permitted the State to ask defendant's wife leading questions in its case-in-chief under Evid.R. 611(C), which allows leading questions on direct examination when "a party calls a hostile witness, an adverse party, or a witness identified with an adverse party * * *." Additionally, at one time the court admonished defendant's wife stating, "you're not to direct your attention to the defendant throughout this proceeding." However, at no time did defense counsel object to this testimony, nor did the court instruct defendant's wife that she had a right to not testify against her husband.[2] Furthermore, there is no finding on the record that defendant's wife voluntarily chose to testify.

While we are aware of the sensitive and traumatic nature of child sex abuse allegations, we are compelled to remand this case for a new trial, given the mandates in *Brown* and *Adamson*, supra.

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[2]We note that both the State and defendant reserved the right to call defendant's wife as a witness at trial; however, we find this immaterial to the analysis at hand. See *State v. Brown*, supra, 115 Ohio St.3d at 67 (holding that "the rule in *Adamson* is absolute. * * * Whether [the spouse] would have still chosen to testify after a proper instruction was given to her is not relevant to the issue of error).

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Under the authority of App.R. 12(A)(1)(c), our order for a new trial renders defendant's remaining assignments of error moot and we do not consider them.

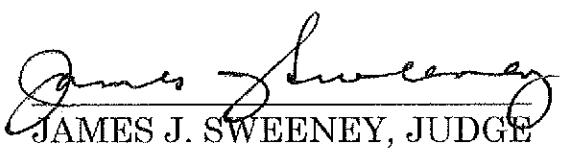
Judgment reversed and case remanded for a new trial.

It is ordered that appellant recover from appellee his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Case remanded to the trial court for new trial.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



JAMES J. SWEENEY, JUDGE

MELODY J. STEWART, P.J., CONCURS;
MARY J. BOYLE, J., CONCURS IN PART AND DISSENTS IN PART (SEE ATTACHED OPINION)

MARY J. BOYLE, J., CONCURRING IN PART AND DISSENTING IN PART:

I respectfully dissent from the majority's resolution of the first assignment of error because the record fails to demonstrate a "manifest necessity" for sua sponte ordering a mistrial.

At the outset, I must emphasize that the constitutional protection afforded under the Double Jeopardy Clause also "embraces the defendant's 'valued right

to have his trial completed by a particular tribunal.'" *Arizona v. Washington* (1978), 434 U.S. 497, quoting *United States v. Jorn* (1971), 400 U.S. 470, 484, and *Wade v. Hunter* (1949), 336 U.S. 684, 689.

And although a trial court has the power to sua sponte declare a mistrial without the defendant's consent, "the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes." *United States v. Perez* (1824), 22 U.S. 579, 580 (case wherein the United States Supreme Court initially coined the "manifest necessity" phrase); *United States v. Toribio-Lugo* (C.A.1, 2004), 376 F.3d 33, 38-39. Indeed, recognizing that a constitutionally protected interest is affected by a court's sua sponte declaration of a mistrial, the Supreme Court has cautioned trial courts to exercise its authority only after a "scrupulous exercise of judicial discretion." *Jorn*, 400 U.S. at 485. As stated by the Supreme Court:

"[A] trial judge, therefore, 'must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate.'" *Washington*, 434 U.S. at 514, quoting *Jorn*, 400 U.S. at 486 (Harlan, J.).

With these considerations in mind, the "manifest necessity" standard is a heavy burden. *Washington*, 434 U.S. at 505. And although there is no precise, mechanical formula to determine whether a mistrial is supported by "manifest

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necessity," a reviewing court must be satisfied that the trial court exercised "sound discretion" in declaring a mistrial. Id. at 506, 514; see, also *Ross v. Petro* (C.A.6, 2008), 515 F.3d 653. To exercise "sound discretion" in determining that a mistrial is necessary, "the trial judge should allow both parties to state their positions on the issue, consider their competing interests, and explore some reasonable alternatives before declaring a mistrial." *State v. Rodriguez*, 8th Dist. No. 88913, 2007-Ohio-6303, ¶23, citing *Washington*, supra.

Based on the circumstances of this case, I do not believe that the trial judge exercised "sound discretion" in declaring a mistrial. Here, after the court properly excused Juror 6, there was a clear alternative to a mistrial: proceeding with 11 jurors. Indeed, *both* the state and defense agreed to have the case heard by 11 jurors and were ready to proceed. Thus, they shared the same position, i.e., proceed with the jury impaneled and sworn. And although the trial judge heard from both sides and discussed the possibility of proceeding with 11 jurors, she nevertheless opted to sua sponte declare a mistrial.

The judge's decision to declare a mistrial was based in part on the trial most likely carrying over to the next week, which the judge believed would have created a severe hardship for some members of the jury. The judge inquired of the members, and two indicated that they had a conflict if the case proceeded past Monday of the following week. (But, as noted by the trial judge, the jurors stated during voir dire that they would fulfill their duty and appear for service

despite any hardship.) The judge further expressed concern that if a juror failed to appear on Monday, the defense would then move for a mistrial.

All of the trial judge's stated concerns, however, fail to demonstrate "manifest necessity" for declaring a mistrial. Notably, the judge's stated concerns were speculative. And, if in fact any of them arose, the court could have addressed them at that time. As for the concern of the defense later moving for a mistrial if there were insufficient number of jurors, such motion would not have implicated the double jeopardy issues present in this case. Simply put, I do not find that the trial court adequately considered Davis's "valued right to have his trial completed by a particular tribunal." See *Washington*, supra.

Further, while I recognize that "manifest necessity" does not mean that a mistrial was absolutely necessary or that there was no other alternative, it does require a trial court to give meaningful consideration to other alternatives before sua sponte ordering a mistrial. This court has repeatedly recognized that a trial court abuses its discretion in sua sponte declaring a mistrial when other less drastic alternatives are easily available. See *North Olmsted v. Himes*, 8th Dist. Nos. 84076 and 84078, 2004-Ohio-4241 (finding an abuse of discretion in declaring a mistrial when a curative instruction would have sufficiently cured any prejudice); *State v. Coon*, 8th Dist. No. 79641, 2002-Ohio-1813 (finding an abuse of discretion because the court failed to consider less drastic alternatives);

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State v. Morgan (1998), 129 Ohio App.3d 838 (finding an abuse of discretion because the trial court failed to cure or otherwise determine the effect of the purportedly tainted evidence).

Here, the trial court could have proceeded with 11 jurors, as consented to by both the state and Davis, and its sua sponte ordering of a mistrial constitutes an abuse of discretion. Therefore, Davis's retrial was barred by double jeopardy, and his first assignment of error should be sustained. See *State v. Glover* (1988), 35 Ohio St.3d 18.

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