

NO. 2009-2208

ORIGINAL

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,

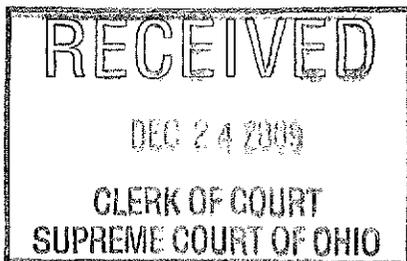
Defendant-Appellee

MOTION TO STAY

Counsel for Plaintiff-Appellant

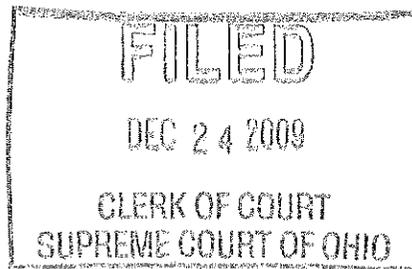
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NO. 2009-2208

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

STATE OF OHIO,

Plaintiff-Appellant

-vs-

WILLIAM N. DAVIS,

Defendant-Appellee

MOTION TO STAY

The State of Ohio requests a stay of proceedings in this matter pending this Court's decision to accept this matter upon appeal. The State filed its notice of appeal and memorandum in support of jurisdiction, contesting the Eighth District Court of Appeals decision in *State v. Davis*, Cuyahoga App. No. 91324, 2009-Ohio-5217, on December 8, 2009. In its memorandum in support of jurisdiction filed in this matter, the State raised the following Propositions of Law:

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.

The issue of procedure regarding an error in the trial court in determining a witness's competency under Evid.R. 601 is an issue that affects courts throughout the State. Further, there is a disagreement as to the effect of such error between the appellate districts, where the Eighth District has created a per se rule of reversal of a trial, but other courts, to include this Court, have applied a plain error analysis. See, e.g., *State v. Adamson* (1995), 72 Ohio St.3d 431, 650 N.E.2d 875, in *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, *City of Mason v. Molinari*, Warren App. No. 06-TRC-00104, 2007-Ohio-5395, *State v. Knox* (Jun. 24, 1997), Franklin App. No. 96APA09-1265, unreported.

In this case, Appellee William Davis was convicted of sexual offenses against minor children. Without a stay in these proceedings, the victims will be subject to immediate preparation for trial. As this issue of whether or not an appellate court is to automatically order a new trial upon the discovery of error under Evid.R. 601 is one where there exists conflict among the district courts of appeal, the State asks that this Court stay the judgment and order granting Appellee a new trial in this matter of the appellate court, pending this Court's decision to accept jurisdiction in this matter.

The subject of the appeal is the ability of the appellate court to limit to automatically order a new trial without conducting a plain error analysis where testimony was admitted

without determining the competency of the witness. As such, the proceedings should be stayed to determine whether or not a new trial is warranted in this matter.

Respectfully submitted,

WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR

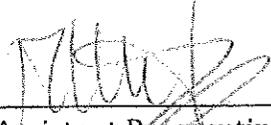
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SERVICE

A copy of the foregoing Motion to Stay has been mailed this 22nd day of December 2009, to Katherine Szudy, 250 East Broad Street, 14th Floor, Columbus, Ohio 43215.



Assistant Prosecuting Attorney

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

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

NOV 17 2009

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



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

OCT 01 2009

[Signature]
GERALD E. JUREST
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.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.

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 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

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

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

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).

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

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);

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.