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.

REPLY BRIEF OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General of Illinois

DAVID L. FRANKLIN
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

MICHAEL L. CEBULA
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-2640
eserve.criminalappeals@atg.state.il.us
mcebula@atg.state.il.us

Counsel for Plaintiff-Appellant
People of the State of Illinois

ORAL ARGUMENT REQUESTED

E-FILED
9/25/2018 8:24 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

ARGUMENT

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.

The People's opening brief demonstrated that defendant consented to a mistrial because he had multiple opportunities to object to a mistrial but failed to do so. Peo. Br. 8-13.[1] In response, defendant raises two contradictory and incorrect arguments: that he (1) did not have an opportunity to object to the declaration of a mistrial; and (2) expressly objected to the mistrial.

1. Defendant had numerous opportunities to object.

The People's opening brief demonstrated that defendant had numerous opportunities to object to a mistrial, including (1) when the prosecutor stated that the jury appeared "completely deadlocked" and referred to the possibility that they might need to be "discharge[d]"; (2) when the prosecutor noted that he was "not saying" that the discussed alternatives to mistrial were "the right method that we believe"; (3) when the trial judge said that she "decline[d]" to attempt the discussed alternatives to mistrial and explained why; (4) when the judge then asked the bailiff to recall the jury; and (5) minutes later when the jury returned to the courtroom but before the judge discharged them. Peo. Br. 12.

In response, defendant argues for the first time that he had no opportunity to object because the possibility of a mistrial was not apparent, and the judge did not expressly announce her intent to declare a mistrial before calling the jury

[1] The common law record and report of proceedings are cited as "C" and "R," respectively. Citations to the People's and Defendant's briefs in this Court appear as "Peo. Br. _" and "Def. Br. _," respectively.

back into the courtroom. Def. Br. 35-36. Defendant's new argument ignores both the law and the facts of this case.

To begin, this Court has held that a defendant must object to a mistrial to preserve a double jeopardy argument, even if the trial court does not announce its decision to declare a mistrial until the jury has been called back into court. *See People v. Camden*, 115 Ill. 2d 369, 377-78 (1987).[2] In *Camden*, the trial court questioned a juror about his self-perceived inability to render a fair verdict but did not mention the possibility of a mistrial. *Id.* at 372-74. After the questioning was completed, a brief recess was held at defendant's request, then the judge called the jurors back into court and declared a mistrial. *Id.* at 374-75. Based on that record, this Court held that Camden consented to a mistrial because (1) he could have objected to a mistrial following the conclusion of the examination of the juror (even though the possibility of a mistrial had not yet been expressly raised); or (2) when the judge declared a mistrial in front of the jury, Camden "could have requested a sidebar and objected outside the presence of the jury." *Id.* at 377-78.

In this case, the judge's intention to declare a mistrial was far more obvious, and defendant had more opportunities to object than the defendant in *Camden*. Here, the possibility of a mistrial first arose when the trial judge called the parties into court and disclosed that she had received two communications

[2] Defendant incorrectly claims that the People rely "primarily" on a First District case, *People v. Escobar*, 168 Ill. App. 3d 30 (1st Dist. 1988), then spends several pages trying to distinguish it. Def. Br. 29, 31-34. To the contrary, the People rely primarily on *Camden*, and cited *Escobar* only in string cites, along with numerous supporting cases from other courts, none of which defendant attempts to distinguish. *See* Peo. Br. 8-10, 21.

from the jurors stating that they were at an impasse; the parties then waited until the jurors were brought in, and the judge questioned the foreperson. R821-824. The foreperson said that the jury had been at an impasse for almost five hours and that further deliberations would be futile. R823-24. After the jurors returned to the jury room, the prosecutor said that it appeared the jurors were "completely deadlocked" and he expressly mentioned the possibility that they might need to be "discharge[d]." R824-25. After lengthy discussion of potential "alternatives," the prosecutor stated that he was "not saying" that any of them were "the right method." R825. The judge then said that she was "fearful" that if she followed such alternatives, "you're going to have some extremely angry jurors," because she had heard "some very loud voices back there for a period of time" and believed such alternatives would be "futile." R825-26. Therefore, she "declined" the alternatives and called the jury back into court; the parties waited for the jurors to appear, and the judge then formally discharged them. R826.

