S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAY EVART GOREE,

Defendant-Appellant.

UNPUBLISHED
July 6, 1999

No. 202938
Kent Circuit Court
LC No. 96-001192 FH

Before: Griffin, P.J., and McDonald and White, JJ.

PER CURIAM.

Defendant appeals of right the trial court's grant of a mistrial after the jury had been sworn, arguing that the court improperly found that manifest necessity existed for a mistrial and that his second trial on the same charge violated double jeopardy. We remand for an evidentiary hearing.

Defendant was charged with breaking and entering an unattached garage with intent to commit larceny, MCL 750.110; MSA 28.305. The trial court declared a mistrial on the second day of defendant's first jury trial because the prosecution's key witnesses refused to appear and testify. Defendant was retried and convicted of the same charge. He was sentenced as an habitual offender, third offense, MCL 769.12; MSA 28.1084, to five to twenty years' imprisonment.

The first day of defendant's first trial involved jury selection and opening statements. The witnesses expected to appear the following day included Robert and Colleen Trumbull, the Grand Rapids homeowners whose garage defendant was accused of breaking into. Since the break-in, the victims had relocated to Port Huron. They had been located and contacted by the prosecutor and the Victim Witness office. Up to the day trial proceedings began, the Trumbulls expressed no hesitation about testifying; however, after the close of proceedings the first day, the Trumbulls informed the prosecutor that they would not be appearing.

On the prosecutor's motion, the trial court granted a mistrial, over defendant's objection, on the basis of manifest necessity.

Under both the United States and the Michigan Constitutions, an accused cannot be placed in jeopardy twice for the same offense. US Const, Am V; Const 1963, art 1, § 15. Jeopardy attaches in a jury trial once the jury is impaneled and sworn. *People v Mehall,* 454 Mich 1, 4; 557 NW2d 110 (1997). Once jeopardy has attached, the defendant has a constitutional right to have his case completed and decided by that tribunal. *People v Dry Land Marina, Inc,* 175 Mich App 322; 325; 437 NW2d 391 (1989). If proceedings are interrupted, retrial for the same offense is permitted only if the defendant consents or a mistrial is declared because of manifest necessity. *Mehall, supra* at 4.

We review a trial court's determination that manifest necessity exists to declare a mistrial for abuse of discretion. *People v Blackburn,* 94 Mich App 711, 714; 290 NW2d 61 (1980). While the United States Supreme Court has consistently declined to pronounce general rules for determining when the manifest necessity standard has been satisfied and has said that each case must be decided on its facts, certain general principles have emerged. Courts should refrain from declaring a mistrial until "a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." *United States v Jorn,* 400 US 470, 485; 91 S Ct 547; 27 L Ed 2d 543 (1971). Further, "[t]he strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence." *Arizona v Washington,* 434 US 497, 507-508; 98 S Ct 824; 54 L Ed 2d 717 (1978). Courts should "resolve any doubt" in favor of the defendant. *Downum v United States,* 372 US 734, 738; 83 S Ct 1033; 10 L Ed 2d 100 (1963).

