MEMORANDUM DECISION

ATTORNEYS FOR APPELLANT

James H. Voyles, Jr.
Jennifer M. Lukemeyer
Voyles Vaiana Lukemeyer Baldwin & Webb
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Sierra A. Murray
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Steven Church,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 27, 2023

Court of Appeals Case No. 23A-CR-1035

Appeal from the Marion Superior Court

The Honorable Cynthia L. Oetjen, Judge

The Honorable Lisa F. Borges, Senior Judge

Trial Court Cause No. 49D30-2003-F1-10092

Memorandum Decision by Judge Tavitas
Judges Pyle and Foley concur.

Tavitas, Judge.

Case Summary

[1] Steven Church was charged with several counts of child molesting based on allegations made by his adopted daughter. Church's first trial resulted in a mistrial. At the second trial, the State added charges for obstruction of justice and invasion of privacy based on Church's violation of a no-contact order. The jury found Church guilty of the child molestation charges and invasion of privacy. Church appeals and argues that the trial court abused its discretion by ordering a mistrial and that double jeopardy principles barred his second trial. We disagree and affirm.

Issues

[2] Church raises two issues on appeal, which we restate as:

I. Whether the trial court abused its discretion by ordering a mistrial.

II. Whether the mistrial order was supported by "manifest necessity" such that double jeopardy principles barred Church's second trial.

Facts

[3] This appeal stems from the verdict in Church's second jury trial, in which the jury found Church guilty of several counts of child molesting and invasion of privacy. Church and his wife, Carol Church, were foster parents for many

years. C.C. is Carol's great niece, and in 2015, C.C. was placed with Church and Carol. Church and Carol adopted C.C. in February 2019.

[4] When C.C. was approximately four years old, Church began touching her inappropriately. He did so multiple times over the next several years. Church told C.C. that the touching was "normal" and "something that every kid does . . . ." Tr. Vol. III p. 36. Church also told C.C. that if she reported the touching, C.C. would be "blame[d]" and "they would put [her] into prison for the rest of [her] life." *Id*. at 61.

[5] When C.C. was in second grade, she disclosed the inappropriate touching to her friend at a sleep-over party. C.C. later told Carol, who contacted the authorities. After further investigation, in 2020, the State charged Church with seven counts: (1) Count I: child molesting, a Level 1 felony; (2) Count II: attempted child molesting, a Level 1 felony; (3) Count III: child molesting, a Level 4 felony; (4) Count IV, attempted child molesting, a Level 1 felony; (5) Count V: child molesting, a Level 4 felony; (6) Count VI: child molesting, a Level 4 felony; and (7) Count VII, child molesting, a Level 4 felony. The trial court issued a no-contact order that prohibited Church from contacting Carol or C.C.

[6] On September 29, 2022, the State filed a motion in limine. Paragraphs seven and eight of the motion sought to preclude defense counsel from referring to reports and findings made by the Department of Child Services ("DCS"). The trial court held a pre-trial conference on the State's motion later that day and

took paragraphs seven and eight under advisement. The record does not reveal the trial court's ruling on these paragraphs.

[7] The first jury trial commenced on October 3, 2022. During opening statements, defense counsel stated the following:

> I'll give you a little preview of what you are going to see and hear. My client was a foster parent for 15 to 20 years. In those years, he hosted at a minimum 65 to 70 children. Ladies and gentlemen, not one red flag. Ladies and gentlemen, not one.

Tr. Vol. II p. 150. The State objected, and the following exchange took place:

> PROSECUTOR: He cannot get in information in an opening argument, or we don't know that -- that's not evidence . . . that's gonna be allowed to come in unless he testifies.
>
> * * * * *
>
> DEFENSE COUNSEL: Judge, I would (indiscernible) argument is not evidence.
>
> THE COURT: Well, this isn't argument. This is opening statement, not an argument. So if you wanna argue that at the end, I think that's appropriate, but this is a preview of the evidence you expect to see, not what -- not -- I think that's going a little far off field. . . .

Id. Defense counsel continued:

> Ladies and gentlemen, you're also gonna hear that Mr. Church is the adopted father of this child. Now, through the process of the adoption, they had to start with a foster. So the foster years plus

> the adoption years. Ladies and gentlemen, through the foster process and the adoption process, there was an army of caseworkers, of case managers, doctors, therapists, evaluators -- nothing. You're gonna hear that the agency, the State of Indiana, the adoption was so confident in Steve Church's abilities, the State of Indiana approved --

Id. at 151. At this point, the State again objected and moved for a mistrial. The State argued that defense counsel's assertions regarding a lack of other allegations against Church and the adoption process violated the motion in limine, were not relevant, and that "those statements about prior red flags, etcetera, are [n]ever going to come in." *Id*. at 153.