Given this record, there is no merit to defendant's new theory that the possibility of a mistrial was not apparent or that the judge's intentions were somehow ambiguous. There was express discussion (and agreement) that the jury appeared "completely deadlocked" and express reference to the possibility that the jury might need to be "discharge[d]." Moreover, the trial judge stated that the discussed alternatives to mistrial would be "futile," and she "decline[d]" to pursue them because of her concerns about the jurors' anger and, by extension, the possibility of a coerced verdict. Defendant's new theory that the judge's

comments "could be read" as an agreement to give a *Prim*[3] instruction or that he had no opportunity to object to a mistrial before the jury returned cannot be squared with the record. *See* Def. Br. 35. Defendant had numerous opportunities to object *before* the jury was recalled, and he should have done so if he wished to preserve a double jeopardy argument.

Further, even accepting the unsupported notion that defense counsel was confused by the judge's comments and did not realize her intention to declare a mistrial until the jury returned and was told that it would be discharged, defendant was obligated at that point to request a sidebar and object. *Camden*, 115 Ill. 2d 378 (defendant consented because he "could have requested a sidebar and objected outside the presence of the jury"). Defendant does not even acknowledge this holding from *Camden*. The People should not be prohibited from prosecuting defendant for his repeated sexual abuse of a minor where (1) any alleged misunderstanding was defendant's fault alone, as he concedes that the judge's comments also could have been read to "indicate her intention to declare a mistrial," Def. Br. 35; (2) when defendant's alleged misunderstanding was cleared up, he still had an opportunity to object in a sidebar and was required to do so by *Camden*; and (3) the People are not alleged to be at fault either in causing the mistrial or contributing to any alleged misunderstanding.

Finally, the only two cases defendant cites where a court found that a defendant had no opportunity to object are inapposite. Def. Br. 36 (citing *Henderson* and *Dahlberg*). In *Henderson v. Wright*, the judge immediately

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

declared a mistrial — without consulting the parties — after the foreperson said the jury was at an impasse. 533 F. Supp. 1373, 1375-76 (D. Me. 1982). In *People v. Dahlberg*, the judge "acted hastily," was "angry" at defendant, "did not give defense counsel an opportunity to explain his position," "took little time for reflection," "failed to consider any alternatives," and immediately left the bench. 355 Ill. App. 3d 308, 314, 316 (2d Dist. 2005). That defendant ignores *Camden* in favor of such inapposite cases further exposes the weakness of his argument.

2. Defendant failed to object to a mistrial.

As noted, this Court has made plain that a defendant's failure to clearly and expressly object to the declaration of a mistrial constitutes implicit consent to the mistrial and bars him from later arguing that a new trial violates double jeopardy principles. Peo. Br. 8-10; *see also Camden*, 115 Ill. 2d at 377-79; *People v. Segoviano*, 189 Ill. 2d 228, 248 (2000). And an overwhelming number of state high courts and federal courts of appeals likewise require defendants to expressly object to a mistrial to preserve a double jeopardy claim. Peo. Br. 9-10.[4]

The requirement of a clear, express objection to a mistrial is sensible for a variety of reasons, including that it (1) provides a bright-line rule that imposes a minimal burden on defendants and is easily applied by courts; (2) removes an

[4] *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"); *see also Marte v. Vance*, 480 F. App'x 83, 85 (2d Cir. 2012); *United States v. Alvarez*, 561 F. App'x 375, 380 (5th Cir. 2014); *United States v. Brewley*, 382 F. App'x 232, 237-39 (3d Cir. 2010); *United States v. DiPietro*, 936 F.2d 6, 9-10 (1st Cir. 1991); *Camden v. Cir. Ct. of Crawford Cty.*, 892 F.2d 610, 615 (7th Cir. 1990); *United States v. Puelo*, 817 F.2d 702, 705 (11th Cir. 1987); *Pellegrine v. Com.*, 446 Mass. 1004, 1005 (Ma. 2006); *State v. Cram*, 46 P.3d 230, 232-33 (Utah 2002); *State v. Johnson*, 267 Ga. 305, 306 (Ga. 1996); *State v. Tolliver*, 839 S.W.2d 296, 300 (Mo. 1992).

incentive for defendants to act ambiguously; and (3) balances a defendant's interest in being tried once for an offense with the People's interest in prosecuting criminal offenses. Peo. Br. 11-12; *see also Camden*, 892 F.2d at 618 (defendants should not be permitted to "manipulate the events" and "profit from a failure to act"); *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").

