No. 122830

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Appellate Court) of Illinois, Second District
Plaintiff-Appellant,	) No. 2-16-0087
v.	) There on appeal from the Circuit Court) of the Twenty-Second Judicial Circuit,) McHenry County, Illinois) No. 13-CF-1123
DAVID KIMBLE,	) The Honorable) Sharon L. Prather,
Defendant-Appellee.	) Judge Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

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POINTS AND AUTHORITIES

NATURE OF THE CASE

In 2014, defendant was charged with four counts of criminal sexual abuse based on his repeated molestation of S.M., a nine-year-old girl. During the first two days of trial, the court denied two motions for mistrial made by defendant and, on the third day, the case was submitted to the jury. During deliberations, the jury informed the court several times that it was at an impasse and further deliberation would be futile. The court eventually concluded that the jury was deadlocked and declared a mistrial. Rather than object to the mistrial, defendant agreed to set a status hearing to schedule a new trial. A month later, however, defendant moved to bar a new trial on double jeopardy grounds, arguing for the first time that the court erred in declaring a mistrial. The trial court denied the motion, but the appellate court reversed, holding that (1) defendant did not consent to a mistrial; and (2) there was no manifest necessity to declare a mistrial even though the jury repeatedly said that it was deadlocked. The People appeal from the appellate court's judgment. No issue is raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether defendant consented to a mistrial by (a) failing to object to the trial court's decision to declare a mistrial and/or (b) moving for a mistrial on each of the previous two days of trial.

2. Whether the appellate court erred in holding that defense counsel's agreement with the prosecutor's initial suggestion that "procedurally" the trial court could give a *Prim* instruction to encourage the jury to continue deliberating constituted an objection to a mistrial where (a) defendant had moved for a mistrial on each of the previous two days of trial; (b) each party agreed that it

appeared that the jury was "completely deadlocked"; (c) defendant did not disagree when the prosecutor clarified that he was not suggesting that it was necessary to give a *Prim* instruction; (d) neither party disagreed when the court explained why a *Prim* instruction would be futile; and (e) defendant agreed to a status hearing to schedule a new trial.

3. Whether defendant was unfairly prejudiced, such that the State is barred from prosecuting him for his sexual abuse of S.M., because earlier in the proceedings the trial court had instructed the jury, ex parte, to continue deliberating.

4. Whether the trial court abused its discretion in concluding that the jury was deadlocked where (a) the jury told the court several times that it was deadlocked; (b) each party agreed that it appeared that the jury was "completely deadlocked"; (c) trial lasted only two days and presented a single issue within the common experience of the jurors; and (d) the judge heard "loud voices" arguing in the jury room and believed that the jury would be "extremely angry" if instructed again to continue deliberating.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 612. On March 21, 2018, this Court allowed the People's petition for leave to appeal.

STATEMENT OF FACTS

A. Defendant's Two Motions for Mistrial

In 2014, defendant, who was then forty-five years old, was charged with four counts of aggravated criminal sexual abuse based on his repeated molestation of S.M., a nine-year-old girl who lived next door. C15-16.[1]

The evidence on the first day of trial showed that S.M. sometimes stayed at defendant's house, and he gave her money and numerous gifts, including underwear, skirts, and a small pair of shorts. R510-11, 518-20, 608-10. S.M. testified that on roughly ten occasions in 2013, when she was nine years old, defendant removed her clothes and rubbed her vagina. R593-94. Other witnesses testified that S.M. told them about the abuse. *See, e.g.*, R514, 544-45, 561-67.

S.M.'s younger sister, B.L., testified that defendant sometimes rubbed her (B.L.'s) leg and upper thigh while she lay on his bed and he gave S.M. her own special bedroom in his house. R631-34. Defendant then moved for a mistrial, arguing that B.L.'s testimony was unduly prejudicial and inadmissible under Illinois law. R646. The court denied the motion. R647.

On the second day of trial, the jury was shown defendant's recorded interview with police. R693. In the interview, defendant said that (1) B.L. slept in bed with him; (2) he cuddled and played with the girls; (3) S.M. would not lie about being touched; and (4) if he ever touched the girls on their vaginas, it was not on purpose. Exh. 28 at 15:15:14-15:16:38, 16:10:50-16:11:31, 18:13:13-

[1] The common law record and report of proceedings are cited as "C__" and "R__," respectively.

18:14:30, 18:15:15-42; 18:15:57-18:16:17. A detective testified that in defendant's bedroom, police discovered photographs of children (including S.M. and her sisters), clothing, shoes, and toys for young girls, and a little girl's bikini. R668-74.

Defendant then moved a second time for a mistrial because the detective briefly mentioned that defendant had asked for a lawyer during his interview. R724-25. The court denied the motion and the State rested. R724, 727.

Defendant neither testified nor called any witnesses. R732-34. The parties stipulated that S.M. told representatives of the State's Attorney's Office that she initially had said that defendant touched her over her clothes (rather than removing her clothes, as actually occurred) because she was too embarrassed to discuss the full extent of defendant's abuse. R736-37. Defendant then rested. R737.

B. The Deadlocked Jury and the Court's Declaration of a Mistrial

Following closing arguments and instructions, the jury began deliberating at 10:50 a.m. on the third day of trial. R812-13. At the jury's request, at 1:40 p.m. the trial court re-played a video of S.M.'s interview at the Child Advocacy Center. R819-20. The jurors returned to the jury room at 2:15 p.m. R820-21.

At 4:25 p.m., the trial judge advised the parties that she had received the following note from the jury: "After deliberating for 5 hours and despite our best efforts, we are at an empasse [sic]." R821; C179. The judge also informed the parties that, earlier in the day, after the jurors had reviewed S.M.'s recorded interview, they had told the bailiff that they were at an impasse. R821. The judge told the parties, "At that time, I instructed the jury — or instructed my bailiff to

tell them to continue to deliberate. So this is the second time that I have received information from the jury that they are at an impasse." R821-22.

The judge suggested that she bring the foreperson into the courtroom to ask whether further deliberations would help. R822. The judge said that she "would be more than willing to ask them if they'd like to go home, come back tomorrow, sleep on it." *Id.* When the jury was brought into the courtroom, the following discussion occurred:

The Court:	I received your note that you are at an impasse. Can you tell me how long that you have been at that impasse?
The Foreperson:	Pretty much a good part of the day. Four and a half hours or five hours.
The Court:	And nothing has changed during that period of time?
The Foreperson:	Some numbers changed here and there, but we were stuck at a certain proportion.
The Court:	And how long has that existed?
The Foreperson:	About I would say three hours.
The Court:	And you haven't moved during that period of time?
The Foreperson:	No, ma'am.
The Court:	Do you — let me ask, do you think if I sent you home for the night, let you sleep on it, would it do any good? Could you continue your deliberation tomorrow? Would that help at all?
The Foreperson:	I asked that question, and it was indicated that it would not.
The Court:	It would not?
The Foreperson:	No, ma'am.
The Court:	You can take the jurors back out. I'll be back with you in just a couple minutes.

R823-24.

The jurors returned to the jury room and the following discussion occurred in the courtroom outside the jury's presence:

The Prosecutor:	Judge, I do understand the foreperson's comments. I understand it seems as though they are completely deadlocked at this point and it might be futile for future further deliberation. However, I believe that procedurally, from the State's point of view, we should at least attempt the *Prim* instruction before we discharge the jury.[2]
Defense Counsel:	I would agree with the State, Your Honor.
The Court:	Pardon?
Defense Counsel:	I would agree with the State.
The Court:	You agree with the State?
Defense Counsel:	I do. Or I guess, in the alternative, my argument would be we – despite them saying it won't make a difference, come back tomorrow. I think those are really the only two viable alternatives.
Prosecutor:	We could always read them the *Prim* instruction and bring them back tomorrow.
The Court:	[Defense counsel]?
Defense Counsel:	I don't have any objection to that, Judge.
Prosecutor:	Just suggestions, Judge. I'm not saying that's the right method that we believe, but—
The Court:	I am fearful, folks, if I do that, you're going to have some extremely angry jurors.
Prosecutor:	I understand, Judge.
The Court:	There has been some very loud voices back there for a period of time. I think it would be futile to do that. Therefore, I would decline.

R824-26.

[2] A *Prim* instruction is a discretionary instruction that can be used to encourage a jury to continue to deliberate. *See People v. Prim*, 53 Ill. 2d 62, 75-76 (1972).

Defense counsel did not object or otherwise respond to the judge's decision not to give a *Prim* instruction. R825-26. The judge then brought the jurors back into the courtroom and declared a mistrial. R826. Defense counsel did not object to the declaration of a mistrial. *Id.*

Defense counsel instead asked the court to set a status hearing in one month so that he could issue subpoenas in advance of the new trial. R827. The prosecutor agreed and the court set a status hearing for December 4, 2015 for "status and to reset for trial." *Id.*

C. Defendant's Motion to Bar Prosecution and His Subsequent Appeal

At the status hearing, defense counsel argued for the first time that continued prosecution was barred by double jeopardy principles. R831, C225. After further briefing and argument, the trial court denied the motion. R836. The appellate court reversed, holding that (1) defendant's agreement that the jury could be given a *Prim* instruction constituted an objection to the court's subsequent declaration of mistrial; and (2) the mistrial was prompted by judicial indiscretion, not a deadlocked jury. *People v. Kimble*, 2017 IL App (2d) 160087.

STANDARD OF REVIEW

A trial court's sua sponte declaration of a mistrial and denial of a motion to dismiss on double jeopardy grounds are reviewed for an abuse of discretion. *People v. Bean*, 64 Ill. 2d 123, 128 (1976); *see also People v. Hill*, 353 Ill. App. 3d 961, 965-66 (4th Dist. 2004) (collecting cases).

ARGUMENT

The Double Jeopardy Clauses of the Illinois and Federal constitutions prevent a defendant from being prosecuted twice for the same offense. U.S. Const. Amend. V; Ill. Const., Art. I, § 10. But because a defendant's interest in finality must be balanced against the public's interest in just outcomes, it has long been held that continued prosecution following a mistrial is not necessarily barred. *See, e.g., Arizona v. Washington*, 434 U.S. 497, 505 (1978). A new trial is permitted if (1) the defense consented to a mistrial; or (2) the mistrial was justified by "manifest necessity," such as where the jury was deadlocked. *Id.*; *see also People v. Camden*, 115 Ill. 2d 369, 377-79 (1987).

Here, the State is permitted to prosecute defendant in a new trial for two independent reasons. First, defendant consented to a mistrial. *See* Section I, below. Second, even if defendant did not consent, the jury was deadlocked and, thus, declaring a mistrial was a manifest necessity. *See* Section II.

I. Defendant Consented to a Mistrial.

A. Defendant Implicitly Consented to a Mistrial Because He Had the Opportunity to Object but Failed to Do So.

This Court has made clear that the failure to expressly object to the declaration of a mistrial before the jury is released constitutes implicit consent to the mistrial and bars the defendant from later arguing that a new trial violates double jeopardy principles. *See Camden*, 115 Ill. 2d at 377-79; *see also People v. Segoviano*, 189 Ill. 2d 228, 248 (2000) (double jeopardy clause does not bar new trial "if defendant had consented to, or even merely failed to object to the mistrial"). In *Camden*, a sheriff heard a juror say during trial that he did not

know whether he could render an impartial verdict. 115 Ill. 2d at 372. The sheriff and the juror were examined in open court; defense counsel did not cross-examine the sheriff or the juror, and he objected to the State questioning the juror about why he was unable to render a verdict. *Id.* at 373-74. The trial court then sua sponte declared a mistrial. *Id.* at 374-75. Camden did not object to the mistrial at that time but at a subsequent hearing he moved to bar a new trial based on double jeopardy principles. *Id.* at 375.

This Court held that Camden had implicitly consented to the mistrial because he had failed to expressly object before the jury was discharged. *Id.* at 377-79. As this Court noted, Camden could have objected to a mistrial (1) following the conclusion of the examination of the juror; or (2) when the judge declared a mistrial. *Id.* at 377-78. Apart from objecting to questioning the juror, however, defense counsel stood mute. *Id.* at 378. Accordingly, this Court held that "the defendant implicitly consented to the mistrial" and that the double jeopardy clause "d[id] not bar reprosecution." *Id.* at 379.