[8] Defense counsel objected to the motion for mistrial. He argued that his assertions were supported by documents shared in discovery and would "come out" through the testimony of Carol and, if he chose to testify, Church. *Id*. at 154. Defense counsel stated, without elaboration, that the lack of other allegations was "certainly relevant." *Id*. The trial court then pressed defense counsel on whether the evidence would be admissible, and defense counsel responded, "Well, I don't know if it's admissible yet. This is . . . opening argument." *Id*. Defense counsel did not request a limiting instruction or other alternative in lieu of a mistrial.

[9] The trial court granted the State's motion for mistrial over Church's objection. The trial court stated:

> Well, guess we're gonna have to have -- a better motion in limine hearing the next time. . . . I think that [defense counsel] brought

> up evidence that . . . may or may not be admissible and in opening statement, you cannot bring evidence in that was ruled as a motion in limine until you then have a hearing outside the presence of the jury. . . .

Id. at 155.

[10] Church's second trial was scheduled for March 13, 2023. The State alleged that Church violated the no-contact order by meeting with Carol before the first trial. Accordingly, the State added two additional counts to the charging information: Count VIII: attempted obstruction of justice, a Level 5 felony; and Count IX: invasion of privacy, a Class A misdemeanor.

[11] At trial, C.C. testified regarding multiple occasions where Church inappropriately touched her, which we need not detail here. Church testified in his own defense and denied inappropriately touching C.C. He testified that, before the adoption, C.C. "rubbed" his leg and his pants and he was "a little aroused." Tr. Vol. III p. 236. He also admitted that he met with Carol before trial and that he did not deny the allegations regarding C.C. during an interview with law enforcement.

[12] The jury found Church guilty on all counts except Count VIII: attempted obstruction of justice. The trial court entered judgments of conviction and sentenced Church to a total sentence of 118 years in the Department of Correction with six years suspended to probation. Church now appeals.

Discussion and Decision

[13] Church argues that the trial court abused its discretion by ordering a mistrial and that Church's second trial was barred by double jeopardy principles. We are not persuaded. We conclude that the trial court did not abuse its discretion by ordering a mistrial and that this determination was supported by manifest necessity. Accordingly, we conclude that Church's second trial was not barred by double jeopardy principles.

I. The trial court did not abuse its discretion by ordering a mistrial

[14] Church first argues that the trial court erred by ordering a mistrial in the first trial. Our trial courts observe trial proceedings first-hand and are in a superior position to determine the propriety of a mistrial. *See Oliver v. State*, 755 N.E.2d 582, 585 (Ind. 2001). Thus, while a mistrial is generally "an extreme remedy granted only when no other method can rectify the situation," we entrust this determination to the "sound discretion of the trial court, and reversal is required only if the defendant demonstrates that he was so prejudiced that he was placed in a position of grave peril." *Id.*

[15] Here, during his opening statement, defense counsel asserted that there were no allegations against Church by the other foster children and that DCS and others had no concerns about Church's adoption of C.C.[1] The State moved for a

[1] Contrary to Church's assertion that DCS had no concerns during the adoption, at the second trial, Church admitted that he was aroused by C.C.'s behavior, Carol reported C.C.'s alleged behavior to DCS, and this report "affect[ed]" the adoption process. Tr. Vol. III p. 184.

mistrial and argued that the absence of other allegations was irrelevant.[2] The trial court granted the State's motion and ordered a mistrial.

[16] "It is well settled that the purpose of an opening statement is to inform the jury of the charges and the contemplated evidence," and the "scope and content" of opening statements are within the sound discretion of the trial court. *Vanyo v. State*, 450 N.E.2d 524, 526 (Ind. 1983); *see also* Ind. Code § 35-37-2-2(1) (providing that, during opening statements, "[t]he prosecuting attorney shall state the case of the prosecution and briefly state the evidence by which he expects to support it, and the defendant may then state his defense and briefly state the evidence he expects to offer in support of his defense"). Discussing the propriety of a mistrial based on an "improper opening statement," the United States Supreme Court has observed:

> An improper opening statement unquestionably tends to frustrate the public interest in having a just judgment reached by an impartial tribunal. Indeed, such statements create a risk, often not present in the individual juror bias situation, that the entire panel may be tainted. The trial judge, of course, may instruct the jury to disregard the improper comment. In extreme cases, he may discipline counsel, or even remove him from the trial . . . . Those actions, however, will not necessarily remove the risk of bias that may be created by improper argument. Unless

[2] The State also argued that defense counsel's statements violated paragraphs seven and eight of the State's motion in limine. Although there is some suggestion that the trial court ruled in favor of the State on those paragraphs, the record lacks a clear indication of the trial court's ruling. The record shows only that the trial court took those paragraphs under advisement. Church argues on appeal that the trial court "never ruled upon" those paragraphs, Appellant's Br. 15, and the State does not contest this assertion. Accordingly, we decide this case without regard to the State's motion in limine.