Defendant's brief cites no case to the contrary, nor does it contest the important policy considerations that underlie this longstanding and widespread rule. Indeed, defendant's brief presents very little argument at all.

Most notably, defendant never attempts to defend the appellate court's ruling that a party's agreement that a jury could be given a *Prim* instruction constitutes an express objection to a mistrial. Defendant merely states in conclusory fashion that he "immediately informed the trial judge of [his] desire to continue with the tribunal he had selected," but does not explain how he supposedly did so. Def. Br. 31. The closest defendant comes to explaining that conclusory assertion comes several pages later when he notes, again in conclusory fashion, that defense counsel agreed that "procedurally" a *Prim* instruction could be given, suggested that the jury could be told to return the next day without a *Prim* instruction, and said that "these are really the only two viable alternatives." *Id.* at 37. Because defendant has failed to develop any argument that such actions constitute an express objection to a mistrial, or cite even a single supporting case, this argument is waived. *See* Ill. S. Ct. R. 341(h)(7).

Waiver aside, defendant's apparent theory is meritless. As the People's opening brief demonstrated, courts that have examined this issue have repeatedly held, consistent with *Camden*, 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 objection to a mistrial. *See, e.g.*, *Alvarez*, 561 F. App'x at 380 (assertion that defendant preferred to proceed to verdict not objection to mistrial); *United States v. Phillips*, 431 F.2d 949, 950 (3d Cir. 1970) (expressed belief that deliberations could continue 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 not objection to mistrial); *Palmer*, 122 F.3d at 219 (expressed desire to complete trial not objection to mistrial); *DiPietro*, 936 F.2d at 11 (defendant did not object despite renewing motion for acquittal).

Defendant neither attempts to distinguish these cases nor cites any contrary authority. Defendant also does not dispute what these cases logically suggest: that a request for a *Prim* instruction is compatible with consent to a mistrial. As the People noted, a party could believe that a jury was deadlocked, and a mistrial was appropriate, but still suggest that, given the time and money spent on the case, there is no harm in encouraging the jury one last time to reach a verdict. Or a party could believe that the jury was deadlocked, and a mistrial necessary, but also believe that it was procedurally appropriate for the trial court to give a *Prim* instruction. Or a party could request a *Prim* instruction and then, after learning new information, realize that a mistrial was necessary to avoid a coerced verdict.

It appears that all of those explanations apply here. Peo. Br. 16-17. Most importantly, as discussed in the People's opening brief but unaddressed in defendant's response, the suggestions that "procedurally" the jury could be given a *Prim* instruction or told to return in the morning came *before* the court told the parties that she was "fearful" that such suggestions would lead to an "extremely angry jury" because she had heard "some loud voices back there [in the jury room] for a period of time." Peo. Br. 20; R825-26. That no further suggestions were made after the disclosure of that new fact strongly indicates that the parties understood that a mistrial was necessary to avoid a coerced verdict.

Indeed, to the extent defendant believes that the mere agreement that "procedurally" the jury could be given a *Prim* instruction constitutes an express objection to a mistrial, he overlooks the context of the parties' discussion in several other ways. For example, defendant had moved for a mistrial on each of the previous two days of trial, which, at the very least, would strongly indicate to the judge that defendant did not wish this particular jury to decide his fate. In addition, defendant agreed with the prosecutor's description of the jury as "completely deadlocked," R824-25, and then remained silent when the prosecutor noted that he was "not saying" that the discussed alternatives were "the right method that we believe," R825. Further, defendant's discussion of a new trial moments after the declaration of the mistrial further indicates his consent. *See*, *e.g.*, *Camden*, 115 Ill. 2d at 378 (defendant's discussion of scheduling moments after jury was discharged indicated consent to new trial); *see also* Peo. Br. 20-21 (collecting cases).

The suggestion in defendant's brief that he merely asked for a status date so he could file a motion to bar a new trial is simply untrue. Def. Br. 31. Immediately after the jury was discharged, the prosecution asked for a status "to set a trial date." R826. Rather than objecting, defendant asked that the status be scheduled so he would have sufficient time to issue subpoenas necessary for that trial. R827. Then, without objection from defendant, the court set a status date "to reset for trial." *Id.* Those actions are consistent with someone who understood why a mistrial was declared and had no intention of raising a double jeopardy argument. *See*, *e.g.*, *Camden*, 892 F.2d at 618 (defendant's actions, including discussion of future scheduling when jury was discharged, "clearly demonstrate that the double jeopardy argument was merely an afterthought that took form long after the first trial ended in a mistrial").