Notably, Camden thereafter filed a federal habeas corpus petition, and the Seventh Circuit Court of Appeals endorsed this Court's holding and reasoning. *Camden v. Cir. Ct. of Crawford Cty.*, 892 F.2d 610, 615 (7th Cir. 1990). The Seventh Circuit noted that Camden and his counsel "were afforded a minimal but adequate opportunity to object" to the mistrial but failed to do so. *Id.* As the Seventh Circuit explained, the trial court's comments "should have prompted defense counsel to object if he did not agree with the need for a mistrial or the propriety of a retrial." *Id.* Defense counsel "merely had to rise in a respectful manner prior to the dispersal of the jury and indicate his objection to the

mistrial." *Id.* at 618. The failure to do so "clearly demonstrate[s] that the double jeopardy argument was merely an afterthought that took form long after the first trial ended in a mistrial." *Id.* Accordingly, a new trial was not barred by double jeopardy principles. *Id.*

Consistent with this Court's holding in *Camden*, numerous other state high courts and federal courts of appeals have held that the failure to expressly object to a mistrial before the jury is released constitutes implicit consent to the mistrial that bars any double jeopardy argument. *See, e.g., United States v. Palmer*, 122 F.3d 215, 219 (5th Cir. 1997) ("Our precedents require that criminal defendants make timely, explicit objections to a sua sponte declaration of a mistrial, lest they be held to have impliedly consented to it"); *see also Marte v. Vance*, 480 F. App'x 83, 85 (2d Cir. 2012) (failure to expressly object to mistrial constituted implicit consent); *United States v. Alvarez*, 561 F. App'x 375, 380 (5th Cir. 2014) (same); *United States v. Brewley*, 382 F. App'x 232, 237-39 (3d Cir. 2010) (same); *United States v. DiPietro*, 936 F.2d 6, 9-10 (1st Cir. 1991) (same); *United States v. Puelo*, 817 F.2d 702, 705 (11th Cir. 1987) (same); *Pellegrine v. Com.*, 446 Mass. 1004, 1005 (Ma. 2006) (same); *State v. Cram*, 46 P.3d 230, 232-33 (Utah 2002) (same); *State v. Johnson*, 267 Ga. 305, 306 (Ga. 1996) (same); *State v. Tolliver*, 839 S.W.2d 296, 300 (Mo. 1992) (same).

And, until this case, the Illinois Appellate Court likewise followed *Camden* and held that a defendant must expressly object to a mistrial to preserve a double jeopardy argument. *See People v. Hill*, 353 Ill. App. 3d 961, 966 (4th Dist. 2004); *People v. Escobar*, 168 Ill. App. 3d 30, 39 (1st Dist. 1988).

The requirement of a clear, express objection to a mistrial is sensible for a variety of reasons. As with other kinds of alleged errors, the requirement that a defendant expressly object to a mistrial allows the trial court to address and resolve a defendant's concerns in the first instance and thus conserve judicial resources. It also provides a bright-line rule that imposes a minimal burden on defendants and is easily applied by trial and appellate courts.

Furthermore, in the context of a mistrial, the express objection requirement takes on even greater importance because it is integral to protecting the interests of justice and maintaining an effective criminal justice system. That is so because, unlike many other kinds of errors, if a trial court is found to have incorrectly declared a mistrial, and the defendant is found not to have consented, the remedy is not remand for a new trial, but rather an acquittal and a bar against continued prosecution, regardless of the evidence against the defendant. *See, e.g.*, *Washington*, 434 U.S. at 503-04. Given those harsh consequences to the interests of the State, it is reasonable — indeed it is plainly correct — to impose the minimal burden on a defendant to expressly object to the declaration of a mistrial before the jury is released.

Indeed, as courts have recognized, if there were no such requirement, then defendants would have an incentive to either remain silent or act ambiguously when a court is considering whether to declare a mistrial, and then later win a bar against prosecution by claiming that the trial court's decision was error. *See, e.g.*, *Camden*, 892 F.2d at 618 (defendants should not be permitted to "manipulate the events" and "profit from a failure to act"); *Hill*, 353 Ill. App. 3d at 967 (similar); *see also People v. Mosley*, 74 Ill. 2d 527, 536 (1979) ("[D]efendant cannot by his

own act avoid the jeopardy in which he stands and then assert it as a bar to subsequent jeopardy"). Such incentive is contrary to this Court's long-held and well-reasoned principle that a party who fails to expressly object to a trial court's course of action cannot claim on appeal that the trial court erred. *See, e.g.*, *People v. Marigny*, 51 Ill. 2d 445, 450 (1972) ("An accused may not sit idly by and allow irregular proceedings to occur without objection and afterwards seek to reverse his conviction by reason of those same irregularities"); *In re Det. Of Swope*, 213 Ill. 2d 210, 217 (2004) (defendant may not appeal trial court action he accepted "even though that acceptance may have been grudging").

Here, defendant did not expressly object to a mistrial even though, as in *Camden*, he had multiple opportunities to do so. For example, defendant could have expressly objected to a mistrial (1) when the prosecutor noted that he was "not saying" that the discussed alternatives to mistrial were "the right method that we believe"; or (2) when the trial judge declined to issue a *Prim* instruction and indicated that she intended to declare a mistrial; or (3) when the judge then asked the bailiff to recall the jury so that she could declare a mistrial; or (4) minutes later when the jury returned to the courtroom but before the judge formally announced the mistrial and discharged the jury; or (5) at any other time during the parties' lengthy discussion of what to do with a jury that appeared to be "completely deadlocked."

But defendant failed to object at any of those opportunities. Instead, he stood silently by when the court announced the mistrial, then asked for a status hearing so that he could issue subpoenas in advance of the new trial. Accordingly, defendant may not now claim that the trial court erred by declaring

a mistrial or argue that a new trial is barred by double jeopardy principles. *See*, *e.g.*, *Camden*, 115 Ill. 2d at 377-79.

B. Defendant Expressly Consented to a Mistrial by Moving for a Mistrial on Each of the Previous Two Days of Trial.

There is a second, independent basis for finding consent: defendant's motions for a mistrial on each of the first two days of trial constitute consent to the trial court's decision to declare a mistrial on the third day. *See Mosley*, 74 Ill. 2d at 536-37. In *Mosley*, the prosecutor admitted on the first day of trial that he was the source for a Chicago Tribune article that provided a variety of important facts about the case. *Id.* at 531-32. Mosley moved for a mistrial on the grounds of "prosecutorial misconduct and fundamental unfairness," then moved for a mistrial several more times based on the court's questioning of jurors about the article. *Id.* The trial judge eventually indicated that he intended to declare a mistrial, though no juror had seen the article, because he was concerned that "the Court itself highlighted the article." *Id.* at 533. Mosley objected, urged the court to sequester the jury, then withdrew that argument. *Id.* at 533-34. The judge then declared a mistrial and Mosley contended that a new trial was barred by double jeopardy principles because the mistrial was (1) on the trial court's own motion and (2) based on a different ground than Mosley's prior requests for a mistrial. *Id.* at 534.

This Court concluded that Mosley was barred from raising a double jeopardy argument because "there can be no doubt that the mistrial eventually declared was the relief requested by the defendant on the earlier occasions." *Id.* at 536. Given Mosley's prior requests for a mistrial, albeit on alternative grounds,

this Court held that the mistrial had to be viewed, "at the minimum, to have been declared with his consent." *Id.* at 537.

Thus, the rule has developed here and in other jurisdictions that a defendant's prior request for a mistrial constitutes consent to the trial court's subsequent declaration of a mistrial unless the defendant withdrew his earlier motion. *See*, *e.g.*, *People v. Orenic*, 88 Ill. 2d 502, 509 (1981) (defendant's requests for additional jury instruction during deliberation, motion for dismissal with prejudice, and assertion that any mistrial should be on judge's motion "since we don't think we were the cause," were insufficient to withdraw prior agreement that mistrial was possible alternative); *United States v. Buljubasic*, 808 F.2d 1260, 1265 (7th Cir. 1987) (finding consent where defendant did not inform trial court that he wished to withdraw earlier motions for mistrial); *Earnest v. Dorsey*, 87 F.3d 1123, 1129 (10th Cir. 1996) (same).

Furthermore, similar to this Court's decision in *Mosley*, other courts likewise have found consent even if the defendant's prior motions for mistrial were based on a different ground than the one ultimately relied on by the trial court. *See*, *e.g.*, *State v. Saunders*, 267 Conn. 363, 397 & n.34 (Conn. 2004) (that defendant's motion for mistrial was based on "different ground" than the one relied on by the trial court "was irrelevant"); *State v. Knight*, 616 S.W.2d 593, 596-97 (Tenn. 1981) (same). Similar to *Mosley*, those courts have noted that a defendant's motion for a mistrial, even if on a different ground, "constituted an acknowledgment" by the defendant that "he was prepared to relinquish his right to have the charges against him resolved in the first trial." *Saunders*, 267 Conn. at 397.

Here, trial lasted only three days. Defendant moved for a mistrial on the first day of trial; he moved for a mistrial on the second day of trial; and the court declared a mistrial on the third day of trial, without an express objection by defendant. By repeatedly moving for a mistrial, defendant plainly indicated that he did not object on double jeopardy grounds to a new trial. And by declaring a mistrial, the trial court granted defendant the relief he had requested every previous day of trial. Indeed, there can be no doubt that had the jury continued to deliberate and returned a guilty verdict, defendant would have argued on appeal that a mistrial should have been *granted* on either of the first two days of trial and the case never should have been submitted to the jury. Accordingly, defendant cannot now claim that a new trial is barred.

C. The Appellate Court Erred in Concluding that Defendant's Consent to a *Prim* Instruction Constituted an Objection to a Mistrial.

The appellate court's conclusion that defendant objected to a mistrial by agreeing with the prosecutor's initial suggestion that a *Prim* instruction could be given is contrary to controlling law, sound policy, and the record on appeal.

1. The appellate court's ruling is contrary to controlling law and sound policy.

As noted, this Court has never held that a request for *Prim* instruction, or anything short of an express objection to a mistrial, is sufficient to preserve a double jeopardy claim. Other courts have likewise found that requests for *Prim* instructions, suggestions that a deadlocked jury be allowed to continue deliberating, or other indications of a defendant's preference to proceed to verdict do not constitute an express objection to a mistrial. *See, e.g., Escobar*,

168 Ill. App. 3d at 38-39 ("The suggestion of a *Prim* instruction, alone, is insufficient" to constitute an objection to a mistrial); *Alvarez*, 561 F. App'x at 380 (defendant's assertion that he preferred to proceed to verdict was not objection to mistrial); *United States v. Phillips*, 431 F.2d 949, 950 (3d Cir. 1970) (expressed belief that deliberations could continue was not objection to mistrial); *United States v. Beckerman*, 516 F.2d 905, 908-09 (2d Cir. 1975) (request that deadlocked jury be re-instructed on burden of proof was not objection to mistrial); *Palmer*, 122 F.3d at 219 (expressed desire to complete trial was not objection to mistrial); *DiPietro*, 936 F.2d at 11 (defendant did not object to mistrial despite renewing motion for acquittal).

There are good reasons for these decisions. As noted, the requirement of a clear, express objection to a mistrial is sensible because it (1) provides a bright-line rule that imposes a minimal burden on defendants and is easily applied by courts; (2) removes an incentive for defendants to act ambiguously; and (3) effectively balances a defendant's interest in being tried once for an offense with the State's interest in prosecuting criminal offenses. *Supra* pp. 11-12.

Furthermore, as these cases suggest, there is no logical basis for the appellate court's belief that a request for a *Prim* instruction is per se incompatible with consent to a mistrial. For example, a party could believe that a jury was deadlocked, and a mistrial was acceptable, but still suggest that given the time and resources spent litigating the case there is no harm in making one last effort to encourage the jury to reach a verdict even though it was likely futile. Or a party could believe that the jury was truly deadlocked, and a mistrial necessary, but also believe that, as a procedural matter, the trial court was permitted to give

a *Prim* instruction. Or a party could initially request a *Prim* instruction and then, after learning new information, come to believe that to avoid a coerced jury it is necessary to declare a mistrial.

Indeed, as discussed further below, it appears that each of those explanations applies here, because defendant (1) agreed with the prosecutor's assertion that the jury appeared "completely deadlocked" and further deliberations might be "futile"; (2) merely agreed with the prosecutor's initial suggestion that "procedurally" a *Prim* instruction could be given but then remained silent when the prosecutor noted that he was "not saying that's the right method that we believe"; and (3) remained silent when the judge explained that a *Prim* instruction was a bad idea, and could lead to "extremely angry" jurors (and, thus, perhaps a coerced verdict), because she had heard "loud voices" arguing in the jury room for some time. *Infra* pp. 18-21. Therefore, a request for a *Prim* instruction is not necessarily incompatible with consent to a mistrial.

