

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DRAGON LUCAJ,

Defendant-Appellee.

UNPUBLISHED

December 19, 2006

No. 265673

Macomb Circuit Court

LC No. 04-003087-FH

Before: Murphy, P.J., and Smolenski and Kelly, JJ.

PER CURIAM.

Plaintiff appeals of right the circuit court's order dismissing charges of domestic violence, MCL 750.81(2), and aggravated stalking, MCL 750.411i, against defendant. Defendant's first trial ended in a mistrial. The trial court later concluded that a second trial was barred by the double jeopardy protection against successive prosecutions. We reverse and remand for trial. This case is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, the prosecution argues that the trial court abused its discretion in dismissing the charges against defendant on the basis of double jeopardy, because there was manifest necessity to declare a mistrial.

"A constitutional double jeopardy challenge presents a question of law that we review de novo." *People v Lett*, 466 Mich 206, 212-213; 644 NW2d 743 (2002). In *Lett*, as in the present case, the threshold issue whether the trial court properly declared a mistrial is "[n]ecessarily intertwined with the constitutional issue." *Id.* at 213.

In a jury trial, jeopardy attaches when a jury is selected and sworn. *Id.* at 215. Once jeopardy attaches, the defendant has a right to have his case completed and decided by that particular tribunal. *Id.* at 214. However, the general rule that the prosecution is allowed one opportunity to obtain a conviction is subordinate to the public's interest in fair trials. *Id.* at 215. Even absent a request or consent of the defendant, "retial is always permitted when the mistrial is occasioned by manifest necessity." *Id.*

"The constitutional concept of manifest necessity does not require that a mistrial be 'necessary' in the strictest sense of the word. Rather, what is required is a 'high degree' of necessity." *Id.* at 218.

Manifest necessity is not a precisely defined concept and must be determined case by case. Manifest necessity “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.” Therefore, “[a] trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial.” [*People v Echavarria*, 233 Mich App 356, 363; 592 NW2d 737 (1999).]

The level of appellate scrutiny that is applied to the court’s decision to declare a mistrial depends on the nature of the circumstances. *Lett, supra* at 218, citing *Arizona v Washington*, 434 US 497, 506-507; 98 S Ct 824; 54 L Ed 2d 717 (1978). The trial court’s evaluation of potential juror bias resulting from the actions of defense counsel is entitled to “special respect” and deference and reviewing courts should determine whether “the trial judge exercised ‘sound discretion’ in declaring a mistrial.” *Id.* at 514.

The events that precipitated the declaration of a mistrial at defendant’s first trial stemmed from a disturbance involving defense counsel, Timothy Barkovic, at a courthouse security checkpoint. The chief judge ordered Barkovic to appear forthwith and Barkovic evidently appeared during a recess in defendant’s trial. The chief judge then issued an order banning him from the court building and, therefore, defense counsel was absent when the proceedings reconvened. The trial judge explained that he had spoken to the chief judge and understood that the chief judge was going to amend the order to allow Barkovic to continue the trial at 1:30 p.m.

At approximately 1:44 p.m., the proceedings reconvened, but Barkovic was not present. The court noted that it had become aware that some of the jurors had witnessed a confrontation between Barkovic and some deputies. The court recalled the jurors and inquired if they had seen anything unusual in the lobby or in front of the building at approximately 11:00 to 11:30 a.m. Juror 51 saw Barkovic “hollering and running up the street,” and heard him say something about being banned from the building. Juror 6 saw the same thing, and knew it was about a court order and not being allowed in the building. Juror 9 also heard this and saw Barkovic walking away. Juror 10 saw the same thing and saw Barkovic pointing at the officer while he was talking. Juror 13 stated that Barkovic and the officer seemed to having a “very strong verbal debate,” a “very animated” conversation, with a lot of finger pointing, concerning a court order and being banned from the building.

The court determined that it was necessary to declare a mistrial because “I think it’s a manifest injustice to the defendant to continue under these circumstances.” In explaining the decision to the jury, the court referred to difficulties that had arisen in scheduling the trial because Barkovic had other trials, in particular a matter scheduled in federal court before Judge Borman. The trial judge indicated that he and Judge Borman had worked out a schedule and Barkovic was supposed to be there the following morning at 9:00 a.m. The court noted that juror 13 had to be out of town the following day. The court then explained that there was “some blow up” at the security checkpoint involving Barkovic and the chief judge had banned him from the building. The court noted that Barkovic was not back “and as much as I hate to start over and throw the case out and mistry it at this point, that’s what we’re going to do.”

Although the court referred to several reasons for its decision, the observations by several jurors of the confrontation between Barkovic and court personnel and their awareness that Barkovic was banned from the court building is the most compelling reason for the court's ruling. Barkovic's failure to appear when the proceedings reconvened and the potential for a scheduling conflict with the federal court may have been resolved without declaring a mistrial, such as by granting a continuance and rescheduling to accommodate other trials. But there was no viable alternative to address the potential bias of jurors who witnessed a confrontation between court personnel and Barkovic and were aware that he had been banned from the court building.

A trial court's conduct in demeaning or scolding a defense attorney may deny a defendant a fair trial by unduly influencing the jury. See, *People v Anderson*, 166 Mich App 455, 461-462; 421 NW2d 200 (1988), and cases cited therein. Similarly, considering that jurors were aware that defense counsel was banned from the courthouse and saw him arguing with court personnel, the court was justifiably concerned that the negative perception of defense counsel may unduly influence the jury and deny defendant a fair trial. Under these circumstances, the trial court exercised sound discretion in declaring the mistrial. *Washington, supra* at 514. The mistrial order was supported by the high degree of necessity pursuant to which the public's interest in fair trials must prevail over defendant's interest in having the case decided by the first jury impaneled. *Id.* at 516.

The trial court's subsequent analysis of "manifest necessity" does not compel a different result. In ruling on defendant's motion to dismiss, the court did not waver from its position that it granted the mistrial because it believed such action was necessary to protect defendant's right to a fair trial. The court maintained, "it was clear to me that the defendant was not going to get a fair trial" However, the court's analysis of manifest necessity appears to have been unduly focused on whether the action necessitating the mistrial was defendant's fault. Fault in creating the situation that produced the mistrial may be pertinent to a double jeopardy analysis in some instances, for example where the prosecution goads defense counsel into requesting a mistrial. See *People v Dawson*, 431 Mich 234, 253; 427 NW2d 886 (1988). But a finding of manifest necessity supporting a mistrial such that a second prosecution is permissible does not depend on a determination of fault on the part of the defendant.¹ Accordingly, the trial court erred in determining that a second trial was barred by the double jeopardy protection against successive prosecutions.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Kirsten Frank Kelly

¹ For example, manifest necessity for a mistrial may be found where there is a deadlocked jury, *Lett, supra*, a situation that is not attributable to any fault on the part of the defendant.