As there is no Michigan law directly addressing the question before us, we may look to other state and federal decisions for guidance. While none of the following cases present circumstances identical to those presented here, they illustrate how courts have approached other "essential witness" mistrial cases where alternative avenues were not explored or employed. In these cases, the courts concluded that manifest necessity had not been established: *McNeal v Hollowell,* 481 F2d 1145 (CA 5, 1973) (no manifest necessity found, and retrial barred, where court granted prosecutor's request for a *nolle prosequi,* over defendant's objection, when based on unexpected testimony of one key prosecution witness and invocation of privilege against self-incrimination by another key witness, who decided not to testify after speaking with the defendant's attorney); *Mizell v Atty General of New York,* 442 F Supp 868 (ED NY, 1977) vacated on other grounds 586 F2d 942, 947 (CA 2, 1978) (retrial barred where two prosecution witnesses failed to appear and trial court discharged the jury solely on basis of convenience of the jury, after denying prosecution's request for a continuance until following week); *New Jersey v Stani,* 197 NJ Sup 146; 484 A2d 341 (1984) (affirming trial court's dismissal of indictment on double jeopardy grounds where, after jury was sworn and testimony taken, the court dismissed the case when the prosecution could not produce the only witness to alleged robbery, who had been subpoenaed, and could not prove a prima facie case with available testimony); *Fonseca v Judges of Family Court of Kings Co,* 299 NYS2d 493, 498; 59 Misc 2d 492 (1969) (no manifest necessity existed where prosecutor began trial while unfamiliar with police witness' testimony and then discovered need for another witness who was not present, the court noting "[t]he doctrine of manifest necessity . . . contemplates a sudden and overwhelming emergency, beyond control of the court and unforeseeable. It does not mean expediency. . . .This was not a case where the key witness could not be located. His whereabouts were disclosed to the court---he was at home taking care of the business. No effort at all was made to produce him. With reasonable diligence his presence could have been secured in an hour, or a continuance granted until the following morning"); *Tolliver v Judges of Family Court*, 298 NYS2d 237, 239; 59 Misc 2d 104 (1969) (no manifest necessity existed for declaring mistrial where prosecution witness did not appear at juvenile adjudicatory hearing and indicated he would not obey a subpoena); *Ostane v Hickey*, 385 So 2d 110 (Fla App, 1980) (stabbing of essential state's witness in front of courthouse, after trial had commenced, held to not constitute manifest necessity where, over defendant's objection, trial court granted a mistrial without exploring when the witness would be available); *Pennsylvania v Ferguson,* 446 Pa 24; 285 A2d 189 (1971) (no manifest necessity for mistrial existed because of illness of prosecution witness based on telephone call from witness' wife reporting that he was suffering from sub-clinical pneumonia and prosecutor's call to physician who would not give a prognosis); *In re Mark R,* 292 Md 244; 449 A2d 393 (Md Sup, 1982) (where juvenile master declared mistrial due to the inability of prosecution's chief witness to be understood, manifest necessity found to be absent because "the cases clearly establish that a deficiency in the prosecution's evidence, whether or not it should have been expected by the prosecutor and whether or not the prosecutor was at fault, ordinarily does not constitute 'manifest necessity' justifying an unconsented mistrial[,]" and "'a retrial is barred by the Fifth Amendment where reasonable alternatives to a mistrial, such as a continuance, are feasible and could cure the problem,' *Cornish v Maryland*, 272 Md. [312] at 320, 322 A.2d 880 [(1974).]").

Our research yielded no case, nor does the prosecution cite any, that supports the proposition that a key prosecution witness' (or a complainant's) refusal to appear to testify constituted manifest necessity under the circumstances presented here: that the witness was under subpoena, the prosecution chose not to assert its power to arrest, and the witness' refusal to appear to testify was not based on unexpected illness, incapacity or death, or another such extenuating circumstance, but was based on alleged economic hardship, inconvenience, and disenchantment with the legal system.[1] Assuming that such factors could under certain circumstances support a finding of manifest necessity, we conclude that the record in this case is insufficient to support the conclusion that no reasonable alternatives to a mistrial existed. See *People v Hicks*, 447 Mich 819, 843; 528 NW2d 136 (1994).

In the instant case, the prosecutor expressly declined to ask for a continuance to enable the prosecution to obtain the Trumbulls' presence at trial. The court found that while the Trumbulls' refusal to honor the subpoena on their own was improper, it was understandable, noting that testifying would require Mr. Trumbull to miss work at a job he had recently begun, and necessitate alternative arrangements for care of the seven Trumbull children, five of whom had special needs. The court rejected the possibility of sending a law enforcement official to escort the Trumbulls to trial, apparently concluding that that course would require their incarceration and would place an undue hardship on the Trumbull children. The court further rejected the possibility of a continuance because of inconvenience to the jurors, who had already served a month. The record does not show why the Trumbulls could not have been escorted to the courthouse for their testimony and then promptly returned home.[2] It does not establish Mr. Trumbull's new work hours or whether they could in some way be accommodated. Nor does it reflect whether Mr. Trumbull in fact discussed the situation with his employer, or whether the prosecutor or court's intervention could alleviate his concerns. The record does not establish that the trial could not have been completed within the week if this had been done, or that the jurors would indeed have suffered hardships if the trial were continued with the same jury as fact-finder. It is possible that the facts presented in chambers established that there was no reasonable alternative to a mistrial. However, on the record before us, the trial court's conclusion to that effect is unsupported.