The appellate court failed to grapple with decisions holding that a request for a *Prim* or similar instruction is insufficient to preserve a Double Jeopardy claim or any of the important legal or policy considerations that underlie them. Instead, against this overwhelming weight of authority, the appellate court relied on only three cases, none of which supported its judgment. *See Kimble*, 2017 IL App (2d) 160087, ¶¶ 25-27 (citing *Escobar*, *Bagley*, *Kendrick*). In *Escobar*, unlike defendant here, Escobar had not moved for a mistrial; Escobar "repeatedly" and "unequivocal[ly]" asked that the jury be told to continue deliberating; and Escobar's attorneys "believed that the verdict would be favorable" and expressly asked "that the jury be allowed to proceed so as not to

jeopardize Escobar's position." *Escobar v. O'Leary*, 943 F.2d 711, 716-17 (7th Cir. 1991). In *Bagley*, the court likewise relied on the fact that, unlike defendant here, Bagley "never formally requested a mistrial" during trial and instead "forcefully argued" that the trial should continue. *People v. Bagley*, 338 Ill. App. 3d 978, 981-82 (2d Dist. 2003). And in *Kendrick*, "defense counsel expressed his desire to continue the trial" because the State's key witness testified that a police officer convinced him to lie and, thus, "it was the prosecution's case which was in shambles." *State v. Kendrick*, 868 S.W.2d 134, 137 (Mo. App. Ct. 1993). None of those cases is remotely similar to the facts presented here. Nor does any of those cases provide any basis for departing from the long-established rules that (1) the failure to expressly object to the declaration of a mistrial before the jury is released constitutes implicit consent to the mistrial; and (2) prior requests for a mistrial constitute consent to a trial court's declaration of a mistrial.

In sum, there is no legal or policy basis for the appellate court's judgment.

2. The appellate court's decision is contradicted by the record.

In addition to its failure to apply this Court's precedent, the appellate court's ruling — which rests on its belief that defendant "forcefully argued" for a *Prim* instruction — is contradicted by the record.

To begin, the appellate court ignored that defendant never suggested (let alone "forcefully argued") that there was reason to believe that the jury could reach a verdict. To the contrary, after examination of the foreperson, defense counsel "agree[d]" with the prosecutor's statement that it appeared that the jury

was "completely deadlocked" and further deliberation might be "futile." R824-25.

The appellate court also ignored that it was the prosecutor (not defendant) who suggested that "procedurally" the court could give a *Prim* instruction, even though it might be "futile." *Id.* Defense counsel's response was simply to agree. R825. Notably, counsel's response was so quiet that the judge had to ask him to speak up and confirm his position. *Id.*[3] Defense counsel then noted that *instead* of giving a *Prim* instruction, the jury could simply be ordered to return the next day. *Id.* The prosecutor noted that it was possible to both give the jury a *Prim* instruction *and* tell it to return the next day; in response defense counsel said, "I don't have any objection to that." *Id.* The prosecutor then noted that he was "not saying" that the discussed alternatives were "the right method that we believe" and defense counsel remained silent. *Id.*

Thus, the record establishes that defendant did *not* "argue forcefully" for a *Prim* instruction. Rather, after the parties agreed that the jury appeared to be "completely deadlocked," it was the prosecutor who suggested possible ways forward and defense counsel merely responded that he "agreed" or had no objection or proposed that no *Prim* instruction be given at all. And, notably, when the prosecutor clarified that he was "not saying" that the discussed alternatives were "the right method," defense counsel never spoke up to insist that they were. Counsel's responses are not the actions of someone who

[3] Although the appellate court said that defendant requested a *Prim* instruction "three times," the record shows that this was merely defense counsel agreeing with the prosecutor's procedural suggestion and then immediately repeating himself twice because the judge asked him to speak up. R825.

"forcefully argued" for a *Prim* instruction, let alone someone who clearly opposed a mistrial, especially when viewed in light of defendant's requests for mistrials on the two previous days of trial.

Perhaps most importantly, the appellate court also ignored that defendant did not disagree when the court explained why a *Prim* instruction was a bad idea and a mistrial was necessary. After the discussion noted above, the judge explained that she was "fearful" that if she gave a *Prim* instruction then "you're going to have some extremely angry jurors," *i.e.*, a jury that could produce a tainted verdict. R825. She then told counsel a fact apparently unknown to them — that she had heard "some very loud voices back there [in the jury room] for a period of time" — and that, therefore, she would not give a *Prim* instruction. R825-26. Notably, neither party disagreed or argued then (or ever) that there was any reason to believe that the jury could reach a verdict. R826. Instead, defense counsel remained silent as the judge called the jurors back to the courtroom, thanked them for their service, and then declared a mistrial. *Id.* All of counsel's actions are consistent with someone who understands that a mistrial is necessary, not someone "forcefully" opposed to it.

Lastly, the appellate court erred in giving no weight to counsel's actions immediately after the trial court declared a mistrial. Rather than objecting to the court's decision, or indicating in any way that he planned to argue that a new trial was barred, defendant instead (1) asked that a status hearing be set for thirty days so that he could issue subpoenas necessary for the new trial; and (2) agreed to a status hearing "to reset for trial." R827. As this Court and others have correctly held, engaging in a discussion about a new trial after the jury is released is

consistent with a finding that defendant consented to a mistrial. *See*, *e.g.*, *Camden*, 115 Ill. 2d at 378 (waiver of speedy trial right and discussion of scheduling moments after jury was discharged indicated consent to new trial); *Camden*, 892 F.2d at 618 (discussion of new trial date moments after mistrial declaration "bolsters our finding that [defendant] impliedly consented to a mistrial"); *Alvarez*, 561 F. App'x at 380 (discussion of venue change after jury discharge indicated consent); *Washington*, 263 Va. at 306 (discussion of scheduling after jury discharge indicated consent).

Accordingly, the appellate court's ruling is contradicted by the record. Even if this Court were to hold that a request for a *Prim* instruction could, in some rare case, constitute an objection to a mistrial (and it should not, for the reasons discussed above), this is not the case to reach that conclusion. Defendant's actions, particularly in light of his repeated requests for a mistrial, are those of someone who understood why a mistrial was necessary and had no objection.

II. The Trial Judge Did Not Abuse Her Discretion in Determining that the Jury Was Deadlocked and a Mistrial Was a Manifest Necessity.

Even if defendant had not consented to a mistrial, a new trial is permitted because the jury was deadlocked and, thus, declaring a mistrial was a manifest necessity. *Washington*, 434 U.S. at 505, 509 (new trial permitted where declaring mistrial was "manifest necessity" such as where jury was deadlocked). The appellate court's conclusion that "judicial indiscretion," not a deadlocked jury, caused the mistrial is contrary to controlling law and the facts of this case.

A. The Trial Court Did Not Prompt a Mistrial by Instructing the Jury, Ex Parte, to Continue to Deliberate.

The appellate court failed to apply controlling law and misconstrued the record when it held that "the [trial] court's indiscretion" — namely, telling the jury ex parte to continue deliberating — "prompted the mistrial" and, thus, "reprosecution is barred." *Kimble*, 2017 IL App (2d) 160087, ¶ 41.

As a matter of best practices, a judge generally should not speak to the jury ex parte while trial is ongoing. But whether such a communication is an error depends on the substance of the communication and, in particular, whether it prejudices the defendant. *See, e.g.*, *People v. McLaurin*, 235 Ill. 2d 478, 497 (2009); *People v. Johnson*, 238 Ill. 2d 478, 489 (2010). Tellingly, defendant never objected to the trial court's ex parte communication — not when he first learned about it in open court, and not a month later when he filed his motion to bar reprosecution. R821-27; C225-27. Accordingly, defendant now bears the burden of showing that he was prejudiced, *i.e.*, that the communication affected the jury's deliberations to his detriment. *See, e.g., McLaurin*, 235 Ill. 2d at 497.

This Court's precedent plainly holds that, under these facts, defendant cannot carry his burden to show that he was prejudiced. In *Johnson*, after the jury announced its guilty verdict and was released, the trial judge told the parties that earlier in the day he had instructed the jury, ex parte, to "continue deliberating" when they reported that they were at an impasse. *Johnson*, 238 Ill. 2d at 482. This Court affirmed Johnson's conviction because, among other reasons, telling the jury to "continue deliberating" is "a clear and noncoercive response well within [the judge's] discretion." *Id.* at 490. Similarly, in

McLaurin, "the court sent the bailiff to tell the jury to 'keep on deliberating'" without notifying the defendant personally of that communication. *McLaurin*, 235 Ill. 2d at 496. This Court concluded that the instruction was neither coercive nor improper and, thus, was not a basis to reverse the defendant's conviction. *Id.* at 498-99.

Johnson and *McLaurin* are directly on point. Here, the jury indicated that it was at an impasse, and the judge instructed the bailiff to tell them "to continue to deliberate." R821-22. There is no material difference between that instruction and the instructions this Court found permissible in *Johnson* and *McLaurin*. Furthermore, any potential for prejudice here (and, to be clear, there is none) is dramatically lower than in *McLaurin* or *Johnson* because in each of those cases, the defendant's convictions were affirmed despite the ex parte instruction, whereas in this case the State is arguing only that it be allowed to continue prosecuting defendant for the numerous sexual abuse charges against him.

The appellate court failed to consider this controlling precedent and instead found that the simple instruction to "continue to deliberate" prejudiced defendant for four reasons, each of which is meritless.

First, the appellate court ignored the record when it held that the judge's ex parte instruction somehow "led to the precipitous declaration of a mistrial without considering available alternatives" such as a *Prim* instruction. *Kimble*, 2017 IL App (2d) 160087, ¶¶ 36, 37. After telling the parties about the ex parte instruction she had given a few hours earlier and that she had now received a new note indicating that the jury was deadlocked, the judge expressly told the parties that she would "be more than willing to ask them if they'd like to go home, come

back tomorrow, sleep on it. If it would do any good, I'll bring them back tomorrow." R822. After further discussion in court, the judge then called in the foreperson to ask for details about the length of the impasse, whether anyone had changed their minds during that time, whether it would help to sleep on it, and whether further deliberations would help. R823-24. The foreperson said that the impasse had existed for hours and that further deliberations would be futile. *Id.* After the foreperson returned to the jury room, the judge then gave the parties ample time and opportunity to suggest how best to proceed. R824-26. Ultimately, after hearing from both parties, the judge explained that she believed she had to declare a mistrial because further deliberations would be "futile" and perhaps worse because of the jurors' anger. R825-26.

Thus, the judge did not act "precipitously" or fail to "reasonably" consider alternatives. Rather, the judge expressly stated her openness to consider alternatives, questioned the foreperson, allowed the parties to suggest alternatives, and then, after gathering and considering that information, explained why she believed a mistrial was necessary.

Second, the appellate court failed to apply controlling law when it held that "defendant suffered a deprivation of his fundamental rights when the judge engaged in the ex parte communication with the jury." *Kimble*, 2017 IL App (2d) 160087, ¶ 36. As noted, this Court has expressly held on multiple occasions that an ex parte instruction to continue deliberating is "well within [the trial judge's] discretion" and does not affect "the fairness of the defendant's trial" or "the integrity of the judicial process." *Johnson*, 238 Ill. 2d at 490 (citations omitted).

Third, the appellate court failed to apply controlling law when it held that telling the jury to continue deliberating "left the jury with no guidance" and could have caused jurors to feel "coerced." *Kimble*, 2017 IL App (2d) 160087, ¶ 38. Again, this Court has made clear that an instruction to continue deliberating is "a clear and noncoercive response well within [the judge's] discretion." *Johnson*, 238 Ill. 2d at 490; *see also McLaurin*, 235 Ill. 2d at 498-99 (same).

Fourth, the appellate court ignored the record and failed to apply this Court's precedent when it concluded that defendant was prejudiced because the ex parte instruction "foreclosed defendant's option to request the *Prim* instruction earlier in the afternoon when the jury first considered itself at an impasse." *Kimble*, 2017 IL App (2d) 160087, ¶ 40. The defendant in *Johnson* raised precisely that same argument and the majority of this Court necessarily rejected it. *See Johnson*, 238 Ill. 2d at 495 (Burke, J., dissenting, describing Johnson's argument). Rightly so, for among other reasons, this Court has long held that a trial judge has broad discretion in dealing with a deadlocked jury and is not obligated to give a *Prim* instruction when a party requests it. *See, e.g., People v. Cowan*, 105 Ill. 2d 324, 328 (1985) (no obligation to give *Prim* instruction); *see also Blueford v. Arkansas*, 566 U.S. 599, 609 (2012) ("We have never required a trial court, before declaring a mistrial because of a hung jury, to consider any particular means of breaking the impasse"); *Escobar*, 943 F.2d at 718, n.5 ("Contrary to Escobar's assertion, Judge Bailey was not obligated prior to declaring a mistrial to read the *Prim* instruction").

