

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No.	09 - 2208
	:		
Appellant/Cross-Appellee,	:	On Appeal from the Cuyahoga	
	:	County Court of Appeals	
vs.	:	Eighth Appellate District	
	:		
WILLIAM N. DAVIS,	:	C.A. Case No. 91324	
	:		
Appellee/Cross-Appellant.	:		

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLEE/CROSS-APPELLANT, WILLIAM N. DAVIS**

WILLIAM D. MASON #0037540
Cuyahoga County Prosecutor

OFFICE OF THE OHIO PUBLIC DEFENDER

T. ALLEN REGAS #0067336
Assistant Cuyahoga County Prosecutor
(COUNSEL OF RECORD)

KATHERINE A. SZUDY #0076729
Assistant State Public Defender
(COUNSEL OF RECORD)

Cuyahoga County Prosecutor's Office
The Justice Center - 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800
(216) 698-2270 - Fax

250 East Broad Street
Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 - Fax
Kathy.Szudy@OPD.Ohio.gov

COUNSEL FOR STATE OF OHIO

COUNSEL FOR WILLIAM N. DAVIS

FILED
DEC 22 2009
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

Page No.

EXPLANATION OF WHY WILLIAM N. DAVIS'S CROSS-APPEAL INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND PRESENTS ISSUES OF PUBLIC OR GREAT GENERAL INTEREST	1
EXPLANATION OF WHY THE STATE'S APPEAL DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION OR PRESENT ISSUES OF PUBLIC OR GREAT GENERAL INTEREST	2
STATEMENT OF THE CASE AND FACTS	3
ARGUMENT IN RESPONSE TO THE STATE'S PROPOSITIONS OF LAW	7
I. Introduction	7
II. The applicable law as stated by this Court	8
A. A trial court may commit a prejudicial and plain error for failing to comply with Evid.R. 601: <i>State v. Adamson</i> (1995), 72 Ohio St.3d 431.	8
B. Counsel may be ineffective for failing to object to spousal testimony: <i>State v. Brown</i>, 115 Ohio St.3d 55, 2007-Ohio-4837.	10
III. Application of the principles that have been established by this Court in <i>State v. Adamson</i>, 72 Ohio St.3d 431 and <i>State v. Brown</i>, 2007-Ohio-4837, to the case sub judice.	12
ARGUMENT IN SUPPORT OF APPELLANT/CROSS-APPELLEE WILLIAM N. DAVIS'S PROPOSITION OF LAW	13
PROPOSITION OF LAW	
In determining whether a trial judge exercised sound discretion in declaring a mistrial, a reviewing court must consider factors such as whether the trial judge heard the opinions of the parties about the propriety of the mistrial; whether the trial judge considered alternatives to a mistrial; and whether the trial judge acted deliberately, instead of abruptly. U.S. Const., Amend. V; Section 10, Article I of the Ohio Constitution.	13
I. Double jeopardy and the manifest necessity doctrine.	13

II.	Mr. Davis’s protection against double jeopardy was violated.....	16
	A. The trial judge did not hear the opinions of the parties regarding the propriety of the mistrial.	16
	B. The trial judge did not consider the alternatives to a mistrial.....	17
	C. The trial judge acted abruptly.....	18
	CONCLUSION	19
	CERTIFICATE OF SERVICE	20
APPENDIX		
	<i>State of Ohio v. William Davis</i> , Decision and Judgment Entry, Cuyahoga County Court of Appeals Case No. 91324, (November 17, 2009).....	A-1

**EXPLANATION OF WHY WILLIAM N. DAVIS'S CROSS-APPEAL INVOLVES A
SUBSTANTIAL CONSTITUTIONAL QUESTION AND PRESENTS ISSUES OF
PUBLIC OR GREAT GENERAL INTEREST**

After sua sponte declaring a mistrial without the manifest necessity to do so, the trial court unconstitutionally retried William N. Davis. The Fifth Amendment provides that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.” U.S. Const. Amend. V. See, also, Section 10, Article I of the Ohio Constitution. The guarantee against double jeopardy, made applicable to the states through the Fourteenth Amendment, *Benton v. Maryland* (1969), 395 U.S. 784, 794, protects against “a second prosecution for the same offense after conviction or acquittal.” *Palazzolo v. Gorcyca* (6th Cir. 2001), 244 F.3d 512, 516. Internal citations omitted.