Finally, although it is difficult to discern from defendant's undeveloped argument, he seems to place weight on defense counsel's use of the word "alternatives," *i.e.*, defense counsel's passing comment that a *Prim* instruction and telling the jury to return in the morning were the "only two viable alternatives." Def. Br. 37. But in common usage the word "alternative" is not exclusionary — it denotes possible paths the court could take in *addition* to the possible path of declaring a mistrial. Contrary to defendant's new theory, describing two paths as "only two viable alternatives" is not the same as saying two paths are the only two viable *options*. And certainly, given defendant's other conduct (such as agreeing that the jury was "completely deadlocked" and moving for a mistrial on each of the two previous days), a judge would not conclude that the use of the word "alternatives" meant that defendant was objecting to a

mistrial. Indeed, that defendant now relies on such semantic arguments demonstrates the wisdom of the longstanding, bright-line rule that a defendant must clearly and expressly object to a mistrial to preserve a double jeopardy argument.

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

The People's opening brief also demonstrated a second basis for finding consent: defendant's motions for a mistrial on each of the first two days of trial constituted consent to the court's decision to declare a mistrial on the third day. Peo. Br. 13-15 (collecting cases). Defendant's response cites no case to the contrary and his sole argument — that his requests for a mistrial did not constitute consent because the bases for his motions were different than the ground the trial court ultimately relied on — is incorrect. Def. Br. 26.[5]

This Court's decision in *Mosley* is instructive. *See Mosley*, 74 Ill. 2d at 535-37. As aptly described in defendant's brief, although Mosley moved several times for a mistrial "because the prosecutor was responsible for the appearance of [an] article [in the Chicago Tribune revealing details of the case]," the trial court found that a mistrial was necessary to "ensure the defendant received a fair

[5] Defendant suggests that the People may have waived this argument but then asks this Court not to address the issue of waiver. Def. Br. 26. Defendant's decision not to pursue a waiver argument was correct. Although in the appellate court briefing and PLA the People did not discuss defendant's mistrial motions, the People have always maintained that defendant consented to the mistrial. Further, because the People were appellee in the appellate court, they may raise any argument here that is supported by the record to sustain the trial court's judgment, and any failure to raise this specific argument in the PLA does not limit this Court's power to consider it. *See*, *e.g.*, *People v. Donoho*, 204 Ill. 2d 159, 169 (2003) (considering argument not raised in People's PLA or in appellate court).

trial with unbiased jurors" unaffected by the trial court's questioning about the article. Def. Br. 26. In turn, Mosley expressly objected that he "never moved for mistrial on [the] point" relied upon by the trial court. *Mosley*, 74 Ill. 2d at 534.

This Court rightly rejected that distinction as irrelevant and disallowed Mosley's double jeopardy claim. As this Court held, "it may fairly be said here that defendant sought *or at least consented* to the mistrial which the trial court ultimately declared." *Id.* at 535 (emphasis added). While it was "not entirely clear" that the judge acted on Mosley's motions when they were raised, "there can be no doubt that the mistrial eventually declared was the relief requested by [Mosley] on the earlier occasions." *Id.* at 536. Mosley's double jeopardy arguments thus were barred because "the mistrial may be said to have resulted from defendant's repeated requests *or, at a minimum, to have been declared with his consent*." *Id.* at 536-37 (emphasis added). That is, even if the mistrial was not granted in response to the Mosley's motions, or for the precise reason Mosley raised, he nevertheless received the relief he wanted and he could not claim that a mistrial was improvidently declared or that retrial was barred.

Further, contrary to defendant's assertion, other courts likewise have held that a defendant's prior motion for a mistrial constituted consent to a mistrial and barred a double jeopardy argument, even though the defendant's prior motion was based on a "different ground" than the one relied upon by the trial court. *See*, *e.g.*, *State v. Saunders*, 267 Conn. 363, 397 & n.34 (Conn. 2004) (citing *State v. Knight*, 616 S.W.2d 593, 596-97 (Tenn. 1981)).

