STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 1, 2001
v	No. 202938 Kent Circuit Court
RAY EVART GOREE, Defendant-Appellant.	LC No. 96-001192 FH ON REMAND

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

PER CURIAM.

This case is before us for the second time. The first time was on defendant's appeal of right from his conviction of breaking and entering an unattached garage with intent to commit larceny, MCL 750.110; MSA 28.305, in a second trial commenced after a mistrial was declared in his first trial. Defendant argued that the trial court erred in finding that there was manifest necessity for the mistrial, and that his second trial on the same charge violated his right to be free from double jeopardy. This panel's first opinion, *People v Goree*, unpublished opinion per curiam (Docket No. 202938, issued 7/6/99), remanded to the trial court for an evidentiary hearing to permit the prosecutor to establish that there was no reasonable alternative to a mistrial, and for reconsideration in light of that opinion. The prosecution sought leave to appeal to the Supreme Court. The Supreme Court denied the application for leave to appeal because it was not persuaded that it should review the question presented before the proceedings ordered in our first opinion were held. The Supreme Court ordered that the circuit court judge before whom the first trial was held submit findings to this Court, and further directed that this Court "should thereafter issue a decision as to whether the defendant's double jeopardy rights were violated."

Having reviewed the hearing held on remand, we conclude that the prosecution did not establish that there was no reasonable alternative to a mistrial. Because there was no manifest necessity for a mistrial and defendant did not consent to the mistrial, we conclude that defendant's second trial violated defendant's right to be free from double jeopardy.

A

The trial court conducted a hearing on remand, taking testimony from the prosecutor, the victim/witness representative from the prosecutor's office who had discussions with the complainants, and the officer who located their new address. In setting forth its findings on remand, the trial court stated its view that defendant did not adequately preserve the issues upon which this Court granted remand by timely requesting a hearing addressing all issues, in contrast to the issue whether the prosecutor knew that the witnesses might not appear. The trial court also stated, *inter alia*, that there was no way that the trial could have been completed within the week due to the court's schedule, even if the witnesses' needs had been accommodated and they were brought to court the following day, and that it was impossible to determine at the time of the hearing on remand whether the jurors would have suffered hardships had the trial continued into the following week.

While the trial court has framed the issue as presenting the question what degree of accommodation will be permitted for complainants in criminal cases without violating a defendant's double jeopardy rights we find it unnecessary to reach that question because the record does not show that the case could not reasonably have been completed by the first jury. See n 2, *infra*

B

The record shows that defense counsel objected to the mistrial and requested a hearing, arguing that there was no manifest necessity under the circumstance that the witnesses were not unavailable, but, rather, they refused to attend, and the prosecutor declined to arrest them.[1]

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[1] The lower court record of the first trial indicates that at 10:35 a.m. on Wednesday, the morning the Trumbulls were supposed to appear, the trial court went on the record:

> THE COURT: . . . . Trial commenced yesterday. It's now 10:35, and we have not yet been able to commence the presentation of proofs this morning. We got through jury selection and opening statements yesterday.
>
> The inability to proceed this morning is as the Court has been informed in chambers in great detail as to the unavailability at this moment of Mr. and Mrs. Trumble [sic], the property owners whose garage was allegedly burglarized and people who – who it is anticipated will testify to actually seeing some or part of the burglary.
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> Mr. Zerial, you have a request to make of the Court?
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> MR. ZERIAL [*prosecutor*]: Yes, your Honor.
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> *I would ask for a mistrial in this case without prejudice*. The Court has heard everything. I don't know how much you want to put on the record. But we – we do feel that in a sentence or two, that the victims in this case *I can certainly understand and sympathize with them refusing to come as the Court heard, as I*

heard yesterday afternoon personally from the – Mr. Trumble [sic]. And that he was most irate because he says in six months we ought to have resolved the problem [i.e., gone to trial].

Our office has chosen not to assert the powers that we do have as to go out and to arrest both him and his wife to pursue this. But we feel that all of the things that the Court has heard in chambers, it might be able to grant a mistrial with these folks having a change of mind when the next trial date comes up.

Thank you.

THE COURT: Mr. Idsinga?

MR. IDSINGA [*defense counsel*]: Thank you, your Honor.

I oppose the granting of any sort of mistrial here today. I'm here with my client. I'm prepared to proceed. *If the prosecutor doesn't have the proofs required, I move that the Court dismiss the case with prejudice, your Honor.*

THE COURT: The Court has spent the better part of the morning consulting with the prosecuting attorney, the defense counsel, personnel from the prosecutor's Victim Witness office, and others, all in an effort to sort out what's occurring here, and what's the appropriate reaction by the Court.

The matter before me right now is the request to declare a mistrial. Granting such a request, if I do that, inevitably implicates serious questions of double jeopardy. However, the jeopardy questions are more properly reserved for a motion to dismiss filed by the defense assuming a mistrial is granted, if, in fact, an effort is made to try this case again.