Although Ohio Revised Code Section 2945.26(A) permits a trial court to discharge a jury without prejudice to the prosecution when a juror becomes ill, such a decision to do so must be justified by a “manifest necessity.” *United States v. Dinitz* (1976), 424 U.S. 600. Accordingly, before declaring a mistrial on manifest-necessity grounds, a trial court may discharge a jury only after a “scrupulous exercise of judicial discretion.” *United States v. Jorn* (1971), 400 U.S. 470, 485. Although federal cases have explained what factors a reviewing court should use when deciding whether a trial court abused its discretion in dismissing a jury (see *Fulton v. Moore* (6th Cir. 2008), 520 F.3d 522, 529; and *Arizona v. Washington* (1978), 434 U.S. 497, 516-517), this Court has not yet reached such a determination as to whether Ohio courts should employ the same factors, or if additional grounds should be considered.

In Mr. Davis’s case, the trial court perfunctorily decided to sua sponte mistry the first jury trial, and then unconstitutionally retried Mr. Davis. Indeed, “[a]ll of the trial judge’s stated concerns...fail[ed] to demonstrate [a] ‘manifest necessity’ for declaring a mistrial. Notably, the

judge's stated concerns were speculative." *State v. Davis*, 8th Dist. No. 91324, 2009-Ohio-5217, at ¶39 (Boyle, J., concurring in part and dissenting in part). Given the lack of state law addressing double-jeopardy concerns, this Court should grant jurisdiction in order to give Ohio courts a basis as to what factors to review when determining whether a trial court "scrupulously" exercised its discretion before sua sponte declaring a mistrial.

**EXPLANATION OF WHY THE STATE'S APPEAL DOES NOT INVOLVE
A SUBSTANTIAL CONSTITUTIONAL QUESTION OR PRESENT
ISSUES OF PUBLIC OR GREAT GENERAL INTEREST**

This Court should not accept jurisdiction over the State's appeal because its legal propositions do not involve a substantial constitutional question, nor are the grounds of public or great general interest. The State proposes that this Court accept jurisdiction because the court of appeals misapplied this Court's decisions in *State v. Adamson* (1995), 72 Ohio St.3d 431 and *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837. (State's Memorandum in Support of Jurisdiction, pp. 4-10). However, the Eighth District Court of Appeals merely applied this Court's longstanding analysis regarding the plain-error doctrine and determined that the trial court committed reversible error when it failed to "instruct the witness on spousal competency and make a finding on the record that she [Mr. Davis's spouse] voluntarily chose to testify." *Davis* at ¶28, quoting *State v. Brown*, 2007-Ohio-4837, at ¶60.

The State proposes that this Court accept jurisdiction because the court of appeals created a "new rule of law" and that the court of appeals "changed the standard of plain-error review under Crim.R. 52." (State's Memorandum in Support of Jurisdiction, p. 1). However, contrary to the State's assertion, the court of appeals never mentioned the phrase "structural error," but instead followed this Court's analyses in *State v. Adamson*, 72 Ohio St.3d 431 and *State v. Brown*, 2007-Ohio-4837. As such, in the absence of any issue deserving of this Court's

resources, it should decline jurisdiction over the State's appeal, but grant jurisdiction in Mr. Davis's cross-appeal.

STATEMENT OF THE CASE AND FACTS

On September 17, 2007, Mr. Davis was charged with 31 counts of rape and gross sexual imposition. On February 20, 2008, a 12-person jury was impaneled without alternates, and court was adjourned. When court reconvened the next day, 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.

The State moved the trial court to discharge Juror 6 in accordance with R.C. 2945.36, stating that it was prepared to go forward with the case if Mr. Davis agreed to try it to a jury of 11. Mr. Davis indicated that he had no objection to discharging Juror 6 and going forward with 11 jurors. The trial court then expressed concern about proceeding on the basis that if the case ran into the following week, there was a possibility of running out of jurors. The following discussion then occurred:

The Court: 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 [on] 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.

I appreciate the fact that you [the State and Mr. Davis] are willing to. I appreciate the fact that everybody’s prepared to proceed. I am, too, and have been since the day before yesterday when we were scheduled or whenever we were first scheduled. Does the State wish to respond?

[The State]: We agree that over the weekend, sending a—well, what would be 11 jurors over a weekend without any alternates, we agree that we could get into a problem next week if another juror fell ill because we are without alternates. We understand the Court’s concern, but I am—the State remains prepared to go forward.

The Court: Well, we can do one of a few things. We can ask the entire jury of their willingness to proceed on Monday because I think it’s safe to say that this case is not going to be concluded tomorrow.

[The State]: That’s fair.