We therefore remand to permit the prosecutor to establish that no reasonable alternative existed,[3] and for reconsideration in light of this opinion. If the prosecutor is unable to establish manifest necessity, defendant shall be discharged. We do not retain jurisdiction.

/s/ Gary R. McDonald
/s/ Helene N. White

[1] We do not read the cases relied on by the prosecutor, *United States v Gallagher*, 743 F Supp 745 (D Or, 1990), and *United States v Khait,* 643 F Supp 605 (SD NY, 1986), as providing substantial guidance here. In *Gallagher, supra,* the key prosecution witness, McLaughlin, appeared at trial, answered some preliminary questions, and then volunteered that he was a liar and that his testimony probably would not be any good. The jury was excused and, after conferring with counsel, McLaughlin stated that he declined to answer questions on Fifth Amendment grounds. *Id.* at 746. On the prosecution's motion, the court entered an order compelling McLaughlin to testify. Nonetheless, he again refused to testify and the court held him in contempt. The court informed the jury that McLaughlin had refused to testify despite a court order and had been found in contempt. The prosecution then called another witness. The following morning, McLaughlin again refused to testify and the court sustained the defendant's objection to admission of a tape-recorded statement made by the witness to an informant. The prosecution then moved for a mistrial on the basis of manifest necessity, over the defendant's objection. The court took the motion under advisement and, in its opinion, granted it. To be sure, the *Gallagher* court found relevant the absence of prosecutorial use of its superior resources, the absence of evidence that the witness would never agree to testify, and the fact that the witness' unavailability was unexpected, arose after the beginning of the trial, and was not due to any fault on the government's part. However, in *Gallagher* the prosecution and the court had done everything possible to obtain the witness' testimony. Because the witness' recalcitrance was unanticipated, the court viewed the case as distinguishable from *Downum, supra*, where the prosecution allowed the jury to be sworn even though its key witness was absent and had not been found. *Gallagher* and the cases relied on therein, *United States ex rel Gibson v Ziegele,* 479 F2d 773 (CA 3, 1973), and *United States v Shaw,* 812 F2d 1182, 1187, superseded by 829 F2d 714 (CA 9, 1987), involve situations where a witness is absent and unable to testify due to illness, or refuses to testify despite the witness' presence at trial and a grant of immunity, or an order to testify.

The second case, *Khait,* is also distinguishable. In *Khait*, after jury selection began but before the jury was sworn, the prosecution learned that its main witness, Granik, would refuse to testify if called. Granik indicated he would not testify because his wife had received a phone call threatening her and her family with death. Granik appeared in court the next day and again stated he would not testify. The prosecution stated that it would seek a civil contempt order, but that such an order could not be imposed absent the jury having been sworn and the witness thereafter refusing to testify. The defendant agreed, the jury was sworn, the witness continued to refuse to testify, and the court found him in contempt. At the prosecution's request, the court adjourned the trial for about two weeks. The court released Granik at that time because there had been no indication that he would testify and because it concluded that no useful coercive purpose would be served by further incarceration. After another adjournment, the government moved for a mistrial with the objective of beginning another trial at a later date. Over the defendant's objection, the trial court granted the motion for mistrial.