In addition, unlike the defendant in *Johnson* (who learned about the impasse and ex parte instruction after the verdict was rendered), (1) this

defendant had an opportunity to argue for a *Prim* instruction; (2) the trial court here considered a *Prim* instruction and offered credible reasons for rejecting it; (3) during the discussion of possible alternatives here, defense counsel noted that one possibility was simply telling the jurors to return the next day *without* giving a *Prim* instruction, *see* R825, and (4) defendant here indicated his consent to a mistrial in multiple ways, as discussed above.

Moreover, while the judge did not formally give a *Prim* instruction, her ex parte instruction to "continue to deliberate" echoes *Prim*'s directive that it is the jurors' duty "to consult with one another and to deliberate." *Prim*, 53 Ill. 2d at 75-76. And the other parts of the *Prim* instruction — that the decision must be unanimous, each juror must decide the case for himself or herself, the jurors are the factfinders, and each juror must be open-minded without surrendering an honest belief to reach a verdict — simply repeat instructions the jurors had already heard that morning when deliberations began and/or have no meaningful application here because the jury did not reach a verdict and, thus, there is no concern that defendant was found guilty by a split or coerced jury. *See* R804, 806-07, 809-10, 812 (selected portions of jury instructions); *see also Cowan*, 105 Ill. 2d at 328 (noting that much of the language in *Prim* was included to avoid coercing jury to reach verdict).

Although the appellate court's primary concern was that absent a *Prim* instruction, the jury did not know to keep an open mind and be willing to reexamine their opinions, there is no reason to assume that jurors are unaware of that basic principle. And that is especially true with respect to these jurors because they showed an open-minded willingness to reexamine their opinions in

at least two ways. According to the foreperson, the jury viewed itself to be at an impasse shortly before noon. R823. Rather than telling the judge or bailiff that they were deadlocked, however, the jurors continued to deliberate, then a few hours later reviewed the videotape of S.M.'s interview. R820-21. Such actions indicate that the jurors remained open-minded, sifted through the evidence, and reexamined their own views. Furthermore, the foreperson noted that earlier in the deliberations, one or more jurors had changed their initial positions, R823, which again indicates that the jurors were aware of their duty to keep an open mind, listen to their fellow jurors, and be willing to change their opinions.

In sum, the appellate court's conclusion that the trial court's ex parte instruction "prompted" the mistrial or in any way prejudiced defendant fails under controlling law and the facts of this case.

B. The Trial Court Did Not Abuse Its Discretion in Determining that the Jury Was Deadlocked.

Both this Court and the United States Supreme Court have repeatedly emphasized that trial courts have "broad discretion" to declare a mistrial. *See*, *e.g.*, *Renico v. Lett*, 559 U.S. 766, 774 (2010); *People v. Hall*, 194 Ill. 2d 305, 341 (2000). And, as the United States Supreme Court has held, "The reasons for 'allowing the trial judge to exercise broad discretion' are 'especially compelling' in cases involving a potentially deadlocked jury." *Lett*, 559 U.S. at 774.

That is so because "the trial court in in the best position to assess all the factors which must be considered in making a necessarily discretionary determination whether the jury will be able to reach a just verdict if it continues to deliberate." *Id.* (internal citations and quotations omitted). Absent such

deference, trial judges "might otherwise employ coercive means to break the apparent deadlock, thereby creating a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors." *Id.* (internal citations and quotations omitted). Because of the deference given to trial courts, the Supreme Court has "never overturned a trial court's declaration of a mistrial after a jury was unable to reach a verdict." *Id.* at 775 (internal citations omitted).

The governing abuse of discretion standard of review requires defendant to show that the trial court's decision was "arbitrary, fanciful, unreasonable" or that "no reasonable person would take the view adopted by the trial court." *People v. Delvillar*, 235 Ill. 2d 507, 519 (2009). On this record, defendant cannot come close to meeting that standard.

Neither this Court nor the United States Supreme Court has adopted a framework for analyzing whether a trial court abused its discretion in declaring a mistrial, but other courts generally have examined six factors:

- Factor one: the jury's collective opinion that it cannot reach a verdict;
- Factor two: the length of deliberations;
- Factor three: the length of trial;
- Factor four: the complexity of the issues presented to the jury;
- Factor five: communications between the judge and jury; and
- Factor six: the possibility of jury exhaustion and coercion.

See, e.g., *People v. Andrews*, 364 Ill. App. 3d 253, 266-67 (2d Dist. 2006) (collecting cases). Each of those factors supports the trial court's decision to declare a mistrial here.

1. Factor one: the jury believed that it was completely deadlocked.

Courts, including the United States Supreme Court, repeatedly have held that the "most important" factor in determining whether a trial court abused its discretion by declaring a mistrial is the jury's own statement that it is unable to reach a verdict. *Lett*, 559 U.S. at 778; *see also*, *e.g.*, *United States v. Hernandez-Guardado*, 228 F.3d 1017, 1029 (9th Cir. 2000) (the "most critical factor" is "the jury's own statement that it is unable to reach a verdict"); *Escobar*, 943 F.2d at 718 (jury's own opinion is "the most critical factor"). That rule is sensible because the jurors are the best judges of their own minds and the possibility that they will change their positions and reach a unanimous verdict.

Here, the jurors made clear that they were completely deadlocked and would not change their minds. In the early afternoon, the jury indicated to the bailiff that they were at an impasse. R821. Then the jury sent a note to the judge several hours later stating that "despite our best efforts, we are at an [i]mpasse." *Id*. And when questioned by the judge, the foreperson said that (1) the jury had been deadlocked for hours; and (2) the jurors collectively believed that it would be futile to continue deliberating. R822-23. Accordingly, the "most critical" factor in this analysis weighs strongly in favor of finding that the trial court appropriately exercised its discretion by declaring a mistrial.

2. Factors two through four: length of deliberations, length of trial, and complexity of the issues.

Courts typically examine the second, third, and fourth factors together, holding that that the shorter the trial and the simpler the issues, the less time a

jury needs to be given before determining it is deadlocked. *See, e.g., Andrews*, 364 Ill. App. 3d at 269.

Here, the trial was short — there were only two days of testimony before the case was submitted to the jury. Furthermore, the case presented only a single issue: whether S.M. was telling the truth that defendant sexually abused her. Notably, there was no physical evidence to consider — this is not a case involving DNA, ballistic reports, or any complex evidentiary issue. And there was no expert testimony, conflicting eyewitness reports, or alibi defenses to resolve. Rather, the question of defendant's guilt depended entirely on whether the jury found S.M.'s testimony credible, and determining someone's credibility is a commonplace task that jurors perform all the time in their everyday lives outside of the courtroom.

Given the brief nature of the trial, and that the verdict depended on only one straightforward issue, it was reasonable for the Court to declare a mistrial after five hours of deliberation, especially given that the judge had already encouraged the jury to continue deliberating earlier in the day. Indeed, courts have routinely affirmed mistrials when the jury deliberated for similar or shorter periods of time in much more complex cases, even where the jury was never given a *Prim* or related instruction. *See, e.g.*, *Hernandez-Guardado*, 228 F.3d at 1029 (affirming mistrial after two hours of deliberations in conspiracy to transport illegal aliens case; no *Prim* instruction given); *People v. Wolf*, 178 Ill. App. 3d 1064, 1066 (3d Dist. 1989) (affirming mistrial after two hours of deliberations in residential burglary case; no *Prim* instruction given); *Lett*, 559 U.S. at 777-78 (affirming mistrial after four hours of deliberation in murder case; no *Prim* instruction given); *Andrews*, 364 Ill. App. 3d at 269 (affirming mistrial after five-

and-a-half hours of deliberation in vehicular hijacking case); *United States v. Malcom*, 295 F. App'x 982, 984 (11th Cir. 2008) (affirming mistrial after five hours of deliberation in armed bank robbery case); *United States v. Vaiseta*, 333 F.3d 815, 818 (7th Cir. 2003) (affirming mistrial after seven hours of deliberations in auto-theft ring case; no *Prim* instruction given). Accordingly, these factors support the trial court's decision to declare a mistrial.

3. Factor five: communications between judge and jury.

Courts have recognized that, even where the trial court did not give a *Prim* instruction, the fact that the trial court "instructed the jury to try again" is an "important factor" weighing in favor of a finding that the trial court did not abuse its discretion by declaring a mistrial. *See*, *e.g.*, *Malcolm*, 295 F. App'x at 984. In addition, courts have found that it is reasonable to declare a mistrial if the trial court spoke to the jury about the status of their deliberations and asked whether they believed they could reach a verdict if given additional time. *See*, *e.g.*, *Vaiseta*, 333 F.3d at 818. Here, as discussed, the trial court did both. Accordingly, the fifth factor demonstrates that the trial court did not abuse its discretion by declaring a mistrial.

4. Factor six: effect of exhaustion and possibility of coercion.

Courts have long recognized that if a mistrial is not declared when a jury says it is unable to reach a verdict, "there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors." *Washington*, 434 U.S. at 509. Here, the trial court reasonably expressed concern about the risk of exhaustion and coercion because (1) the jurors already had been encouraged once to keep deliberating, and they

were still unable to reach a verdict; and (2) the judge noted that she was concerned that further deliberations would create "extremely angry jurors," and thus perhaps a tainted verdict, because she had been hearing "very loud voices back there [in the jury room] for a period of time." R825-26. Thus, the sixth factor also weighs in favor of declaring a mistrial.

In sum, all six factors demonstrate that the trial court did not abuse its discretion in declaring a mistrial. Accordingly, even if defendant did not consent to the mistrial, this Court should find that the jury was deadlocked and hold that the State is permitted to continue defendant's prosecution.

CONCLUSION

For the foregoing reasons, this Court should reverse the appellate court's judgment and remand for trial.

June 29, 2018

Respectfully submitted,

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RULE 341(c) CERTIFICATE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is thirty-two pages.

/s/ Michael L. Cebula
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KeyCite Yellow Flag - Negative Treatment
Appeal Allowed by People v. Kimble, Ill., March 21, 2018

2017 IL App (2d) 160087
Appellate Court of Illinois,
Second District.

The PEOPLE of the State of Illinois, Plaintiff-Appellee,
v.
David D. KIMBLE, Defendant-Appellant.

No. 2-16-0087
|
Opinion filed September 25, 2017

Synopsis

Background: Following mistrial on charges of four counts of aggravated criminal sexual abuse, defendant filed a motion to dismiss the charges on double jeopardy grounds. The Circuit Court, McHenry County, No. 13-CF-1123, Sharon L. Prather, J., denied defendant's motion to dismiss the charges. Defendant appealed.

Holdings: The Appellate Court, Zenoff, J., held that:

[1] defendant did not consent or acquiesce to the mistrial, and

[2] defendant suffered a deprivation of his fundamental right to be present at proceedings in person and by counsel when the judge engaged in ex parte communication with the jury.

Reversed.

West Headnotes (35)

[1] **Criminal Law**
⇐ Issues related to jury trial

The Appellate Court reviews the denial of a motion to dismiss on double-jeopardy grounds for an abuse of discretion. U.S. Const. Amend. 5.

Cases that cite this headnote

[2] **Constitutional Law**
⇐ Fifth Amendment

The Double Jeopardy Clause applies to the states through the Due Process Clause of the Fourteenth Amendment. U.S. Const. Amends. 5, 14.

Cases that cite this headnote

[3] **Double Jeopardy**
⇐ Constitutional and statutory provisions

The Illinois Constitution prohibits placing persons in double jeopardy. Ill. Const. 1970, Art. 1, § 10.

Cases that cite this headnote

[4] **Double Jeopardy**
⇐ Constitutional and statutory provisions

The Illinois Double Jeopardy Clause is construed in the same manner as the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. U.S. Const. Amend. 5; Ill. Const. 1970, Art. 1, § 10.

Cases that cite this headnote

[5] **Double Jeopardy**
⇐ Empanelling and swearing jury, or swearing witness and receiving evidence

In a jury trial, jeopardy attaches when the jury is empaneled and sworn. U.S. Const. Amend. 5.

Cases that cite this headnote

[6] **Double Jeopardy**
⇐ Right to completion of trial by single tribunal

The protection against double jeopardy embraces a defendant's valued right to have his trial completed by a particular tribunal. U.S. Const. Amend. 5.

Cases that cite this headnote

[7] **Double Jeopardy**
⇐ Right to completion of trial by single tribunal

Double Jeopardy
⇐ Mistrial or Recusal

As a general rule, the prosecution is entitled to only one opportunity to try a defendant, however, retrial is not automatically barred after a mistrial is declared.