The Court: But my recollection from voir dire was there were some people who said it would cause great hardship for next week. They would be here if required to, but it would be extraordinarily difficult and I think that the jurors who so responded demonstrated a great respect for the system that they would be willing to appear even with great hardship, but why set ourselves up for a greater possibility of not being able to proceed here, or greater possibility of a mistrial?

I don’t want to do that. I want this case to proceed so we can inquire of the jury. Let me first ask, [defense counsel], with respect to 2945.36, did you agree that juror number 6 ought to be discharged?

[Defense Counsel]: Yes. Given the circumstances, I agree, your Honor.

The Court: And do you agree that if she is discharged, that that means that she is discharged without—that this jury would then be discharged without prejudice to the prosecution pursuant to 2945.36?

[Defense Counsel]: No. I won't agree to that.

The Court: Well, then you better cite your reasons why.

[Defense Counsel]: I generally don't look at statutes and procedural matters.

The Court: Well, I generally do. Okay. So what's your response? You just want to say I just don't agree without backing it up at all?

[Defense Counsel]: Your Honor, I have no access to a law library. I've been in your courtroom all day. I can't cite—I'm not a machine, your Honor. I don't have a code book. I don't have Supreme Court case law.

The Court: There's a code book right there. You've had all day. You're the one who said you've been in conversations with the Court since this morning.

You can't have it both ways. So you think juror number 6 should be discharged, but you think that although she ought to be discharged that pursuant to 2945.36, that this doesn't mean it's without prejudice to the prosecution? And yet, you don't want to cite any authority?

[Defense Counsel]: That's right.

The Court: You're setting this up for an ineffective assistance of counsel. I don't appreciate that.

[Defense Counsel]: Your Honor, statutes don't control in procedural matters.

The Court: Case law does cite some—coming in here and just talking about it doesn't do it either.

[Defense Counsel]: I have to protect my client's rights.

The Court: Then do it.

[Defense Counsel]: I'd ask to hold this trial in abeyance so I can do some legal research.

The Court: You had all day. You said so yourself.

[Defense Counsel]: Your Honor, I've been in the courtroom—

The Court: No, you haven't. We had to call you to get you here. No, you weren't.

[Defense Counsel]: Fine, your Honor.

The Court: All rise.

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

Mr. Davis timely appealed, and argued the following assignments of error:

- 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 [sic] 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; and
- III. Appellant was prejudiced by ineffective assistance of counsel.

State v. Davis, 2009-Ohio-5217, at ¶10-12.

The court of appeals, addressing an issue sua sponte, reversed and remanded Mr. Davis's case for a new trial, stating that the trial court failed to comply with this Court's decisions in *State v. Adamson*, 72 Ohio St.3d 431 and *State v. Brown*, 2007-Ohio-4837. *Davis* at ¶28-30. Although the majority of the court admitted that "whether to discharge the jury is a close call under the facts of this case," (*Davis* at ¶26) it ultimately did not agree with Mr. Davis's argument that he was unconstitutionally put in jeopardy twice. But contrary to the majority's conclusion, the dissenting opinion stated that "the record fails to demonstrate a 'manifest necessity' for sua sponte ordering a mistrial." *Davis* at ¶32 (Boyle, J., concurring in part and dissenting in part). The State filed a notice of appeal and memorandum in support of jurisdiction on December 8, 2009. Mr. Davis now asks this Court to decline jurisdiction over the State's appeal, and to accept jurisdiction in his cross-appeal.

ARGUMENT IN RESPONSE TO THE STATE'S PROPOSITIONS OF LAW

I. Introduction.

While the precise wording of the State's propositions of law differs, the issue presented by each is the same: when a trial court fails to comply with Evid.R. 601(B), and no objection is made regarding the competency of a spouse's testimony, may a court of appeals remand the case for a new trial based on a finding that the trial court committed a reversible, plain error? This Court has already affirmatively answered that question twice. See *State v. Adamson*, 72 Ohio St.3d 431, at syllabus ("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. The trial judge must take an active role in determining competency, and must make an affirmative determination on the record that the spouse has elected to testify."); and *State v. Brown*, 2007-Ohio-4837, at ¶60

("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."). Indeed, the court of appeals cited to this Court's decisions in *Adamson* and *Brown* and applied this Court's ruling appropriately. (See Arguments II and III, pp. 8-13, *infra*). And the State just disagrees with the court of appeals' application of the facts in the case sub judice to the applicable law.