There are sound policy bases for applying this rule even when the defendant's and trial court's grounds differ. As defendant's brief notes, the

Double Jeopardy Clause protects a defendant's right to have his fate decided by the first jury empaneled. Def. Br. 22. But as courts have correctly found, a motion for a mistrial, even if on a different ground, is a statement 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. In fact, a motion for mistrial is not merely a statement that the defendant is prepared to relinquish his right to have that particular jury decide his fate; it is an express request that *another jury* decide his fate because he believes that the first jury has somehow been tainted. Here, for example, defendant repeatedly told the trial court that he believed a mistrial should be declared because the jury was tainted by (1) testimony from the victim's sister about how defendant also abused her; and (2) a detective's testimony about defendant's request for a lawyer. R646, 724. By declaring a mistrial the next day (albeit on different grounds) the court provided "the relief requested by defendant on the earlier occasions," and defendant should not now be permitted to contend that the court erred and that the first jury should have decided his fate. *Mosley*, 74 Ill. 2d at 536.

Defendant's new theory that, in the time between his motions for mistrial and the trial court's declaration of a mistrial, "the landscape of the case had changed" and defendant had "made a conscious choice to continue to a verdict" is wholly unsupported by the record. Def. Br. 28. Defendant's second motion for a mistrial came at the end of the second day of trial; the court then denied defendant's motion for a directed verdict, the jury began deliberating the next morning, and the court declared a mistrial that afternoon. The only evidence submitted between defendant's final motion for mistrial and the beginning of jury

deliberations was a stipulation regarding S.M.'s pretrial statements to prosecutors that emphasized the pain and embarrassment S.M. felt as a result of defendant's abuse. R736-37. While defendant now argues that the jury's request to review the video of S.M.'s interview suggests that the jury had questions about her credibility, that request does not in any way indicate how such questions would be resolved. Indeed, given the strong evidence against defendant, the best he could have hoped for was a hung jury and a new trial.

But even if defendant had, for unknown reasons, suddenly "made a conscious decision to continue to verdict" (again, an assertion that finds no support in the record), he had an obligation to make clear that he was withdrawing his earlier motions. *See* Peo. Br. 13-14 (collecting cases); *People v. Orenic*, 88 Ill. 2d 502, 509 (1981) (finding consent where defendant's statements and suggestions to trial court were insufficient to constitute withdrawal of prior agreement that mistrial was possible alternative). Defendant fails to cite any contrary cases or provide any policy arguments against this rule.

In that regard, it is telling that defendant's brief fails to dispute the People's observation that had the jury continued to deliberate and returned a guilty verdict, defendant almost certainly would have argued on appeal that a mistrial should have been *granted* on either of the first two days of trial and that the case never should have been submitted to the jury. The law prevents defendants from creating such "no-lose" situations. *See People v. Bowman*, 138 Ill. 2d 131, 148 (1990) (defendants may not create "no lose" situations where they insist on speedy trial rights then, if they lose, argue that counsel had insufficient time to prepare); *Mosley*, 74 Ill. 2d at 536 ("[D]efendant cannot by his own act

avoid the jeopardy in which he stands and then assert it as a bar to subsequent jeopardy").

II. The 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, a new trial is permitted because the jury was deadlocked and, thus, a mistrial was a manifest necessity. Defendant's theory that "judicial indiscretion," not a deadlocked jury, caused the mistrial is contrary to both 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 People's opening brief demonstrated that the appellate court wrongly held that the trial court's supposed "indiscretion" — *i.e.*, telling the jury *ex parte* to "continue deliberating" — prompted the mistrial and, thus, barred a new trial. Peo. Br. 22-27. This Court has repeatedly held that a judge's *ex parte* instruction to continue deliberating is "a clear and noncoercive response well within [the judge's] discretion" and does not affect "the fairness of the defendant's trial" or "the integrity of the judicial process." *People v. Johnson*, 238 Ill. 2d 478, 489-90 (2010); *see also People v. McLaurin*, 235 Ill. 2d 478, 497-99 (2009) (same).

Defendant does not cite a single case holding that an *ex parte* instruction to continue deliberating constitutes judicial "indiscretion," and his halfhearted attempt to distinguish *Johnson* and *McLaurin* fails. *See* Def. Br. 40-41. While defendant notes that McLaurin's counsel was present when the judge instructed the jury to continue deliberating, he fails to note that McLaurin himself was not and, thus, this Court treated the instruction as *ex parte* and concluded there was