Cases that cite this headnote

[8] **Double Jeopardy**
⇐ Right to completion of trial by single tribunal

A defendant's valued right to have his trial completed by a particular tribunal sometimes must be subordinated to the public interest in affording the prosecution one full and fair opportunity to present its evidence to an impartial jury.

Cases that cite this headnote

[9] **Double Jeopardy**
⇐ Consent or fault of accused

Reprosecution is permissible where a mistrial is attributable to the defendant by virtue of his motion or consent.

Cases that cite this headnote

[10] **Double Jeopardy**
⇐ Waiver

A defendant who requests or consents to a mistrial is presumed to have waived his or her valued right to have the trial completed by the jury that was originally seated.

Cases that cite this headnote

[11] **Double Jeopardy**
⇐ Manifest necessity;other grounds

When a mistrial is declared without a defendant's consent, retrial is permitted if there was a manifest necessity for declaring the mistrial.

Cases that cite this headnote

[12] **Double Jeopardy**
⇐ Mistrial or Recusal

The prosecution shoulders a heavy burden of justifying a mistrial to avoid the double-jeopardy bar. U.S. Const. Amend. 5.

Cases that cite this headnote

[13] **Criminal Law**
⇐ Failure of jury to reach verdict

A trial judge may discharge a genuinely deadlocked jury and require a defendant to submit to a second trial.

Cases that cite this headnote

[14] **Criminal Law**
⇐ Issues related to jury trial

The decision to declare a mistrial when the jury is deadlocked is accorded great deference by a reviewing court.

Cases that cite this headnote

[15] **Criminal Law**
⇐ Necessity in general

Criminal Law
⇐ Issues related to jury trial

Whether a manifest necessity exists for declaring a mistrial depends upon the particular facts, and a trial court's decision to declare a mistrial is reviewed for an abuse of discretion.

Cases that cite this headnote

[16] **Double Jeopardy**
⇐ Consent or fault of accused

Defendant did not consent or acquiesce to trial court's declaration of a mistrial, and thus

reprosecution was barred by double jeopardy; the record showed that defense counsel requested jury deliberation instruction and asked the jury to return the next day. U.S. Const. Amend. 5.

Cases that cite this headnote

[17] **Criminal Law**
On giving instructions to or otherwise communicating with jury

Defendant suffered a deprivation of his fundamental right to be present at proceedings in person and by counsel when the judge engaged in ex parte communication with the jury during deliberations; trial judge concluded it would be futile to give jury deliberation instruction and allow further deliberations, and trial judge would not have reasonably concluded this without the earlier ex parte communication. U.S. Const. Amend. 6.

Cases that cite this headnote

[18] **Criminal Law**
Necessity in general

A mistrial is improper where the trial judge is responsible for the difficulty and alternatives are available.

Cases that cite this headnote

[19] **Criminal Law**
Public Trial

Criminal Law
Presence of Accused

Criminal Law
Stage of Proceedings as Affecting Right

A criminal defendant has a constitutional right to a public trial, and to appear and participate in person and by counsel at all proceedings involving his or her substantial rights. U.S. Const. Amend. 6; Ill. Const. 1970, Art. I § 8.

Cases that cite this headnote

[20] **Criminal Law**
On giving instructions to or otherwise communicating with jury

Criminal Law
Instructions;communications with jury

Jury deliberations are a critical stage of trial, involving substantial rights that trigger a defendant's right to be present and participate in person and by counsel. U.S Const. Amend. 6.

Cases that cite this headnote

[21] **Criminal Law**
On giving instructions to or otherwise communicating with jury

Criminal Law
Instructions;communications with jury

Communications between the judge and the jury after the jury has retired to deliberate, except when held in open court and in the defendant's presence, deprive the defendant of his or her fundamental right to be present in person and by counsel at all proceedings involving his or her substantial rights. U.S. Const. Amend. 6.

Cases that cite this headnote

[22] **Criminal Law**
Communications by or with jurors

Trial judge's ex parte communication with jury during deliberations, rather than giving jury deliberation instruction, prejudiced defendant, as judge declared a mistrial without considering available alternatives and the content of the ex parte communication did not give guidance to the jury.

Cases that cite this headnote

[23] **Criminal Law**
On giving instructions to or otherwise communicating with jury

Criminal Law
Instructions;communications with jury

The purpose of a defendant's right to be present with counsel at any jury communication is so that counsel can aid and advise the defendant as to what course of action he should take, including whether to object, concur, or attempt to influence how the court addresses the jury. U.S. Const. Amend. 6.

Cases that cite this headnote

[24] **Criminal Law**
⇦ 'Allen,' 'dynamite,' or 'hammer,' etc., charge

It is proper to give the jury deliberation instruction if the court perceives that the jury is having difficulty reaching a verdict.

Cases that cite this headnote

[25] **Criminal Law**
⇦ 'Allen,' 'dynamite,' or 'hammer,' etc., charge

The court is not required to delay giving the jury deliberation instruction until the foreman flatly states that the jury cannot reach a verdict.

Cases that cite this headnote

[26] **Criminal Law**
⇦ Time of keeping jury together

The court may have the jury continue to deliberate even though it has reported that it is deadlocked and will be unable to reach a verdict.

Cases that cite this headnote

[27] **Criminal Law**
⇦ Urging or Coercing Agreement

When faced with a deadlocked jury, a trial judge should not leave the jury to grope in such circumstances without some guidance from the court.

Cases that cite this headnote

[28] **Criminal Law**
⇦ 'Allen,' 'dynamite,' or 'hammer,' etc., charge

The purpose of the jury deliberation instruction, which instructs juries to be unanimous, deliberate, impartially consider evidence, and not hesitate to reexamine their views and change opinions they believe to be erroneous provided that the change is not due solely to a mere desire to reach a verdict, is to ensure that deadlocked jurors will closely examine their competing views and attempt to reach a unanimous verdict.

Cases that cite this headnote

[29] **Criminal Law**
⇦ 'Allen,' 'dynamite,' or 'hammer,' etc., charge

Trial court's ex parte admonition to jury to "continue to deliberate" was not the equivalent of a proper deadlocked jury instruction, as it did not advise jurors that each juror much agree to a verdict, jurors have a duty to consult with one another, juror must decide the case for himself or herself after impartially considering the evidence, jurors should not hesitate to reexamine their own views, and jurors should not surrender their honest convictions.

Cases that cite this headnote

[30] **Criminal Law**
⇦ Mistrial

Reviewing courts must examine the facts of each case to determine the propriety of a double-jeopardy claim following mistrial. U.S. Const. Amend. 5.

Cases that cite this headnote

[31] **Criminal Law**
⇦ Failure of jury to reach verdict

The jury's own view of whether it can reach a verdict is only one factor in the

court's determination of whether the jury is deadlocked.

Cases that cite this headnote

[32] **Criminal Law**
⇦ Time of deliberations

There is no requirement that a mistrial be declared because of the jurors' inability to come to a unanimous verdict immediately.

Cases that cite this headnote

[33] **Criminal Law**
⇦ Failure of jury to reach verdict

A trial court is not required to accept a jury's assessment of its own inability to reach a verdict.

Cases that cite this headnote

[34] **Criminal Law**
⇦ Time of keeping jury together

Generally, the longer the trial and the more complex the issues, the longer the jury should be given to deliberate.

Cases that cite this headnote

[35] **Criminal Law**
⇦ Issues related to jury trial

Criminal Law
⇦ Issues related to jury trial

While trial judges have considerable leeway in determining whether the jury is hopelessly deadlocked, the reviewing court has an obligation to satisfy itself that the trial judge exercised sound discretion; If the record establishes that the trial judge failed to exercise sound discretion, the reason for deference disappears.

Cases that cite this headnote

***1248** Appeal from the Circuit Court of McHenry County, No. 13-CF-1123, Honorable Sharon L. Prather, Judge, Presiding.

Attorneys and Law Firms

Michael J. Pelletier, Thomas A. Lilien, and Josette M. Skelnik, of State Appellate Defender's Office, of Elgin, for appellant.

Patrick D. Kenneally, State's Attorney, of Woodstock (Patrick Delfino, Lawrence M. Bauer, and Aline B. Dias, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.

OPINION

JUSTICE ZENOFF delivered the judgment of the court, with opinion.

****963** ¶ 1 On January 22, 2014, a McHenry County grand jury indicted defendant, David D. Kimble, on four counts of aggravated criminal sexual abuse (720 ILCS 5/11-1.60(c)(1) (West 2012)) against 9-year-old S.M. The indictment charged that, on four separate occasions between August and November 2013, defendant touched S.M.'s vagina over her clothing. The jury trial consumed three days. After less than three hours' deliberation, the jury communicated to the court through the bailiff that it was at an "impasse." Without notifying the State and the defense, the judge directed the bailiff to instruct the jury to continue deliberating. After a total of five hours of deliberation, with significant interruptions, the jury foreman reported in open court that the jury was still at an impasse. The court denied the State's and defendant's request to give the *Prim* instruction for juries in disagreement,[1] remarking that it would be "futile" to do so, and *sua sponte* declared a mistrial. Defendant appeals the order denying his motion to dismiss the charges on the ground that reprosecution would be barred by double jeopardy pursuant to section 3-4(a)(3) of the Criminal Code of 2012 (720 ILCS 5/3-4(a)(3) (West 2014)). We reverse.

¶ 2 I. BACKGROUND

¶ 3 Trial commenced on November 2, 2015. The evidence showed the following. S.M. lived in Wonder Lake, Illinois,

with her father, Jeff, her three siblings, Jeff's girlfriend, Jen, and Jen's two children. For a time, they lived next door to defendant. Defendant and Jeff worked and socialized together. All of the children frequented defendant's home, and defendant babysat them. Even after Jeff and his family moved some distance away, the children continued to visit defendant. Defendant gave S.M. presents, including clothing, money, and a bicycle.

¶ 4 On December 5, 2013, Jen asked S.M. whether defendant had ever touched her inappropriately. S.M. at first was silent but then said yes. On December 10, 2013, Detective Misty Marinier interviewed S.M. at the Children's Advocacy Center (CAC) in Woodstock, Illinois. The interview was videotaped. During the interview, S.M. told Marinier that defendant touched her "privates" with his hand, and she pointed to the genital area on a chart depicting the female anatomy. S.M. told Marinier that her clothes were "usually" on when defendant ***1249 **964** touched her. Marinier testified that, according to S.M., the touching happened between two and five times, in defendant's bedroom. S.M. did not tell Marinier that defendant held her down or that he pulled down her pants. According to Marinier, children sometimes disclose more after they have been formally interviewed.

¶ 5 S.M., 11 years old at the time of trial, testified that defendant pushed her onto his bed, removed her clothes, and rubbed her "bad spot" approximately 10 times. She did not remember when it happened, but she recalled that it was still daylight, and it always occurred in defendant's bedroom. S.M. testified that she did not tell Marinier that defendant removed her clothes. She testified that she was not comfortable talking to Marinier.

¶ 6 Anne Huff, the principal at S.M.'s school, testified that she interviewed Jen's daughter, Brooklyn, and then spoke to S.M. because Brooklyn told Huff that defendant had "snuggled" with her.

¶ 7 The parties stipulated that S.M. was interviewed by the State's Attorney's victim witness coordinator, Kelly Gallagher, on October 30, 2015. Assistant State's Attorneys Sharyl Eisenstein and John Gibbons were also present. S.M. told them that defendant had touched her over her clothes approximately 10 times. S.M. denied that defendant ever touched her under her clothes. S.M. stated that she was confused when she told the prosecutors the previous week that defendant touched her under her clothes. S.M. also stated on October 30, 2015, that defendant held her down and that her clothes were both "on" and "off." S.M. then said in that interview that, because she was embarrassed to talk about it, she told them that her clothes were on.

¶ 8 Brooklyn, age 9 at the time of trial, testified that she knew "Dave," but she did not see him in the courtroom. Brooklyn testified that "Dave" knelt beside her and rubbed his hand over her upper thigh when she was on his bed.

¶ 9 Detective Michelle Asplund testified that she interviewed defendant on December 11, 2013. During the three-hour interview, defendant repeatedly denied any wrongdoing. The State rested. The court denied defendant's motion for a directed verdict, and defendant rested without presenting evidence.

¶ 10 On November 5, 2015, the jury began deliberating at 10:50 a.m. The jurors asked to watch the tape of Marinier's CAC interview with S.M. again. The time of that request is not noted in the record. The video of the interview was replayed for the jury in the courtroom at 1:40 p.m. The jurors returned to the jury room at 2:15 p.m.