The State confuses the court of appeals' finding that the trial court committed a reversible, plain error with a ruling that the trial court committed a structural error. In so doing, the State unreasonably argues that when the court of appeals made the determination that a "reversible, plain error" occurred, such a decision was tantamount to employing "a per se rule of reversal upon noticing plain error." (State's Memorandum in Support of Jurisdiction, p. 1). However, a plain-error analysis, which the court of appeals conducted, evidences that the trial court prejudiced the outcome of Mr. Davis's trial when it failed to ensure that Mr. Davis's wife voluntarily chose to testify against him.

II. The applicable law as stated by this Court.

A. A trial court may commit a prejudicial and plain error for failing to comply with Evid.R. 601: *State v. Adamson* (1995), 72 Ohio St.3d 431.

In *State v. Adamson*, 72 Ohio St.3d 431, this Court was faced with the same factual scenario as in the case sub judice. During Mr. Adamson's trial, the court did not consider Evid.R. 601(B), which deals with the competency of spousal testimony. The trial judge never informed Mrs. Adamson that in order to testify against her husband, she had to elect to do so in accordance with Evid.R. 601(B)(2). This Court first reviewed Evid.R. 601, which provides, in pertinent part:

Every person is competent to be a witness except:

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

(2) The testifying spouse elects to testify.

Adamson at 433. Explaining the differences between Evid.R. 601 and R.C. 2945.42, this Court stated:

The focus of Evid.R. 601(B) is the competency of the testifying spouse; in contrast, R.C. 2945.42 focuses on the privileged nature of spousal communications:

“Husband or wife shall not testify concerning a communication made by one to the other, or act done by either in the presence of the other, during coverture, unless the communication was made or act done in the known presence or hearing of a third person competent to be a witness....”

Thus, R.C. 2945.42 “confers a substantive right upon the accused to exclude privileged spousal testimony concerning a confidential communication....” *State v. Rahman* (1986), 23 Ohio St.3d 146, 23 OBR 315, 492 N.E.2d 401, syllabus. However, if the accused commits acts in the known presence of a third person, the accused may not assert the spousal privilege. *Id.* That is the case even if that third person is unable to testify. See *State v. Mowery* (1982), 1 Ohio St.3d 192, 1 OBR 219, 438 N.E.2d 897.

Spousal privilege and spousal competency are distinct legal concepts which interrelate and provide two different levels of protection for communications between spouses. Under R.C. 2945.42, an accused may prevent a spouse from testifying about private acts or communications. However, even when the privilege does not apply because another person witnessed the acts or communications, a spouse still is not *competent* to testify about those acts or communications unless she specifically elects to testify. While the presence of a witness strips away the protection of the privilege, the protection provided pursuant to Evid.R. 601 remains.

Adamson at 433-434. Emphasis original.

Accordingly, Evid.R. 601 requires that the testifying spouse elect to testify against his or her spouse. *Adamson* at 434. An election is “the choice of an alternative[;] the internal, free, and spontaneous separation of one thing from another, without compulsion, consisting in intention and will.” *Adamson* at 434, quoting Black’s Law Dictionary (5 Ed.1990) 517. Thus, under Evid.R. 601(B), a spouse remains incompetent to testify until he or she makes a deliberate choice to testify, with knowledge of his or her right to refuse.

Competency determinations are the province of the trial judge. *Adamson* at 434, citing *State v. Clark* (1994), 71 Ohio St.3d 466, 469. Indeed, as mandated by Evid.R. 601(A):

[T]he trial judge must determine whether a child under ten is competent to testify by inquiring as to whether the child is capable of “receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.” See, also, *State v. Frazier* (1991), 61 Ohio St.3d 247, 574 N.E.2d 483. Likewise, under Evid.R. 601(B), *the judge must take an active role in determining competency, and make an affirmative determination on the record that the spouse has elected 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.

Adamson at 434. Emphasis added. Conducting a plain-error review, this Court next reviewed the facts of the case, and held that the trial court’s elicitation of Mrs. Adamson’s “testimony without informing her of her right to not testify against her husband was plain error.” *Id.* at 435.

B. Counsel may be ineffective for failing to object to spousal testimony: *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837.