> unscrupulous defense counsel are to be allowed an unfair advantage, the trial judge must have the power to declare a mistrial in appropriate cases. The interest in orderly, impartial procedure would be impaired if he were deterred from exercising that power by a concern that any time a reviewing court disagreed with his assessment of the trial situation a retrial would automatically be barred. The adoption of a stringent standard of appellate review in this area, therefore, would seriously impede the trial judge in the proper performance of his duty, in order to protect the integrity of the trial, to take prompt and affirmative action to stop . . . professional misconduct.

Arizona v. Washington, 434 U.S. 497, 512-513, 98 S. Ct. 824, 834 (1978) (internal citations and quotations omitted).

[17] We are not persuaded that the trial court abused its discretion by ordering a mistrial here. We begin by noting that, pursuant to Evidence Rule 402, "[i]rrelevant evidence is not admissible." Evidence is relevant if: (a) "it has any tendency to make a fact more or less probable than it would be without the evidence," and (b) "the fact is of consequence in determining the action." Evid. R. 401. Trial courts enjoy "wide" discretion in determining whether evidence is relevant. *Snow v. State*, 77 N.E.3d 173, 176 (Ind. 2017).

[18] This case was about C.C.'s allegations against Church. The absence of other allegations against Church shines minimal if any light on the probity of C.C.'s allegations. The fact that DCS and others approved Church's adoption of C.C. is likewise hardly relevant to whether Church later molested C.C. Although defense counsel asserted that the absence of other allegations was "certainly relevant," Tr. Vol. II p. 154, he did not elaborate at trial, nor does Church now

on appeal. Defense counsel also did not explain why he believed that the evidence supporting his assertions would be otherwise admissible.[3] *Cf. Wright v. State*, 593 N.E.2d 1192, 1196 (Ind. 1992) (affirming mistrial order when defense counsel referred to inadmissible polygraph examination during opening statement).

[19] Church also argues that the trial court abused its discretion because "evidence referred to in defense counsel's first opening statement **was admitted** in the second trial . . . ." Appellant's Br. p. 17 (emphasis in original). Even if we assume that we may evaluate whether the trial court abused its discretion based on circumstances not before the trial court at the time the challenged decision was made, the record does not support Church's assertion. During the second trial, Church and Carol testified that they were foster parents and received training, and they both briefly testified regarding the adoption process. Church, however, does not direct us to any testimony regarding a lack of other allegations against Church as asserted in his appellate brief. *See Miller v. Patel*, 212 N.E.3d 639, 657 (Ind. 2023) ("The purpose of our appellate rules, Ind. Appellate Rule 46[4] in particular, is to aid and expedite review and to relieve the

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[3] Church does not argue that the lack of other allegations against him constitutes good character evidence under Evidence Rule 404(a)(2), and accordingly, we do not discuss this issue further. *See Miller v. Patel*, 212 N.E.3d 639, 657 (Ind. 2023) ("We will not step in the shoes of the advocate and fashion arguments on his behalf, nor will we address arguments that are too poorly developed or improperly expressed to be understood." (citation omitted)).

[4] As relevant here, Indiana Appellate Rule 46(A)(8)(a) instructs that the appellant's brief "must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be **supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on**, in accordance with Rule 22." (Emphasis added).

appellate court of the burden of searching the record and briefing the case." (citation omitted)).

[20] Ultimately, the trial court was "in the best position to gauge the surrounding circumstances" of defense counsel's opening statement and "its impact on the jury." *Pavey v. State*, 764 N.E.2d 692, 698 (Ind. Ct. App. 2002), *trans. denied*; *accord Arizona*, 434 U.S. at 513-14, 98 S. Ct. at 834. We are not persuaded that we should second-guess the trial court's determination here.