¶ 11 At 4:25 p.m., the foreman sent a note to the judge: "Dear Judge Prather, after deliberating for 5 hours and despite our best efforts, we are at an empasse [*sic*]." After receiving this communication, the judge convened defense counsel and the State. The record does not show whether defendant was present. The judge disclosed the note, and she also disclosed that the jury had earlier indicated to her, through her bailiff, that it was at an "impasse." She divulged that she had instructed the bailiff to tell the jury to continue deliberating. According to the judge, that *ex parte* communication occurred "shortly after" the jury rewatched Marinier's CAC interview with S.M. Now, the judge suggested that she inquire whether further deliberation would help. She noted that she was willing to ask if the jurors would like to go home, sleep on it, and return the next morning. When the State wondered whether the judge's questions would elicit multiple responses, the judge stated: "I'll inquire of the foreperson." Defense counsel ****965 *1250** agreed to that procedure. The judge then acquiesced to the State's request to follow up on the foreman's answers with

arguments outside the jury's presence on how next to proceed.

¶ 12 The jurors returned to the courtroom, and the judge asked the foreman how long the jury had been at an impasse. He replied, "[p]retty much a good part of the day. Four and a half hours or five hours." He indicated that "some numbers changed here and there, but we were stuck at a certain proportion" for the last three hours. The judge asked if it would do any good to go home and "sleep on it" and continue deliberations the next day. The foreman stated: "I asked that question, and it was indicated that it would not [do any good]." The judge asked: "It would not?" The foreman replied: "No, ma'am." The jury then returned to the jury room.

¶ 13 The State and defense counsel both asked the judge to give the *Prim* instruction and to bring the jury back for further deliberations the following morning. The judge responded: "I am fearful, folks, if I do that, you're going to have some extremely angry jurors. *** There has been [*sic*] some very loud voices back there for a period of time. I think it would be futile to do that. Therefore, I would decline." The prosecutor said: "Understood, Judge." Defense counsel did not respond. The judge then excused the jurors and declared a mistrial. The State asked for another trial date. Defense counsel requested a status date.

¶ 14 On December 4, 2015, defendant filed a motion to dismiss the charges on the ground that reprosecution was barred by double-jeopardy principles. Defendant argued that, as he and the prosecution had both requested the court to give the *Prim* instruction and to order further deliberation, there was no "manifest necessity" to declare a mistrial. The court found that a manifest necessity existed and denied the motion. Defendant filed a timely appeal.

¶ 15 II. ANALYSIS

[1] ¶ 16 Defendant contends that the court abused its discretion in denying his motion to bar retrial where the trial judge's *ex parte* communication with the jury caused the conditions that led to the mistrial. The State argues that defendant consented or acquiesced to the mistrial or, alternatively, that there was a manifest necessity to declare the mistrial because the jury was hopelessly deadlocked. We review the denial of a motion to dismiss on double-jeopardy grounds for an abuse of discretion. *People v. Wilson*, 309 Ill.App.3d 235, 242, 242 Ill.Dec. 826, 722 N.E.2d 315 (1999).

¶ 17 A. Double-Jeopardy Principles

[2] **[3]** **[4]** **[5]** ¶ 18 The fifth amendment to the United States Constitution 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. The double-jeopardy clause applies to the states through the due process clause of the fourteenth amendment. *Benton v. Maryland*, 395 U.S. 784, 787, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). The Illinois Constitution also prohibits placing persons in double jeopardy. Ill. Const. 1970, art. 1, § 10 ("[n]o person shall *** be twice put in jeopardy for the same offense"). The Illinois double-jeopardy clause is construed in the same manner as the double-jeopardy clause of the fifth amendment to the United States Constitution. *People v. Staple*, 2016 IL App (4th) 160061, ¶ 13, 409 Ill.Dec. 896, 68 N.E.3d 1004. The deeply ingrained idea behind the prohibition against double jeopardy is that the State, with all its resources and power, should not be permitted to subject a defendant to the embarrassment, expense, and ordeal of **966 *1251 multiple prosecutions. *People v. Cervantes*, 2013 IL App (2d) 110191, ¶ 24, 372 Ill.Dec. 214, 991 N.E.2d 521. Indeed, the prohibition against trying a defendant twice for the same crime is the *sine qua non* of American due process standards. *State v. Olson*, 609 N.W.2d 293, 303 (Minn. Ct. App. 2000). In a jury trial, jeopardy attaches when the jury is empaneled and sworn. *People v. Bellmyer*, 199 Ill.2d 529, 538, 264 Ill.Dec. 687, 771 N.E.2d 391 (2002).

[6] **[7]** **[8]** **[9]** **[10]** ¶ 19 Because a second prosecution subjects a person to the ignominy alluded to above, the protection against double jeopardy embraces a defendant's "valued right" to have his trial completed by a particular tribunal. *Arizona v. Washington*, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978). For this reason, as a general rule, the prosecution is entitled to only one opportunity to try a defendant. *Washington*, 434 U.S. at 505, 98 S.Ct. 824. However, retrial is not automatically barred after a mistrial is declared. *Washington*, 434 U.S. at 505, 98 S.Ct. 824. A defendant's valued right to have his trial completed by a particular tribunal sometimes must be subordinated to the public interest in affording the

prosecution one "full and fair" opportunity to present its evidence to an impartial jury. *Washington*, 434 U.S. at 505, 98 S.Ct. 824. Reprosecution is also permissible where the mistrial is attributable to the defendant by virtue of his motion or consent. *People v. Dahlberg*, 355 Ill.App.3d 308, 312, 291 Ill.Dec. 357, 823 N.E.2d 649 (2005). A defendant who requests or consents to a mistrial is presumed to have waived his or her valued right to have the trial completed by the jury that was originally seated. *People v. Bagley*, 338 Ill.App.3d 978, 981, 273 Ill.Dec. 686, 789 N.E.2d 860 (2003).

[11] [12] [13] [14] [15] ¶ 20 When a mistrial is declared without a defendant's consent, retrial is permitted if there was a "manifest necessity" for declaring the mistrial. *Washington*, 434 U.S. at 505, 98 S.Ct. 824; *People v. Street*, 316 Ill.App.3d 205, 211, 249 Ill.Dec. 227, 735 N.E.2d 1052 (2000).[2] Discussing the phrase "manifest necessity," the Supreme Court held that it cannot be interpreted literally, but that a "manifest" necessity means a "high degree" of necessity. *Washington*, 434 U.S. at 505-06, 98 S.Ct. 824. The prosecution shoulders a heavy burden of justifying a mistrial to avoid the double-jeopardy bar. *Washington*, 434 U.S. at 505, 98 S.Ct. 824. That said, a trial judge may discharge a genuinely deadlocked jury and require a defendant to submit to a second trial. *Washington*, 434 U.S. at 509, 98 S.Ct. 824. The decision to declare a mistrial when the jury is deadlocked is accorded great deference by a reviewing court. *Washington*, 434 U.S. at 510, 98 S.Ct. 824. Whether a manifest necessity exists depends upon the particular facts, and a trial court's decision to declare a mistrial is reviewed for an abuse of discretion. *People v. Edwards*, 388 Ill.App.3d 615, 625, 327 Ill.Dec. 844, 902 N.E.2d 1230 (2009).

¶ 21 B. Whether Defendant Consented to the Mistrial

[16] ¶ 22 Before the trial court, defendant joined the State in requesting the *Prim* instruction and in arguing that the jury should be brought back the next day to resume deliberations. Nevertheless, the State now maintains that defendant consented or acquiesced to the mistrial. Relying on ****967 *1252** *People v. Camden*, 115 Ill.2d 369, 105 Ill.Dec. 227, 504 N.E.2d 96 (1987), the State contends that defendant had to specifically object to the mistrial, although at oral argument the State could not articulate when the objection should have been made.

¶ 23 In *Camden*, our supreme court held that defense counsel consented to a mistrial where he had two opportunities to object but stood mute and then later agreed to a date for retrial. *Camden*, 115 Ill.2d at 377-78, 105 Ill.Dec. 227, 504 N.E.2d 96. *Camden* is readily distinguishable from our case. Here, defense counsel did not stand mute. Counsel joined in the State's request for the *Prim* instruction, and he also suggested that the court order the jury to keep deliberating. That conduct is inconsistent with a request for, or acquiescence to, a mistrial.

¶ 24 The State also relies on *People v. Escobar*, 168 Ill.App.3d 30, 118 Ill.Dec. 736, 522 N.E.2d 191 (1988). In *Escobar*, the judge called the foreman of a deliberating jury into chambers when he discovered that the jurors had access to police street files. *Escobar*, 168 Ill.App.3d at 35-36, 118 Ill.Dec. 736, 522 N.E.2d 191. When the judge suggested that he declare a mistrial, defense counsel stated: "We'll just have to proceed. We don't want to jeopardize our client's position." *Escobar*, 168 Ill.App.3d at 36, 118 Ill.Dec. 736, 522 N.E.2d 191. The jury kept deliberating until it informed the court that it was unable to reach a verdict. *Escobar*, 168 Ill.App.3d at 36, 118 Ill.Dec. 736, 522 N.E.2d 191. Then, the judge rejected defense counsel's request for the *Prim* instruction and *sua sponte* declared a mistrial. *Escobar*, 168 Ill.App.3d at 36, 118 Ill.Dec. 736, 522 N.E.2d 191. Days later, the defendant objected to the mistrial and moved to dismiss the cause on double-jeopardy grounds. The judge denied the motion, and the defendant appealed. *Escobar*, 168 Ill.App.3d at 36, 118 Ill.Dec. 736, 522 N.E.2d 191. The First District of the Appellate Court affirmed, holding that the defendant was required to contemporaneously object to the mistrial, in words that specifically invoked the right against double jeopardy. *Escobar*, 168 Ill.App.3d at 39, 118 Ill.Dec. 736, 522 N.E.2d 191. The court noted that the "suggestion of a *Prim* instruction, alone, is insufficient." *Escobar*, 168 Ill.App.3d at 39, 118 Ill.Dec. 736, 522 N.E.2d 191.

¶ 25 Reviewing the *Escobar* decision in the context of a federal *habeas corpus* proceeding, the Seventh Circuit disagreed. In *Escobar v. O'Leary*, 943 F.2d 711 (7th Cir. 1991), the court noted that the United States Supreme Court has never required that an objection to a mistrial contain an explicit reference to double jeopardy to preserve a defendant's double-jeopardy rights. *O'Leary*, 943 F.2d at 715-16. "As long as the defendant's desire

that the first jury continue deliberating is clear, there is no additional obligation to broach the topic of retrial." *O'Leary*, 943 F.2d at 716. This is so because judges are capable of recognizing that a mistrial has double-jeopardy implications. *O'Leary*, 943 F.2d at 716. The court concluded that Escobar's "unequivocal expression of his desire to proceed to verdict in the first trial was sufficient to dispel any implication that he consented to the mistrial or waived his double jeopardy objection." *O'Leary*, 943 F.2d at 717.

¶ 26 We agree with the reasoning in *O'Leary* and reject the *Escobar* decision. In *Bagley*, this court held that a defendant who "forcefully argued" his position that the trial should proceed was not obligated to specifically object when the court *sua sponte* declared a mistrial. *Bagley*, 338 Ill.App.3d at 982, 273 Ill.Dec. 686, 789 N.E.2d 860. Other caselaw supports our conclusion.

¶ 27 In *State v. Kendrick*, 868 S.W.2d 134 (Mo. Ct. App. 1993), after a State's ****968** ***1253** witness admitted committing perjury, the judge expressed his belief off the record that a directed verdict in the defendant's favor would be appropriate. *Kendrick*, 868 S.W.2d at 135. The judge indicated on the record that he wanted to end the case, but defense counsel suggested allowing the prosecution to proceed so that counsel could make a motion for a directed verdict at the end of the State's case. *Kendrick*, 868 S.W.2d at 135. Instead, the judge *sua sponte* declared a mistrial. *Kendrick*, 868 S.W.2d at 135. The defendant moved to dismiss the case on double-jeopardy grounds, but the motion was denied. *Kendrick*, 868 S.W.2d at 136. The Missouri Court of Appeals held that the defendant did not implicitly consent to the mistrial by failing to make a specific objection. *Kendrick*, 868 S.W.2d at 137. The court held that determining consent "does not turn on any mechanical formula." *Kendrick*, 868 S.W.2d at 136.