In *State v. Brown*, this Court considered the issue of whether defense counsel was ineffective for failing to object to testimony that had been given by Mr. Brown’s alleged spouse, Jillian Wright. *State v. Brown*, 2007-Ohio-4837. Appellate counsel argued that had trial counsel objected, the court would have been required to determine whether Mr. Brown and Ms. Wright were legally married. *Brown* at ¶55. If they were married, the trial court would then have been

compelled, under *State v. Adamson*, 72 Ohio St.3d 431 (“a spouse remains incompetent to testify until she makes a deliberate choice to testify, with knowledge of her right to refuse”) to determine Ms. Wright’s competency and to make a finding on the record that she had chosen to voluntarily testify. *Id.*

This Court once again first reviewed Evid.R. 601. *Brown* at ¶54. And citing to *State v. Adamson*, this Court explained that “[t]o ensure proper enforcement of this rule, this Court has held that a spouse remains incompetent to testify until she makes a deliberate choice to testify, with knowledge of her right to refuse. The trial judge must take an active role in determining competency, and must make an affirmative determination on the record that the spouse has elected to testify.” *Id.* Internal citations omitted.

This Court reviewed Mr. Brown’s appellate record, and concluded that sufficient evidence existed to support a conclusion that Mr. Brown and Ms. Wright were legally married. *Brown* at ¶56. Accordingly, Ms. Wright may have chosen to testify voluntarily at trial, even after being informed of her right not to do so. However, this Court stated that “the rule in *Adamson* is absolute. 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.” *Id.* at ¶60. Because there was a question as to whether Mr. Brown and Ms. Wright were married, Mr. Brown’s counsel had an obligation to request a formal decision on whether Ms. Wright and Mr. Brown were actually married. And just as this Court reversed the *Adamson* case for a new trial due to the fact that the trial court committed a plain and prejudicial error when it failed to comply with Evid.R. 601, this Court reversed the *Brown* case for a new trial based on counsel’s ineffectiveness.

III. Application of the principles that have been established by this Court in *State v. Adamson*, 72 Ohio St.3d 431 and *State v. Brown*, 2007-Ohio-4837, to the case sub judice.

In the instant case, Mr. Davis's wife testified on behalf of the State. She testified that she had no direct knowledge of the allegations and made several inconsistent statements about whether she believed that Mr. Davis had committed the offenses. "Eventually, the court permitted the State to ask [Mr. Davis'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....'" *Davis*, 2009-Ohio-5217, at ¶29. Additionally, at one time the court admonished Mr. Davis's wife stating, "you're not to direct your attention to [Mr. Davis] throughout this proceeding." *Id.* However, at no time did defense counsel object to this testimony, "nor did the court instruct Mr. Davis's wife that she had a right to not testify against her husband." *Id.* Furthermore, there is no finding on the record that Mr. Davis's wife voluntarily chose to testify. *Id.*

Adhering closely to this Court's decisions in *Adamson* and *Brown*, the court of appeals explained:

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*, 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*, 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 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.").

Davis at ¶28. Accordingly, the court of appeals reviewed the record along with the applicable law, and determined that the trial court committed a prejudicial and plain error when it failed to comply with Evid.R. 601. The State would merely like this Court to conduct a second plain-error analysis. And such a request amounts to this Court's engaging in error correction.

**ARGUMENT IN SUPPORT OF APPELLANT/CROSS-APPELLEE
WILLIAM N. DAVIS'S PROPOSITION OF LAW**

PROPOSITION OF LAW

In determining whether a trial judge exercised sound discretion in declaring a mistrial, a reviewing court must consider factors such as whether the trial judge heard the opinions of the parties about the propriety of the mistrial; whether the trial judge considered alternatives to a mistrial; and whether the trial judge acted deliberately, instead of abruptly. U.S. Const., Amend. V; Section 10, Article I of the Ohio Constitution.

Mr. Davis's first trial began on February 20, 2008. After the jury was impaneled and sworn, a juror had to be removed due to having been assaulted. When the defense requested additional time to research the issue as to whether the trial court could dismiss the remaining 11 jurors, the trial court abused its discretion and declared a mistrial without a manifest necessity to do so. The absence of a manifest necessity, coupled with the State's subsequent decision to retry Mr. Davis, violated the Double Jeopardy Clause of the Fifth Amendment.

I. Double jeopardy and the manifest necessity doctrine.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution commands that no person "shall be subjected for the same offense to be twice put in jeopardy of life or limb," and applies to state prosecutions through the Fourteenth Amendment. U.S. Const. Amend. V; Section 10, Article I of the Ohio Constitution; *Benton v. Maryland*, 395 U.S. 784. The Double Jeopardy Clause bars a second prosecution only if jeopardy attached in the original

proceeding. In a criminal proceeding, attachment occurs when the defendant faces the risk of a determination of guilt. *Serfass v. United States* (1975), 420 U.S. 377, 391-92. Consequently, jeopardy attaches in a jury trial when the jury is impaneled and sworn. See *Crist v. Bretz* (1978), 437 U.S. 28. See, also, *Downum v. United States* (1963), 372 U.S. 734, 737-38 (jeopardy attached when the jury was impaneled and sworn even though the jury was discharged before trial).