no prejudice because telling a jury to "keep on deliberating" is clear, simple, and not coercive. *McLaurin*, 235 Ill. 2d at 491-93; *see also Johnson*, 238 Ill. 2d at 487 (describing *McLaurin* as a case regarding "a trial court's *ex parte* communication with a jury"). And while defendant correctly notes that the Court characterized the evidence against Johnson as strong, so too is the evidence here, given S.M.'s and B.L.'s testimony, defendant's admission that S.M. was not the type of girl to lie about being abused, defendant's unbelievable statements that any contact with S.M.'s vagina was "accidental," and the many skimpy clothes, toys, and movies for little girls found in defendant's home. More to the point, regardless of the evidence, this Court held that an *ex parte* instruction to continue deliberating is "clear and noncoercive" and "well within [the judge's] discretion." *Johnson*, 238 Ill. 2d at 490. Thus, *Johnson* plainly forecloses the claim that an *ex parte* instruction to continue deliberating is an "indiscretion."

While defendant notes that the juries in *Johnson* and *McLaurin* reached a verdict, that fact demonstrates that any alleged prejudice in this case is far *less*, because Johnson and McLaurin were convicted (and their convictions upheld by this Court), whereas here the People ask only that they be allowed to continue defendant's prosecution. If this Court did not overturn a conviction because a judge instructed the jury *ex parte* to continue deliberating, then the People should not be barred from prosecuting a defendant where the judge gave the same instruction.

Defendant's other theories fare no better. He provides no record support or explanation for his claim that the trial judge "used the fact of her prior *ex parte* communication as the basis" for declaring a mistrial. Def. Br. 41. The judge

referred to the *ex parte* communication only once — when she brought the parties into court to discuss the new note stating that the jury was completely deadlocked. R821. In response, the judge 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. She then brought the foreperson into court to ask about the deadlock. R823-24. When the foreperson said that further deliberations would be useless, the judge gave the parties ample time to suggest how to proceed. R823-26. After hearing them out, the judge explained that she believed that a mistrial was necessary because further deliberations would be futile and risked coercing a verdict (because of the jurors' anger). R825-26. Thus, defendant's argument that the judge "used the fact of her prior *ex parte* communication as the basis" for declaring a mistrial is meritless. Def. Br. 41.

Defendant's assertion that he was prejudiced because he did not have an opportunity to request a *Prim* instruction earlier, Def. Br. 38, ignores that this Court rejected that same argument in *Johnson*, *see* Peo. Br. 25. That holding was correct because, among other reasons, it has long been settled that a court has no obligation to give a *Prim* instruction. *See id.* (collecting cases). While defendant complains that absent a *Prim* instruction a jury may not know of its obligation to communicate and keep an open mind (an unfair and unsupported assumption), Peo. Br. 42, defendant elsewhere admits that this jury's behavior, such as asking to review S.M.'s video, as well as the foreperson's comment that at least one vote had changed earlier in the day, demonstrates that the jurors were "willing to reexamine their views and change their opinions," Def. Br. 43. That proven

open-mindedness is further reason to conclude that the absence of a *Prim* instruction had no effect here.

Finally, the only two cases defendant relies upon are inapposite because, among other reasons, they do not involve *ex parte* instructions. Def. Br. 37-39 (citing *Jorn* and *Wiley*). In *United States v. Jorn*, the trial judge refused to allow certain witnesses to testify and, when the prosecutor attempted to state that he intended to try the case, the judge "cut him off in midstream and immediately discharged the jury" with "no opportunity" to suggest a continuance. 400 U.S. 470, 486-87 (1971). In *People v. Wiley*, the trial court suddenly dismissed the case because the prosecution asked for an overnight recess to bring in its remaining witnesses when the judge had previously told the prosecution to have its witnesses available. 71 Ill. App. 3d 641, 642 (1st Dist. 1979).

In sum, *McLaurin* and *Johnson* are controlling, and the trial court's *ex parte* instruction to "continue deliberating" does not bar a new trial.

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

The People's opening brief demonstrated that the trial judge did not abuse her discretion by concluding that the jury was deadlocked and, thus, that a mistrial was a manifest necessity. Peo. Br. 27-32. Defendant's response fails to acknowledge the wide discretion necessarily afforded to trial courts in determining when a jury is deadlocked, and he provides no argument that the trial judge abused her discretion, *i.e.*, that her decision was "arbitrary, fanciful" or that "no reasonable person would take the view adopted by the trial court." *People v. Delvillar*, 235 Ill. 2d 507, 519 (2009); *see also Renico v. Lett*, 559 U.S.