¶ 28 We agree. In our case, defense counsel's position that he wanted the trial to continue could not have been clearer. Defense counsel stated three times that he was requesting the *Prim* instruction. When the State suggested that the court give the *Prim* instruction before discharging the jury, defense counsel stated: "I would agree with the State, your Honor." The court responded: "Pardon?" Defense counsel repeated: "I would agree with the State." The court inquired: "You agree with the State?" Defense counsel replied: "I do." Defense counsel then suggested that the jury return the next day to deliberate. Surely, three requests for the *Prim* instruction as well as asking that the jury return the next day qualify as "forceful argument" under *Bagley*. In *Bagley*, in response to the State's eleventh-hour production of a videotape of the defendant's arrest that it had earlier represented was lost, defense counsel suggested that the court exclude the tape and proceed with the trial. *Bagley*, 338 Ill.App.3d at 980, 273 Ill.Dec. 686, 789 N.E.2d 860. Here, defense counsel argued his position at least as forcefully as did counsel in *Bagley*. There was no need to make a *pro forma* objection when the court declared the mistrial. Accordingly, we hold that defendant did not consent or acquiesce to the mistrial.

¶ 29 C. Whether There Was a Manifest Necessity for the Mistrial

¶ 30 1. Judicial Indiscretion

[17] ¶ 31 Much of the caselaw applying the manifest-necessity doctrine involves the proper evaluation of alternatives to a mistrial. 5 Wayne R. LaFave *et al.*, Criminal Procedure § 25.2(d), at 615-16 (3d ed. 2007); see *Street*, 316 Ill.App.3d at 212, 249 Ill.Dec. 227, 735 N.E.2d 1052 (one of the factors in determining whether there was a manifest necessity for a mistrial is whether the trial judge considered the alternatives). Here, defendant maintains that the judge's improper *ex parte* jury communication contributed to her subsequent decision to declare a mistrial rather than provide the available alternative of the *Prim* instruction. Defendant argues that this "judicial indiscretion" bars reprosecution.

¶ 32 Defendant relies on *People v. Wiley*, 71 Ill.App.3d 641, 644-45, 27 Ill.Dec. 875, 389 N.E.2d 1283 (1979), where the trial judge's *sua sponte* dismissal of the charges barred a retrial. In *Wiley*, after the arresting officer testified for the prosecution, the State requested an overnight continuance to bring in its two remaining witnesses. *Wiley*, 71 Ill.App.3d at 642, 27 Ill.Dec. 875, 389 N.E.2d 1283. The judge denied the request, and then, "on his own unprompted motion," dismissed the case. *Wiley*, 71 Ill.App.3d at 642, 27 Ill.Dec. 875, 389 N.E.2d 1283. The State appealed, arguing that the dismissal was not an acquittal that would trigger double-jeopardy concerns. ***1254** ****969** *Wiley*, 71 Ill.App.3d at 642-43, 27 Ill.Dec. 875, 389 N.E.2d 1283. The appellate court held that, even if the dismissal was not an outright acquittal, retrial was

prohibited because the decision to abort the trial was the result of what the court cryptically termed "judicial indiscretion." *Wiley*, 71 Ill.App.3d at 644, 27 Ill.Dec. 875, 389 N.E.2d 1283.

¶ 33 The court in *Wiley* relied on *United States v. Jorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971). In *Jorn*, the trial judge *sua sponte* declared a mistrial so that government witnesses, who assisted in preparing fraudulent tax returns, could consult with attorneys. *Jorn*, 400 U.S. at 473, 91 S.Ct. 547. Even though the government and the witnesses themselves assured the court that federal agents had warned them of their constitutional rights, the court refused to believe them. *Jorn*, 400 U.S. at 486-87, 91 S.Ct. 547. Then, the court opined that, even if the witnesses had been warned of their rights, the warnings were insufficient. *Jorn*, 400 U.S. at 487, 91 S.Ct. 547. The Supreme Court held that reprosecution was barred because the trial judge considered nothing less drastic, such as a continuance, before declaring a mistrial. *Jorn*, 400 U.S. at 487, 91 S.Ct. 547.

¶ 34 A legal commentator has construed *Jorn* to mean that a trial judge abuses his or her discretion by ordering a mistrial without a "scrupulous" search for alternative means to deal with the difficulties. Stephen J. Schulhofer, *Jeopardy and Mistrials*, 125 U. Pa. L. Rev. 449, 465 (1977). Professor Schulhofer also observed that *Jorn* upheld the defendant's double-jeopardy claim "in the absence of actual or potential harassment and in the absence of identifiable prejudice to the defendant." Schulhofer, *supra*, at 466. [3]

[18] ¶ 35 When we read *Wiley* in light of *Jorn*, we interpret *Wiley* to mean that a mistrial is improper where the trial judge is responsible for the difficulty and alternatives are available. We agree with defendant that *Wiley* is apt.

[19] **[20]** **[21]** ¶ 36 In our case, the judge's *ex parte* jury communication led to the precipitous declaration of a mistrial without considering available alternatives. A criminal defendant has a constitutional right to a public trial, and to appear and participate in person and by counsel at all proceedings involving his or her substantial rights. U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8; *People v. Childs*, 159 Ill.2d 217, 227, 201 Ill.Dec. 102, 636 N.E.2d 534 (1994). Jury deliberations are a critical stage of trial, involving substantial rights that trigger a defendant's right to be present and participate in person and by counsel. *People v. Ross*, 303 Ill.App.3d 966, 975, 237 Ill.Dec. 366, 709 N.E.2d 621 (1999). Communications between the judge and the jury after the jury has retired to deliberate, except when held in open court and in the defendant's presence, deprive the defendant of his or her fundamental rights. *People v. Cotton*, 393 Ill.App.3d 237, 262, 332 Ill.Dec. 646, 913 N.E.2d 578 (2009). Thus, defendant suffered a deprivation of his fundamental rights when the judge engaged in the *ex parte* communication with the jury.

¶ 37 This tipped the scales in the judge's decision to *sua sponte* abort the trial rather than give the *Prim* instruction. The judge disclosed the *ex parte* communication to emphasize that the 4:25 p.m. note from the jury was "the second time" the ****970 *1255** court "received information from the jury that they [*sic*] are at an impasse." Hence, the judge concluded that it would be "futile" to give the *Prim* instruction and allow further deliberations. Without the earlier *ex parte* communication, the court could not reasonably have believed that giving the *Prim* instruction would be futile. The foreman's note said that the jury had been deliberating for five hours. However, we note that, in that time, it had also picked the foreman, eaten lunch, and rewatched the video of the CAC interview with S.M.

[22] ¶ 38 Furthermore, we determine that the judge's *ex parte* communication prejudiced defendant. We look at whether the content of the communication created prejudice. *Ross*, 303 Ill.App.3d at 975, 237 Ill.Dec. 366, 709 N.E.2d 621. The judge told the bailiff to instruct the jury to "continue to deliberate." Presumably, that is what the bailiff conveyed to the jury, though the bailiff's precise words are not part of the record. That direction was given when the jury first indicated that it was at an impasse, "shortly after" it rewatched the video. The purpose of the *Prim* instruction is to guide a jury that is unable to reach a verdict. *Chapman*, 194 Ill.2d at 222, 252 Ill.Dec. 474, 743 N.E.2d 48. Having the bailiff tell the jury to "continue to deliberate" left the jury with no guidance. Indeed, jurors voting in the minority conceivably could feel coerced if, when seeking guidance from the court, "they are met with stony silence and sent back to the jury room for further deliberation." *Prim*, 53 Ill.2d at 74, 289 N.E.2d 601.

¶ 39 As a result, our supreme court approved a jury instruction to avoid that state of affairs. *Prim*, 53 Ill.2d at 76, 289 N.E.2d 601. In *Prim*, the instruction was given

after approximately four hours of deliberation. *Prim*, 53 Ill.2d at 71, 289 N.E.2d 601. In *People v. Andrews*, 364 Ill.App.3d 253, 267, 301 Ill.Dec. 109, 845 N.E.2d 974 (2006), a mistrial was not declared until after the jury had been deliberating under the *Prim* instruction for 90 minutes. In *People v. Dungy*, 122 Ill.App.3d 314, 324, 77 Ill.Dec. 862, 461 N.E.2d 485 (1984), the *Prim* instruction was given after 12 hours of deliberation. In *Dungy*, the appellate court noted that "[i]t is within the trial court's discretion to permit further deliberation and to monitor the length of such deliberation even after a jury has indicated that it is hopelessly deadlocked." (Internal quotation marks omitted.) *Dungy*, 122 Ill.App.3d at 324, 77 Ill.Dec. 862, 461 N.E.2d 485.

[23] [24] [25] [26] [27] ¶ 40 The purpose of a defendant's right to be present with counsel at any jury communication is so that counsel can "aid and advise the defendant as to what course of action he should take, including whether to object, concur, or attempt to influence how the court addresses the jury." *Ross*, 303 Ill.App.3d at 976, 237 Ill.Dec. 366, 709 N.E.2d 621. Here, the court's *ex parte* communication foreclosed defendant's option to request the *Prim* instruction earlier in the afternoon when the jury first considered itself at an impasse. Then, because the jury declared itself still at an impasse approximately two hours later, the court declined to give the *Prim* instruction, which provides as follows:

> "The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.
>
> It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to ****971 *1256** reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.
>
> You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case." *Prim*, 53 Ill.2d at 75-76, 289 N.E.2d 601.

Our supreme court explicitly directed that trial courts give this instruction when faced with juries in disagreement. *Prim*, 53 Ill.2d at 76, 289 N.E.2d 601. In *People v. Cowan*, 105 Ill.2d 324, 328, 85 Ill.Dec. 502, 473 N.E.2d 1307 (1985), the court held that whether and when to give the instruction is discretionary, based upon such factors as the length of the deliberations and the complexity of the issues. It is proper to give the *Prim* instruction if the court perceives that the jury is having difficulty reaching a verdict. *People v. Preston*, 76 Ill.2d 274, 284, 29 Ill.Dec. 96, 391 N.E.2d 359 (1979). The court is not required to delay giving the instruction until the foreman flatly states that the jury cannot reach a verdict. *Preston*, 76 Ill.2d at 284, 29 Ill.Dec. 96, 391 N.E.2d 359. The court may have the jury continue to deliberate even though it has reported that it is deadlocked and will be unable to reach a verdict. *Cowan*, 105 Ill.2d at 328, 85 Ill.Dec. 502, 473 N.E.2d 1307. When faced with a deadlocked jury, a trial judge should not leave the jury "to grope in such circumstances without some guidance from the court." *Prim*, 53 Ill.2d at 74, 289 N.E.2d 601.

[28] [29] ¶ 41 The State argues that the court's *ex parte* admonition to "continue to deliberate" was the equivalent of the *Prim* instruction. We disagree. The purpose of the *Prim* instruction is to ensure that deadlocked jurors will closely examine their competing views and attempt to reach a unanimous verdict. *People v. Bibbs*, 101 Ill.App.3d 892, 900, 57 Ill.Dec. 285, 428 N.E.2d 965 (1981). The instruction to "continue to deliberate" did not contain the five points inherent in the *Prim* instruction: (1) to return a verdict, each juror must agree thereto, (2) jurors have a duty to consult with one another and to deliberate with a view to reaching agreement, (3) each juror must decide the case for himself or herself but only after an impartial consideration of the evidence with fellow jurors, (4) jurors should not hesitate to reexamine their own views and change their opinions if convinced they are erroneous, and (5) no juror should surrender his or her honest conviction. *Prim*, 53 Ill.2d at 74-75, 289 N.E.2d 601. Whereas the *Prim* instruction encourages jurors to reexamine their opinions and to abjure them if the evidence warrants it, the direction to "continue to deliberate" conveys a different message: "Keep doing the same thing you're already doing." The judge's *ex parte* communication thus might have contributed to the jury's lack of progress and later did unduly influence her denial of the joint

request for the *Prim* instruction. Consequently, we hold that the court's judicial indiscretion, rather than a manifest necessity, prompted the mistrial. Under these circumstances, reprosecution is barred.

¶ 42 2. Jury Deadlock

[30] ¶ 43 Even though we have determined that retrial is barred due to judicial indiscretion, we nevertheless will consider defendant's argument that there was no manifest necessity to declare the mistrial due to jury deadlock. In *Andrews*, this court identified six factors to consider where the issue presented is the manifest necessity for declaring a mistrial based on jury deadlock: (1) the jury's collective opinion that it cannot agree, (2) the length of the deliberations, (3) the length of the ****972 *1257** trial, (4) the complexity of the issues, (5) any proper communications that the judge has had with the jury, and (6) the effects of possible exhaustion and the impact that coercion of further deliberations might have on the verdict. *Andrews*, 364 Ill.App.3d at 266-67, 301 Ill.Dec. 109, 845 N.E.2d 974. Reviewing courts must examine the facts of each case to determine the propriety of a double-jeopardy claim. *Street*, 316 Ill.App.3d at 211, 249 Ill.Dec. 227, 735 N.E.2d 1052.