The purpose of the constitutional prohibition against double jeopardy is to prevent the government from making repeated attempts to convict an individual of an alleged offense, “thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuous 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, 187-88. See, also, *United States v. DiFrancesco* (1980), 449 U.S. 117, 138 (“[I]f the government may re-prosecute, it gains an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own.”); *Arizona v. Washington*, 434 U.S. at 504 n. 14 (noting that “subtle changes” in government cases “may occur during the course of successive prosecutions”). Thus a defendant has a “valued right to have his trial completed by a particular tribunal.” *Wade v. Hunter* (1949), 336 U.S. 684, 689.

In some instances, the valued right of the defendant to have his or her trial completed by the tribunal of his or her choice must “be subordinated to the public’s interest in fair trials designed to end in judgments.” *Id.* at 689. Consequently, double jeopardy does not bar all re-prosecutions. A defendant who consents to the termination of a first trial may again be placed in jeopardy for the same offense, so long as the conduct of the judge or prosecutor was not intended to provoke the mistrial. See *Oregon v. Kentucky* (1982), 456 U.S. 667. Even when a

defendant does not consent, he or she may nonetheless be retried if there was a “manifest necessity” to terminate the first trial. See *United States v. Dinitz*, 424 U.S. at 907-08; *United States v. Perez* (1824), 22 U.S. 579 (Story, J., coining the phrase “manifest necessity”).

Manifest necessity has been interpreted by the Supreme Court to mean a high degree of necessity, and its existence depends on the type of problem at trial that prompted the judge to consider a mistrial. *Arizona v. Washington*, 434 U.S. at 506. The prosecution bears a heavy burden in demonstrating that a manifest necessity exists when the defendant’s “valued right to have his trial completed by a particular tribunal” is implicated. *Id.* at 505. The manifest-necessity standard may not “be applied mechanically or without attention to particular problems confronting the trial judge.” *Id.* at 506. Although the standard is flexible, a court must always balance the need to abort the trial with an accused’s right not to be twice placed in jeopardy for the same offense. *Illinois v. Somerville* (1973), 410 U.S. 458, 462.

Reviewing courts have an obligation to determine whether the trial judge exercised sound discretion in declaring a mistrial. *Arizona v. Washington*, 434 U.S. at 514; see, also, *United States v. Perez*, 22 U.S. at 580. Some reviewing courts have established certain indicators that must be examined while determining whether the trial judge engaged in a “scrupulous exercise of judicial discretion” when declaring a mistrial. *United States v. Jorn* (1971), 400 U.S. 470, 485. According to federal law, reviewing courts should consider whether the trial court:

1. Has heard the opinions of the parties about the propriety of the mistrial;
2. Considered alternatives to a mistrial and chosen the alternative least harmful to a defendant’s rights; and whether the court
3. Acted deliberately instead of abruptly.

Arizona v. Washington, 434 U.S. at 515-516; *Fulton v. Moore*, 520 F.3d at 529. When the record is barren of reasons for a mistrial, or reveals that the judge failed to consider reasonable alternatives, the decision to declare a mistrial may be reversed by a reviewing court. *United States v. Bates* (9th Cir. 1990), 917 F.2d 388, 395-396.

This Court has neither adopted such factors nor enunciated a specific review that Ohio courts should abide by when determining whether a trial court properly declared a mistrial. This Court has explained that “[i]n examining the trial judge’s exercise of discretion in declaring a mistrial, a balancing test is utilized, in which the defendant’s right to have the charges decided by a particular tribunal is weighed against society’s interest in the efficient dispatch of justice.” *State v. Glover* (1988), 35 Ohio St.3d 18, 19. Although “inflexible standards” (*Id.*) are generally disfavored in a court’s review of a double-jeopardy claim, courts should have some viable guidelines, rather than merely “balancing” a defendant’s constitutional rights against a societal interest.

II. Mr. Davis’s protection against double jeopardy was violated.

The facts of this case simply did not present one of those circumstances in which a trial, once begun, had to be aborted sua sponte by the court. When Mr. Davis was retried, he was placed in jeopardy a second time, contrary to the state and federal constitutions. A review of the factors listed by the United States Supreme Court in *Arizona v. Washington*, *supra*, and the Sixth Circuit Court of Appeals in *Fulton v. Moore*, *supra*, demonstrate that the trial court’s sua sponte declaration of a mistrial during Mr. Davis’s first trial was both unreasonable and abrupt.

