

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAY EVART GOREE,

Defendant-Appellant.

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UNPUBLISHED

May 1, 2001

No. 202938

Kent Circuit Court

LC No. 96-001192-FH

ON REMAND

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

GRIFFIN, P.J. (*dissenting*).

Previously, the majority remanded this matter to the trial court for an evidentiary hearing regarding the factual basis for the lower court's ruling of manifest necessity and no reasonable alternative for the declaration of a mistrial. On remand, the Honorable Dennis C. Kolenda diligently attempted to comply with our Court's directive, although he acknowledged the great difficulty of recreating events that occurred nearly four years ago.

One of the matters that the majority remanded for a factual finding was whether defendant's trial could have been completed within the week it was scheduled had the victims of the crime been arrested and hauled into court for their testimony. On this factual issue, the trial court made the following factual finding:

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' [crime victims] situation. We would, therefore, have had to begin the proofs on Thursday. Looking at the number of witnesses here 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.

The majority also directed the trial court to make a factual finding regarding whether the jury members would have suffered undue hardship had their service been continued into the next week although the jury term expired at the end of Friday. On this issue, the trial court ruled:

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 now determine that.

Although the majority does not articulate its standard of review, it is our duty to review a trial court's factual findings under a clearly erroneous standard. MCR 2.613(C).<sup>1</sup> Contrary to the majority, I do not find the trial court's factual determinations to be clearly erroneous.

The majority advances the following rationale for its reversal of the lower court:

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.

While the majority cannot find a case involving the same unusual and extraordinary circumstances of the present case, the concept of manifest injustice is defined through our case by case review. As we stated in *People v Rutherford*, 208 Mich App 198, 202-203; 526 NW2d 620 (1994):

Although there is no precise test concerning what constitutes "manifest necessity," it appears to refer to the existence of sufficiently compelling circumstances that would otherwise deprive the defendant of a fair trial or make its completion impossible.<sup>3</sup> Accordingly, " 'A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction . . . would have to be reversed on appeal due to an obvious procedural error in the trial.' " [*People v*] *Benton* [402 Mich 47; 260 NW2d 77 (1977)], *supra* at 57, quoting *Illinois v Somerville*, 410 US 458, 464; 93 S Ct 1066; 35 L Ed 2d 425 (1973).

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<sup>3</sup> See, e.g., *Commonwealth v Gains*, 383 PA Super 208; 556 A2d 870 (1989) (manifest necessity found where one of the juror's exposed jury to prejudicial

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<sup>1</sup> MCR 2.613(C) provides:

Findings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.

information concerning the defendant's wife); *Bailey v State*, 521 A2d 1069 (Del, 1987) (manifest necessity found where prosecution witnesses improperly referred to the defendant's prior trial and conviction in the matter); *State v Pierce*, 459 A2d 148 (Me, 1983) (manifest necessity found where the trial court determined in a bench trial that it could not impartially assess the credibility of a prosecution witness); *Fuller v State*, 420 So 2d 650 (Fla App, 1982) (manifest necessity found where juror indicated during trial he could not be impartial and there was no alternate juror to replace him); *People v Harvey*, 121 Mich App 681; 329 NW2d 456 (1982) (manifest necessity found where jury was deadlocked); *People v Hamm*, 79 Mich App 281; 261 NW2d 288 (1977) (manifest necessity found where the defendant was declared incompetent during trial).

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On appeal, "[t]he grant or denial of a mistrial motion rests in the sound discretion of the trial judge and relief is merited only after a finding of abuse of that discretion." *People v Robertson*, 87 Mich App 109, 111; 273 NW2d 501 (1978). The trial court must *consider* reasonable alternatives before declaring a mistrial, *People v Hicks*, 447 Mich 819, 841; 528 NW2d 136 (1994) (opinion by Griffin, J.), and exercise "sound discretion," *Arizona v Washington*, 434 US 497; 98 S Ct 824; 54 L Ed 717 (1978).

In the present case, the trial court explicitly considered the possible alternatives before declaring a mistrial. In this regard, the trial court found that arresting the crime victims and hauling them over one hundred miles into court would be unreasonable unless advance arrangements were made for the care of their seven children, five of whom had special needs. In addition, the lower court ruled that impaneling the jurors beyond their month-long term of service would impose an undue hardship on the jury members. Finally, the unexpected refusal of the crime victims to comply with the subpoena for their appearance was conduct beyond the control of the prosecutor. As our Supreme Court explained in *People v Dawson*, 431 Mich 234, 252; 427 NW2d 886 (1988):

The thrust of the Court's decisions is that the Double Jeopardy Clause does not bar retrial where the prosecutor or judge made an innocent error or where the cause prompting the mistrial was outside their control.

In view of the unique circumstances of the present case and the trial court's proper consideration of reasonable alternatives, I would hold that the trial court exercised "sound discretion" in its determination of manifest necessity and did not abuse its discretion by declaring a mistrial. *Arizona v Washington, supra*; *Robertson, supra*. Accordingly, I respectfully dissent. I would affirm.

/s/ Richard Allen Griffin