¶ 44 Turning to the factors set forth in *Andrews*, we examine whether the mistrial in the present case was a manifest necessity.

¶ 45 a. The Jury's Collective Opinion That It is Deadlocked

¶ 46 After receiving the jury's 4:25 p.m. note, the court brought the entire jury into the courtroom but spoke only to the foreman.[4] The foreman related that the jury had been at an impasse "pretty much a good part of the day. Four or five hours." He also indicated that "some numbers changed here and there, *but we were stuck at a certain proportion for the last three hours.*" (Emphasis added.) The foreman opined that it would not do any good to continue deliberations the next day. The salient point is that the actual deadlock was only three hours old.

[31] **[32]** **[33]** ¶ 47 As the court explained in *Mills v. Tinsley*, 314 F.2d 311, 313 (10th Cir. 1963), "[t]he jury cannot determine the length of its deliberations." The court also noted that "[i]t is not unusual for a jury to advise the court that it is deadlocked and to thereafter agree and return a verdict." *Mills*, 314 F.2d at 313. In *Mills*, the jury reported that it was deadlocked, but it nevertheless returned a verdict after being given a deadlocked-jury instruction. *Mills*, 314 F.2d at 312-13. Thus, the jury's own view of whether it can reach a verdict is only one factor in the court's determination. *People v. Thompson*, 93 Ill.App.3d 995, 1008, 49 Ill.Dec. 468, 418 N.E.2d 112 (1981). "There is no requirement that a mistrial be declared because of the jurors' inability to come to a unanimous verdict immediately." *People v. Logston*, 196 Ill.App.3d 30, 33, 142 Ill.Dec. 525, 552 N.E.2d 1266 (1990). Pertinently, a trial court is not required to accept a jury's assessment of its own inability to reach a verdict. *Logston*, 196 Ill.App.3d at 33, 142 Ill.Dec. 525, 552 N.E.2d 1266.

¶ 48 Here, the judge expressed her belief that "you're going to have some extremely angry jurors" if deliberations were allowed to continue. Experience shows that tempers flare in the emotional atmosphere of a criminal trial. In other words, angry voices do not necessarily signal a hopelessly deadlocked jury.

¶ 49 b. The Length of Deliberations, Length of Trial, and Complexity of Issues

[34] ¶ 50 Generally, the longer the trial and the more complex the issues, the longer the jury should be given to deliberate. *Andrews*, 364 Ill.App.3d at 269, 301 Ill.Dec. 109, 845 N.E.2d 974. Here, the trial involved four counts of aggravated criminal sexual abuse, and it lasted three days. The five hours that the jury deliberated included time-outs to pick the foreman and to eat lunch, as it retired to deliberate near the lunch hour. Then, the jury spent over a half hour rewatching the video of the CAC interview.

****973 *1258** ¶ 51 The issue that the jury had to resolve was S.M.'s credibility. That issue was anything but straightforward. Jen was the first person to ask S.M. if defendant had touched her inappropriately. S.M. at first did not answer, but then she indicated that defendant had touched her. The indictment charged that the touching occurred over S.M.'s clothing, because that was what she told investigators. She also told investigators that it happened two to five times. Then, S.M. testified that it happened 10 times and that defendant removed her

clothes. The parties stipulated that S.M. had variously told members of the State's Attorney's office that she was dressed or undressed. Consequently, we cannot agree with the State that determining S.M.'s credibility was a simple job.

¶ 52 c. Communications Between the Judge and the Jury

¶ 53 The judge and the jury communicated three times. The first communication was on the jury's request to rewatch the video of the CAC interview. As discussed above, the second, *ex parte* communication caused the court to end the trial prematurely when it received the third communication (the note), because the court had foreclosed all other options. It is significant that neither side moved for a mistrial.

¶ 54 d. Effect of Exhaustion on the Jury

¶ 55 Because the jury did not deliberate for even a full workday, this factor weighs against a manifest necessity to declare a mistrial.

[35] ¶ 56 We are mindful that, while trial judges have "considerable leeway" in determining whether the jury is hopelessly deadlocked, the reviewing court has an obligation to satisfy itself that the trial judge exercised sound discretion. *Renico v. Lett*, 559 U.S. 766, 785, 130 S.Ct. 1855, 176 L.Ed.2d 678 (2010) (Stevens, J., dissenting, joined by Sotomayor, J., and joined in part by Breyer, J.). If the record establishes that the trial judge failed to exercise sound discretion, the reason for deference disappears. *Renico*, 559 U.S. at 785-86, 130 S.Ct. 1855. Accordingly, we hold that there was no manifest necessity for the court's *sua sponte* declaration of the mistrial. It follows that the court abused its discretion in denying defendant's motion to bar reprosecution. Pursuant to this court's authority under Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994), we grant defendant's motion to bar reprosecution.

¶ 57 III. CONCLUSION

¶ 58 For the foregoing reasons, the judgment of the circuit court of McHenry County is reversed and defendant's motion to bar reprosecution is hereby granted.

¶ 59 Reversed.

Justices McLaren and Jorgensen concurred in the judgment and opinion.

All Citations

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Footnotes

1 See *People v. Prim*, 53 Ill.2d 62, 75-76, 289 N.E.2d 601 (1972) (approving the language of a draft instruction to be used by trial courts faced with juries in disagreement); Illinois Pattern Jury Instructions, Criminal, No. 26.07 (4th ed. 2000) (taken verbatim from the language approved in *Prim*). The *Prim* instruction informs the jury that the verdict must be unanimous, the jury has a duty to deliberate, the jurors must impartially consider the evidence, and the jurors should not hesitate to reexamine their views and change their opinions if they believe them to be erroneous, provided that the change is not due solely to the other jurors' opinions or the mere desire to reach a verdict. *People v. Chapman*, 194 Ill.2d 186, 222, 252 Ill.Dec. 474, 743 N.E.2d 48 (2000).

2 The "manifest necessity" doctrine was first articulated in *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 6 L.Ed. 165 (1824).

3 According to Professor Schulhofer, the decision in *Illinois v. Somerville*, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973), distinguished *Jorn* but can be reconciled with it. Schulhofer, *supra*, at 466-69.

4 In *Andrews*, this court held that a mistrial due to jury deadlock may be declared even where the trial judge relies on the foreperson's statement without polling the other jurors. *Andrews*, 364 Ill.App.3d at 268, 301 Ill.Dec. 109, 845 N.E.2d 974. However, we expressed that polling each juror with respect to his or her opinion on the issue of deadlock is the preferred procedure. *Andrews*, 364 Ill.App.3d at 268, 301 Ill.Dec. 109, 845 N.E.2d 974.

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video from the Child Advocacy Center again. We have it set up and will now play it for you.

(Whereupon, the video recording was played after which the following proceedings were had.)

THE COURT: You can take the jurors back out, please. We are in recess.

(Whereupon, the jury retired and continued to consider their verdict at 2:15 p.m.)

(A recess was taken.)

(Whereupon, the following proceedings were held out of the hearing and presence of the jury at the time of 4:25 p.m.)

THE COURT: The Court has received a note from the jury that reads: After deliberating for five hours, and despite our best efforts, we are at an impasse, signed by the foreperson.

The jury had also indicated earlier shortly after viewing the video from the Child Advocacy Center to my bailiff that they were at an impasse. At that time, I instructed the jury -- or instructed

my bailiff to tell them to continue to deliberate. So this is the second time that I have received information from the jury that they are at an impasse.

I would suggest that I bring them into the courtroom and ask them whether they think any further deliberation would help. I would be more than willing to ask them if they'd like to go home, come back tomorrow, sleep on it. If it would do any good, I'll bring them back tomorrow. State have any objection to that?

MR. GIBBONS: Judge, I have no objection to that. The only thing I would inquire is whether or not you want to send a note to them. I don't know if you'd get multiple answers or something like that out here.

THE COURT: I'll inquire of the foreperson.

MR. GIBBONS: Understood, Judge.

THE COURT: Defense, any objection?

MR. HAIDUK: None, your Honor.

THE COURT: Bring them in.

MR. GIBBONS: Judge, if they say that they don't think that more time would help, I would ask to send them out. And then, I'd ask if I could -- if

Ms. Eisenstein and I could address the Court then?

THE COURT: You may. Mr. Gibbons, do you want me to send them back out before the Court makes any decision?

MR. GIBBONS: I would ask for that, Judge.

THE COURT: Okay.

(Whereupon, the following proceedings were held in open court in the presence of the jury.)

THE COURT: Has the jury selected a foreperson?

THE FOREPERSON: I am, your Honor.

THE COURT: Mr. Ditroia. Mr. Ditroia, I received your note that you are at an impasse. Can you tell me how long that you have been at that impasse?

THE FOREPERSON: Pretty much a good part of the day. Four and a half hours or five hours.

THE COURT: And nothing has changed during that period of time?

THE FOREPERSON: Some numbers changed here and there, but we were stuck at a certain proportion.

THE COURT: And how long has that existed?

THE FOREPERSON: About I would say three hours.

THE COURT: And you haven't moved during that

period of time?

THE FOREPERSON: No, ma'am.

THE COURT: Do you -- let me ask, do you think if I sent you home for the night, let you sleep on it, would it do any good? Could you continue your deliberation tomorrow? Would that help at all?

THE FOREPERSON: I asked that question, and it was indicated that it would not.

THE COURT: It would not?

THE FOREPERSON: No, ma'am.

THE COURT: You can take the jurors back out. I'll be back with you in just a couple minutes.

(Whereupon, the following proceedings were held out of the hearing and presence of the jury.)

THE COURT: Mr. Gibbons?

MR. GIBBONS: Judge, I do understand the foreperson's comments. I understand it seems as though they are completely deadlocked at this point and it might be futile for future further deliberation. However, I believe that procedurally, from the State's point of view, we should at least

attempt the Prim instruction before we discharge the jury.

MR. HAIDUK: I would agree with the State, your Honor.

THE COURT: Pardon?

MR. HAIDUK: I would agree with the State.

THE COURT: You agree with the State?

MR. HAIDUK: I do. Or I guess, in the alternative, my argument would be we -- despite them saying it won't make a difference, come back tomorrow. I think those are really the only two viable alternatives.

MR. GIBBONS: We could always read them the Prim instruction and bring them back tomorrow.

THE COURT: Mr. Haiduk?

MR. HAIDUK: I don't have any objection to that, Judge.

MR. GIBBONS: Just suggestions, Judge. I'm not saying that's the right method that we believe, but --

THE COURT: I am fearful, folks, if I do that, you're going to have some extremely angry jurors.

MR. GIBBONS: I understand, Judge.

THE COURT: There has been some very loud voices

back there for a period of time. I think it would be futile to do that. Therefore, I would decline.

MR. GIBBONS: Understood, Judge.

THE COURT: Bring the jurors back, please.

(Whereupon, the following proceedings were held in open court in the presence of the jurors.)

THE COURT: Ladies and gentlemen of the jury, the Court is going to excuse you from further service in this case. I thank you for the time and attention that you've given to the Court and the lawyers and for the efforts that you've made. You are free to go.

(Whereupon, the following proceedings were held out of the hearing and presence of the jury.)

THE COURT: The Court would declare a mistrial.

MR. GIBBONS: Judge, I can sincerely tell the Court that this changes nothing from our point of view. We will -- if we need a status date to set a trial date, I have no issue with that, but that's where we are at.

MR. HAIDUK: And your Honor, from our perspective --

THE COURT: You folks can be seated.

MR. GIBBONS: Sorry, Judge.

THE COURT: Sorry.

MR. HAIDUK: Judge, from our perspective, your Honor, I think it was approximately two weeks ago, I don't remember the day, when I had asked the Court for additional time because I had said I had sent some subpoenas out, if I had the opportunity, that I need. I would ask that we set over a status so that I can issue those materials based on the State's disclosure from October.

THE COURT: What date would you like, Mr. Haiduk?

MR. HAIDUK: I'd ask for Friday December 4, if the Court would allow.

THE COURT: Mr. Gibbons, do you have any objection to that date for status and to reset for trial?

MR. GIBBONS: I have no objection, Judge.

THE COURT: Matter is continued to December 4 at 9:00 o'clock for status and to reset for trial.

MR. GIBBONS: Thank you, your Honor. Thank you

for your time, Judge.

THE COURT: You're welcome.

(Which were all the proceedings had in the above-entitled cause this date.)

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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On June 29, 2018, the foregoing **Brief and Appendix of Plaintiff-Appellant People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my email address to the email addresses below:

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Additionally, upon its acceptance by the Court's electronic filing system, the undersigned will mail thirteen duplicate paper copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701

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