A. The trial judge did not hear the opinions of the parties regarding the propriety of the mistrial.

Reviewing courts have found that trial courts are much more likely to have exercised sound discretion when the trial court has listened to the parties before declaring a mistrial and

dismissing the jury. *Arizona v. Washington*, 434 U.S. at 515-16 & n. 34 (The Supreme Court declined to find that the trial judge committed an abuse of discretion in declaring a mistrial because both defense counsel and the prosecutor were given a “full opportunity to explain their positions on the propriety of a mistrial.”); *United States v. Klein* (2nd Cir. 1978), 582 F.2d 186, 195 (the Second Circuit praised the trial judge for requesting that defense counsel provide alternatives to declaring a mistrial). In contrast, the Supreme Court and the Seventh Circuit found that the trial judges abused their discretion in *United States v. Jorn*, 400 U.S. at 487 and *Lovinger v. Circuit Court* (7th Cir. 1987), 845 F.2d 739, 744, respectively, because the judges did not give the parties an opportunity to speak.

In Mr. Davis’s case, when the trial court declared a mistrial on February 21, 2008, it would not even allow defense counsel a short recess to research the issue involving Mr. Davis’s right to be protected from being placed in jeopardy twice. Instead of addressing the propriety of a mistrial, the trial judge summarily stated that Mr. Davis’s case would be mistried, and that “there will be no prejudice to the prosecution.” Essentially, the trial court refused to hear any arguments regarding the propriety of a mistrial.

B. The trial judge did not consider the alternatives to a mistrial.

Absent a motion for a mistrial by the defendant, the trial court should not foreclose the defendant’s option to proceed with the impaneled jury without a “scrupulous exercise of discretion” in determining whether a manifest necessity warrants the declaration of a mistrial. *United States v. Jorn*, 400 U.S. at 485. *United States v. Jorn* places a duty on the trial judge to “exhaust *all* other reasonable possibilities before deciding to foreclose [a] defendant[’s] option to proceed.... The scrupulous exercise of discretion means that he must seek out and consider all avenues of cure to avoid trial abortion.” *United States v. Walden* (4th Cir. 1971), 448 F.2d 925,

929, citing *Jorn* at 485. Emphasis added. “The power [to abort] ought to be used with greatest caution, under urgent circumstances, and for very plain and obvious causes.” *United States v. Perez*, 22 U.S. at 580.

In this case, “after the court properly excused Juror 6, there was a clear alternative to a mistrial: proceeding with 11 jurors. Indeed *both* the [S]tate 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.” *State v. Davis*, 2009-Ohio-5217, at ¶37 (Boyle, J., concurring in part and dissenting in part). Emphasis original.

The trial court’s decision to declare a mistrial was based in part on the court’s prediction that the trial would most likely carry over to the next week. The court believed that that would have created a severe hardship for some members of the jury. But even though two members of the panel indicated that they would have had a conflict if the case proceeded past Monday of the following week, those jurors had stated during voir dire that they would have fulfilled their duty and appear for service despite any hardship.

C. The trial judge acted abruptly.

A trial court’s abrupt declaration of a mistrial suggests that it failed to exercise sound discretion. *United States v. Bates*, 917 F.2d at 396. “A precipitate decision, reflected by a rapid sequence of events culminating in a declaration of mistrial, would tend to indicate insufficient concern for the defendant’s constitutional protection.” *Id.*, quoting *Brady v. Samaha* (1st Cir. 1981), 667 F.2d 224, 229.

In cases which have held that the trial judge exercised sound discretion in finding that manifest necessity compelled a mistrial, the trial judge engaged in “careful consideration and solicitude for the serious consequences attendant upon mistrials....” *Glover v. McMackin* (6th

Cir. 1991), 950 F.2d 1236, 1241; see, also, *Arizona v. Washington*, 434 U.S. at 515-16 (noting that “the trial judge did not act precipitately, but...[was] concern[ed] for the possible double jeopardy consequences of an erroneous ruling, [and] gave both defense counsel and the prosecutor [a] full opportunity to explain their positions on the propriety of a mistrial”). In *United States v. Simpson* (6th Cir. 1991), 1991 U.S. App. LEXIS 1031, No. 90-5982, *5, the court found that the trial judge exercised sound discretion in declaring a mistrial because the trial judge “held an extensive hearing on the effects and repercussions of the evidentiary errors” and “took a night to deliberate over the question of whether a mistrial was necessary.”