In holding that a retrial was not barred, the court noted that "[t]here is no doubt that there is the possibility if not the probability that Khait made these threats, or caused them to be made," and that this was a case "where the possible conduct of defendant necessitated the early termination of the trial." *Id.* at 609. The court further noted:

> . . . . It is clear that under the "manifest necessity" standard, the government "bears the 'heavy' burden of showing a mistrial to have been demanded by a 'high degree' of necessity." *U.S. v. Kwang Fu Peng*, 766 F.2d 82, 85 (2d Cir. 1985), *citing Arizona v. Washington*, 434 U.S. 497, 505-06, 98 S.Ct. 824, 830-31, 54 L.Ed.2d 717 (1978). What is before me, however, is sufficient to demonstrate that defendant Khait's "valued right to have his trial completed by a particular tribunal must . . . be subordinated to the public's interest in fair trials designed to end in just judgments." *Wade v. Hunter,* 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974 (1949); *Accord Arizona v. Washington,* [*supra* at 505]; *U.S. v Glover,* 731 F.2d 41, 45 (D.C.Cir. 1984).
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> My ruling here does not disregard the general proposition that "[r]etrial is not permitted after a mistrial due to unavailability of prosecution witnesses or evidence . . . except in extraordinary circumstances." Project, *Fifteenth Annual Review of Criminal Procedure; United States Supreme Court and Courts of Appeals 1984-1985*, 74 GEO.L.J. 499, 728 (1986). It merely recognizes this set of facts to constitute "extraordinary circumstances."

Thus, in *Khait* as well, the prosecutor and the court took all measures to obtain the witness' testimony and, further, the defendant himself was believed to be responsible for the witness' recalcitrance.

[2] It is also unclear why the care of the children in the Trumbulls' absence suddenly became an issue when it never had been before.

[3] It appears that at the first trial the court may have denied a request by the defense for a hearing regarding the necessity for a mistrial. On the second day of defendant's second jury trial, over which a different judge presided, the prosecutor asked the court for permission to recall Mrs. Trumbull, and to make a separate record of the events at the first trial:

MR. ZERIAL [*counsel for the prosecution*]: The last time, as you know, we had a mistrial. There was a – we've heard all of our testimony from our side of the discussions and so forth to the problems that, [sic?] through miscommunications.

Should this go up on appeal and –and question the issue as to whether or not any issue involving their not coming the last time, I'd like to have them here such that we don't have to go through this again in the future. Just a—a few seconds.

THE COURT: Well, you kind of lost me. I don't mind making a separate record if you want to make a separate record. I don't want to be in front of the jury.

MR. ZERIAL: That's what I'm talking about, a separate record for just a few moments.

MR. IDSINGA [*defense counsel*]: Without the jury?

THE COURT: Yes.

MR. ZERIAL: Right.

THE COURT: Okay.

MR. ZERIAL: Can I be so—

MR. IDSINGA: Well, I object to that. I think the Court decided based on the facts at that time, *I asked for a full hearing on the issue then and I was denied that*. I don't see any sense in making a record now after it's—

THE COURT: I tend to agree, Mr. Zerial. Why should I make a record now? Whatever Judge Kolenda did or I did –

MR. ZERIAL: Well, because they weren't here and if the argument goes up that, well, we didn't hear their side of the story, being Mr. and Mrs. Trumble [sic], as to why they weren't here, all we've got is the prosecutor's side. If anybody were to challenge it, it's not me, it was basically, I did have something to say, but it was Soet—

THE COURT: I'll let him make a separate record. The Court of Appeals can decide whether they want to hear it or not. A separate record is up to the Court of Appeals. If they want to read it, they can read it. If they don't want to read it, they don't have to.

MR. IDSINGA: I don't think that's even relevant, your Honor. And I – there's a lot of issues. I mean, if we want to open this up to a hearing, I think we need to call victim/witness, persons who may have had contact with him, I want to get into this one hundred percent. If we're going to have a hearing on it, I have to do my job.

If you want to open the whole issue up, I need a witness –

MR. ZERIAL: I'll withdraw it. [Emphasis added.]