* * *

The prosecution is to inform the Court within two weeks whether it intends to even attempt that new trial date. If it chooses not to do that, then, of course, this matter is over with. If it chooses to do that, *then I'm sure a motion to dismiss will be filed by the defense.*

At that point, Judge Benson, because this is his case, it is being returned to him, may conduct an evidentiary hearing, I'm sure he will, to establish all that I've stated here has been represented to me over the last hour-and-a-half. But, frankly, having it represented to me over an hour-and-a-half, it strikes me that he needn't spend another hour-and-a-half putting in on the record now. Particularly when it really relates to the issue of whether or not a motion to dismiss ought to be granted, which I think is distinct [sic?] under the circumstances from a mistrial motion.

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MR. IDSINGA: *Your Honor, at this time I want to place on the record my very strong objection to the Court's decision in this.*

The prosecutor has decided not to proceed. There's no indication that the availability of the witness will change – of either of these witnesses will change. They've both made it clear that they don't want to testify. They choose not to.

The prosecutor has the opportunity right now to request that the Court issue an order that they be arrested as material witnesses. I see there is only two fair way [sic] to proceed here, your Honor –to proceed here, your Honor. That's to proceed with the trial as planned, and the prosecutor can request a warrant for them, have them brought in by tomorrow, or dismiss the case, your Honor. I see no manifest necessity to grant an adjournment in violation of my client's due process right, particularly when the Court has agreed that the witnesses in this case are not unavailable.

THE COURT: All right. The trial, gentlemen, will be Monday, August 19th, if, in fact, the matter is pursued.

The Court has already addressed the issue of directing that these witnesses be arrested and brought here. *It's not hearing such a request from the prosecution. It understands, as it's indicated, why such a request is not being made.*

If this case goes further, and it's premature to discuss that at this moment, but if it goes further, if a motion to dismiss is denied, if there then is a conviction to be appealed, a lot of "ifs" before we ultimately get to the question, the Court of Appeals will then be confronted with the case which squarely asks it how much it has concern for the convenience and sensibilities of the victims in a particular case.

* * *

MR. IDSINGA: Your Honor, *I would request at this time that this Court schedule time for a motion to dismiss and a hearing in connection with that.*

I would note that I think the prosecutor did have notice that this may happen in his opening statement. He did say there were anticipated problems. He said that he may be presenting witnesses out of order and so on. I think he knew there was problems [sic]. I think what I would like to see in this case is a hearing on the issue and a motion to dismiss heard by the Court.

THE COURT: *Well, like I said [sic], a motion to dismiss is premature unless and until there is, in fact, the prospect of a second trial and that prospect is not real enough right now to – or certain enough to justify going forward.*

> What I heard Mr. Zerial say was is that given that witnesses were coming from out-of-town, scheduling might not be exactly in the order that he'd like and, therefore, an opening statement is particularly important because the witnesses might not be testifying in the most chronological, understandable orders [sic].
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> *Of course, an evidentiary hearing, if there is a motion to dismiss, if there is a second trial, is a time at which all of this can be aired in front of Judge Benson.* And he can then decide whether or not circumstances are as they have been reported to me.
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> *** * ***
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> But if the facts are other than what I've had them represented to be or if the law is other than what I think it is, then that can be dealt with later. I do think, however, it's not a situation that has to be dealt with today by actually dismissing the case because there's enough reason to think that the mistrial is appropriate to do that and then allow things to proceed in the normal course. . . .
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> *I can't set a date for your hearing, Mr. Idsinga,* not only because I think it's premature to do that and take up time on a busy judge's calendar, it's not my calendar that that date will be set on. I can control the trial calendar as the chief judge, I probably can if I want to insist, control the motion calendar, but I don't think that's a good way to run a court. I'll let each judge handle his own motion calendar and evidentiary hearings. [Emphasis added.]

On the second day of defendant's retrial before Judge Benson, 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: 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.
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> 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.
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> MR. IDSINGA: Without the jury?
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> THE COURT: Yes.

Defense counsel asserted that the case should be dismissed with prejudice, rather than without prejudice as requested by the prosecutor. The prosecutor did not request an adjournment of trial before the same jury. Under these circumstances, it was not incumbent upon defendant to ask for an adjournment in order to preserve the issue whether adjournment was a reasonable alternative to a mistrial, although we observe that defense counsel did request that the witnesses be brought to court the following morning. See n 1, *supra.* In fact, the court itself addressed the possibility of an adjournment and continuation before the same jury and rejected it.[2] We do not agree with

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> MR. ZERIAL: Right.
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> THE COURT: Okay.
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> MR. ZERIAL: Can I be so—
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> 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—
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> THE COURT: I tend to agree, Mr. Zerial. Why should I make a record now? Whatever Judge Kolenda did or I did –
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> 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—
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> 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.
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> 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.
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> If you want to open the whole issue up, I need a witness –
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> MR. ZERIAL: I'll withdraw it. [Emphasis added.]