II. Manifest necessity supported the mistrial determination, and Church's second trial was not barred by double jeopardy principles

[21] Next, we must determine whether the mistrial was supported by manifest necessity such that Church's second trial was not barred by double jeopardy principles. When a criminal trial results in a mistrial, the double jeopardy clause of the Fifth Amendment provides the defendant with special protections.[5] *Brock v. State*, 955 N.E.2d 195, 199 (Ind. 2011). Under these double jeopardy principles, when a mistrial is ordered over the defendant's objection, the mistrial "acts as an acquittal and bars reprosecution for the same offense," unless "manifest necessity" for the mistrial existed. *Id*. at 206.

[22] Manifest necessity "is not a literal standard, and a declaration of mistrial will be found manifestly necessary if there is a 'high degree' of necessity." *Id*. at 207

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[5] That clause provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Article 1, Section 14 of the Indiana Constitution also provides double jeopardy protections; however, Church makes no separate argument under this section.

(quoting *Arizona*, 434 U.S. at 506, 98 S. Ct. at 831). On appeal, we consider several factors:

> If the reason for the mistrial is due to prosecutorial error, then the State must demonstrate a much higher degree of necessity for the mistrial because such a situation suggests that the State would like a do-over so that it may put on a stronger case. Additionally, we examine the necessity of the mistrial in light of the steps taken by the trial court to avoid a mistrial, including whether counsel had an opportunity to be heard, whether the trial court considered alternatives, and whether the trial court's decision came after adequate reflection. We also consider the burden imposed by the mistrial and, as a general matter, the values protected by the Double Jeopardy Clause are not as great when the trial is terminated shortly after jeopardy has attached as opposed to at a later stage in the trial.

Brock, 955 N.E.2d at 207 (internal citations and quotations omitted). The trial court is not required to explicitly find that manifest necessity exists, nor is the trial court required to "state that it considered alternative solutions but found them inadequate." *Englehardt v. State*, 218 N.E.3d 606, 610 (Ind. Ct. App. 2023) (citing *Jackson v. State*, 925 N.E.2d 369, 373 (Ind. 2010)).

[23] In the instant case, although the trial court made no explicit finding of manifest necessity, the circumstances here support such a finding. The mistrial order was based on defense counsel's comments during his opening statement, not prosecutorial error. Accordingly, the State need not show "a much higher degree of necessity for the mistrial." *Brock*, 955 N.E.2d at 207 (quotation omitted). Additionally, the trial court's determination does not appear to have been rushed or ill-considered. The trial court warned defense counsel about his

opening statement before ordering the mistrial and permitted him to make a record regarding his objection. *Cf. id.* (noting that the trial court "gave defense counsel several chances to explain himself and to continue his closing without confusing the jury"). As we have explained, defense counsel did not explain why his assertions were relevant or would be supported by admissible evidence. The trial court did not explicitly consider alternatives to a mistrial; however, defense counsel did not request any.

[24] Finally, and most importantly, the trial court ordered the mistrial after the trial had only just begun. *See id*. ("[T]he values protected by the Double Jeopardy Clause are not as great when the trial is terminated shortly after jeopardy has attached as opposed to at a later stage in the trial."). No evidence had been submitted at that point. Although the mistrial order delayed Church's trial, Church does not argue that any witnesses or evidence necessary to his defense were compromised by this delay.[6] Indeed, at the second trial, Church testified in his own defense and did not call any witnesses. Accordingly, any burden caused by the mistrial was minimal.

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[6] Church argues that the State "gained an advantage" through the mistrial by adding the obstruction of justice and invasion of privacy charges, which "bolstered the State's evidence on the child molestation charges." Appellant's Br. p. 18. Church, however, fails to explain how these charges, which were based on conduct years after the alleged inappropriate touching took place, bolstered the State's evidence regarding the child molestation charges. Because Church fails to develop a cogent argument, this argument is waived. *See* App. R. 46(A)(8)(a). Moreover, we note that Church orally moved to sever the obstruction of justice and invasion of privacy charges before the second trial and argued that the invasion of privacy charge had "nothing to do with the -- major acts as well as the alleged victim on those first seven counts." Tr. Vol. II p. 169. The trial court denied this motion, and Church does not appeal that ruling.

[25] Manifest necessity supported the trial court's mistrial order based on the circumstances of this case. As a result, Church's second trial was not barred by double jeopardy principles.

Conclusion

[26] The trial court did not abuse its discretion by ordering a mistrial, and the mistrial was supported by manifest necessity. Church's second trial, thus, was not barred by double jeopardy principles. Accordingly, we affirm.

[27] Affirmed.

Pyle, J., and Foley, J., concur.