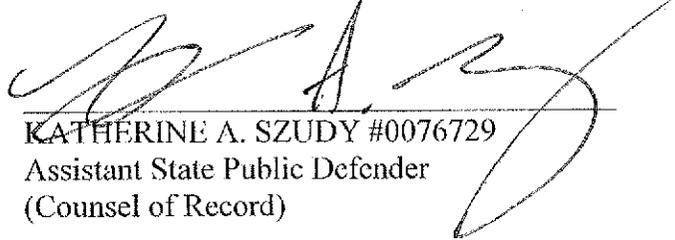
However, in Mr. Davis’s case, the record reveals that the trial court acted abruptly in declaring the mistrial. The sequence of events leading up to the declaration of a mistrial were so rapid that the trial court would not even allow defense counsel a short recess in which to research the constitutional ramifications of the decision to mistry the case. Accordingly, just as the record evidences that the trial court failed to consider the serious consequences of a mistrial, the record also establishes that it failed to act rationally, responsibly, or deliberately. Consequently, the court failed to exercise the sound discretion that is required by constitutional guarantees against double jeopardy. U.S. Const. Amend. V; Section 10, Article I of the Ohio Constitution; *United States v. Jorn*, 400 U.S. at 485; *United States v. Perez*, 22 U.S. at 580.

CONCLUSION

For all of the foregoing reasons, Mr. Davis respectfully requests this Court to both decline jurisdiction of the State’s appeal and to accept jurisdiction of his cross-appeal. While the State is requesting this Court to engage in error correction, Mr. Davis’s cross-appeal involves substantial constitutional questions, as well as questions of public or great general interest. And this Court should grant him jurisdiction.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



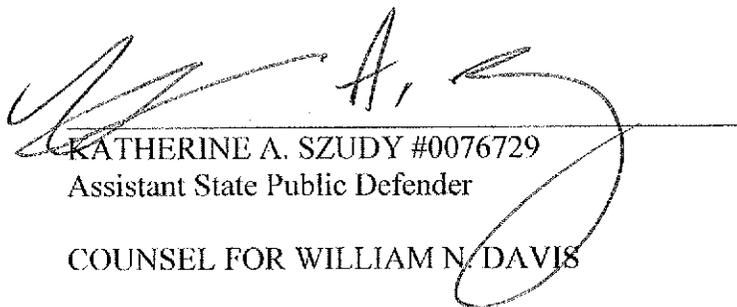
KATHERINE A. SZUDY #0076729
Assistant State Public Defender
(Counsel of Record)

250 East Broad Street – Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 (Fax)
Kathy.Szudy@OPD.Ohio.gov

COUNSEL FOR WILLIAM N. DAVIS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLEE/CROSS-APPELLANT WILLIAM N. DAVIS** has been served upon T. Allen Regas, Cuyahoga County Assistant Prosecutor, addressed to his office at the Cuyahoga County Prosecutor's Office, The Justice Center, 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113, on this 22nd day of December, 2009.



KATHERINE A. SZUDY #0076729
Assistant State Public Defender

COUNSEL FOR WILLIAM N. DAVIS

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No.
Appellant/Cross-Appellee,	:	
	:	On Appeal from the Cuyahoga
vs.	:	County Court of Appeals
	:	Eighth Appellate District
WILLIAM N. DAVIS,	:	
	:	C.A. Case No. 91324
Appellee/Cross-Appellant.	:	

**APPENDIX TO MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLEE/CROSS-APPELLANT, WILLIAM N. DAVIS**

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

-i-

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

CA08091324



60495477

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

NOV 17 2009

GERALD E. TUBERT
CLERK OF THE COURT OF APPEALS
BY *[Signature]* DEP.

CA08091324

59698117



ANNOUNCEMENT OF DECISION
PER APP.R. 22(C)
RECEIVED

OCT 01 2009

GERALD E. TUBERT
CLERK OF THE COURT OF APPEALS
BY *[Signature]* 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

-1-

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.1¹ 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.

¹The 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.

-2-

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."

-3-

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.

-4-

"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,

-5-

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 the jury may be discharged and a new jury then or thereafter impaneled." (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

-6-

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, with the approval of the court, 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

-7-

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.

-8-

"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.

-9-

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 I* (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

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.

²We 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).

-11-

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

-12-

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

-13-

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

-14-

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);

-15-

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.