[2] The court stated:

> I could, of course, simply tell the jury to come back later. The one thing which is not a factor here is my scheduled vacation for next week. Given the stage of

the trial court that defendant was obliged at that point to object to the court's statement that a continuance before the same jury was not an acceptable alternative. If the court had offered such an alternative to defendant, and defendant had objected, we would agree that this aspect of the issue had been waived. However, the court itself rejected this option.

C

On remand, the court stated that the trial could not have been concluded within the week because of the court's schedule, and that it was impossible to determine at the time of remand whether the jurors would have been able to continue to sit without hardship:

> I have recreated my calendars for those days, and the one thing I can say with certainty is this trial could not have been completed that week. We were at the point where we could have nothing productive on that Wednesday because of all the time that was spent trying to sort out the Trumbulls' situation. We would, therefore, have had to begin the proofs on Thursday. Looking at the number of witnesses and knowing the lawyers involved and anticipating the arguments, et cetera, there is simply no way that everything, proofs, arguments, and instructions, could have been completed by Friday.
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> That is, in large part, because the trial day in this Court – I don't know if the Court of Appeals knows this – runs from 8:30 until 1:00. At one o'clock, the judges, this one included, break for lunch, and at two o'clock all kinds of other things are scheduled. I've looked at my calendar and note that my Wednesday afternoon, my Thursday afternoon, and my Friday afternoon that week, were solidly booked with proceedings which did, in fact, occur. So, frankly, I could not have run the trial other than the planned times from 8:30 until 1:00 . . . .
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> So, looking at things, we could never have completed this case from 8:30 to 1:00 on Thursday, and then 8:30 until noon on Friday. We quit at noon on Fridays because Friday afternoon is motion day, and we have to start at 1:30 with the full motion and the Court staff need a slight break before going into a full motion call.

> proceedings here, I think another judge could take over this case compatibly with the rule that provides for how that's to be done. It would be easy in light of what little was done on the record yesterday that that judge would have to review.
>
> The bigger concern I have is for these jurors. As the lawyers will recall, a good many of them have served on juries before. All of them are at the end of their jury term. These people have been on a jury –jury duty for a month. Many of them have served on one or more juries. They were all told yesterday that this case would be completed this week. It is simply not fair to them, and I think that's also something we have to take into account, to instruct them to come back next week, or to come back in a couple of weeks when they, too, have lives to proceed with.

> So, I do find, and have no qualms about finding, that trial, had we been able to get the Trumbulls here in some fashion, could not have been completed within the week. We couldn't have gotten them here on Wednesday, that was for sure. They were a hundred miles away. And whatever arrangements were made in regard to the children and whatever else, Thursday would have been the soonest. And we just couldn't have finished that week.
>
> The Court of Appeals then goes on to say that the record doesn't adequately establish, either that the jurors would, indeed have suffered hardships if the trial were continued as the same jury as fact finders. Of course, what they mean is continue into the next week. This, frankly, happens to be one of those findings which it is now impossible to make, given the passage of time.
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> I, frankly, do not recall whether we knew what the jury's schedule was, but, frankly, they usually start telling us about the end of the jury term, the other things that they've got planned. They expect to be finished and out of here. And probably had some specific reason to know that one or more of them were not going to be available the next week. But, I don't know anymore for sure. And, frankly, there's no way to determine that.

We are aware of no case that would permit a court to declare a mistrial on the basis that the court's practice of handling non-trial matters in the afternoon, coupled with the practice to complete jurors' service within a set period of time, has operated to make it impossible to finish the trial within that period of time, even under the added circumstance that the trial was unexpectedly prolonged due to unanticipated delay in securing the presence of the complaining witnesses.[3] Had this been a case involving a more serious charge and more complicated facts, and had the complaining witnesses announced their unwillingness to be inconvenienced after seven days of trial, it might be more clear that the court could not properly declare a mistrial without exploring every reasonable alternative, including adjourning the court's other matters, and without making a clear record through examination of the jurors that continuing the trial beyond the expected date of completion would cause real and considerable hardship to more jurors than the court is able to excuse based on the number of alternates. The Constitution does not distinguish between such a circumstance and the instant circumstance.[4] Jeopardy attaches once the jury is impaneled and sworn, *People v Mehall,* 454 Mich 1,4; 557 NW2d 110 (1997),

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[3] Nor are we aware of any case that has found manifest necessity where a witness, even a complainant, fails to appear due to inconvenience, and the prosecutor thereafter takes no measures, either by issuing a warrant or alleviating the inconvenience, to secure the witness' presence at the trial.

[4] It is highly unlikely that this issue would arise in such a circumstance because the trial court would be most reluctant to grant a mistrial separate and apart from double jeopardy considerations given the value ascribed to the time already invested in the trial. The Constitution assigns no lesser value to the defendant's interest in having the first jury decide the case. US Const, Am V; Const 1963, art 1,

and once jeopardy attaches, manifest necessity must be shown in order to retry the defendant on the same charge if a mistrial is declared over the defendant's objection. *Id.*

Defendant's conviction is vacated.

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