766, 774 (2010) (discussing need to give trial courts "broad discretion" in determining that jury is deadlocked). In addition, the few arguments defendant raises regarding the six-factor test for determining whether a jury is deadlocked are incorrect.

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

Defendant's assertion that the trial court erred by relying "heavily, if not exclusively" on the foreperson's statements that further deliberations would be futile ignores that the Supreme Court, among other courts, has held that the "most important" factor is the jury's own statement that it is unable to reach a verdict. *Lett*, 559 U.S. at 778; Peo. Br. 29 (collecting cases). Defendant also (1) ignores that the judge discussed the loud, angry voices she had heard in the jury room (prompting her fear of a coerced verdict); (2) provides no basis to assume that the judge did not consider the length and complexity of the case; and (3) cites no case holding that a judge erred by relying on a jury's statement that it could not reach a verdict.

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

Although defendant contends that the court acted prematurely by declaring a mistrial, he (1) does not cite a single case where a court was found to have prematurely declared a jury deadlocked; and (2) fails to acknowledge, let alone attempt to distinguish, the long list of cases cited by the People in which courts affirmed mistrials where the jury deliberated for shorter periods of time in much more complex cases. Peo. Br. 30-31. As to the evidence, defendant correctly concedes that the case was a "credibility contest between S.M. and the

defendant," and the People submit it cannot be "fanciful" or "unreasonable" for a trial court to conclude that five hours is sufficient time to determine a victim's credibility, especially where the defendant himself said that the victim was honest and would not lie about being abused.

Finally, defendant's attack on S.M.'s credibility ignores significant corroborative evidence (including B.L.'s testimony, the little girls' clothing and toys found in defendant's home, and defendant's own statements, *see* Peo. Br. 3-4) and misstates the record. For example, what defendant describes as a "dramatic change" in S.M.'s statement was simply a slight increase in the number of times she was abused and the disclosure that she was touched directly on her vagina rather than over her clothes (either of which is a crime); and S.M. explained the minor discrepancy, stating that she was scared and embarrassed at first to disclose the full extent of defendant's abuse. R575-76, 597, 737. Lastly, given the nature of the abuse, defendant's reliance on the lack of physical evidence and eyewitnesses is misplaced.

3. Factor five: communications between judge and jury.

Defendant fails to dispute the People's argument that the judge's questioning of the foreperson before declaring a mistrial weighs in favor of finding that the judge did not abuse her discretion. Peo. Br. 31 (collecting cases).

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

Defendant cites no authority for his contention that the jury was not exhausted and, more importantly, provides no basis to believe that it was unreasonable for the judge to be concerned about a coerced verdict. As noted, the trial judge based her decision, at least in part, on the loud, angry voices she

had been hearing for some time from the jury room. Defendant fails to consider that the trial judge is tasked not only with helping the jury reach a verdict but also with avoiding a coerced verdict, whether due to intimidation or exhaustion. And when the appellate court substituted its judgment about the meaning of the jurors' loud, angry voices, it engaged in precisely the type of *de novo* review that is prohibited here because it is detrimental to the interests of justice. *See*, *e.g.*, *Lett*, 559 U.S. at 774 (failing to give trial courts wide discretion in declaring a mistrial would create "a significant risk" of coerced verdicts in the future).

CONCLUSION

This Court should reverse the appellate court's judgment and remand for trial.

September 25, 2018

Respectfully submitted,

LISA MADIGAN
Attorney General of Illinois

DAVID L. FRANKLIN
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

MICHAEL L. CEBULA
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
Telephone: (312) 814-2640
Fax: (312) 814-2253
eserve.criminalappeals@atg.state.il.us
mcebula@atg.state.il.us

Counsel for Plaintiff-Appellant
People of the State of Illinois

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(c) certificate of compliance, and the certificate of service, is twenty pages.

/s/ Michael L. Cebula
MICHAEL L. CEBULA
Assistant Attorney General

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 September 25, 2018, the foregoing **Reply Brief 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:

Thomas A. Lilien
Josette Skelnik
Office of the State Appellate Defender
One Douglas Avenue, Second Floor
Elgin, Illinois 60120
2nddistrict.eserve@osad.state.il.us

Patrick Delfino
David J. Robinson
Aline Dias
State's Attorneys Appellate Prosecutor
2032 Larkin Avenue
Elgin, Illinois 60123
2nddistrict.eserve@ilsaap.org

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.

/s/ Michael L. Cebula

MICHAEL L. CEBULA
Assistant Attorney General