

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN DALE McCLAIN,

Defendant-Appellant.

UNPUBLISHED

November 19, 1996

No. 190293

LC No. 95-006417 FC

Before: Reilly, P.J., and Sawyer and W.E. Collette,* JJ.

PER CURIAM.

Defendant appeals by leave granted the denial of his motion to dismiss on the ground that his scheduled retrial on criminal sexual conduct charges was barred by double jeopardy. Defendant's first trial ended in a mistrial when defense counsel elicited information during his direct examination of defendant regarding an accusation that defendant's brother raped the victim's sister. We affirm and remand for trial.

Defendant was charged with four counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and two counts of second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3), for allegedly assaulting his former sister-in-law. At trial, the victim recounted numerous instances of molestation by defendant, including kissing, fondling, cunnilingus and sexual intercourse, during a three year period beginning when she was ten years-old. The victim described one incident during which her sister, defendant's ex-wife, interrupted defendant while he and the victim were engaged in sexual conduct in the home of his parents. Defendant's ex-wife corroborated this testimony, testifying that she discovered defendant performing cunnilingus on her sister in his parents' home.

Defendant, testifying in his own defense, summarized he and his ex-wife's living arrangements during the relevant time period in an effort to show that the incidents could not have taken place at the time and locations alleged. Defendant next stated that the incident allegedly observed by his ex-wife never occurred. The following exchange then took place:

* Circuit judge, sitting on the Court of Appeals by assignment.

- Q. Do you know why [the victim] was not used as a baby-sitter during that period of time?
- A. My parents -- my parents wouldn't allow any other girls at our -- at their home to stay the night or anything like that.
- Q. Why?
- A. Because just before that or whatever, a few months before that, my youngest brother, [name omitted] was accused of raping [my ex-wife and the victim's] other sister.

The prosecutor immediately objected, and after the jury was removed from the courtroom, moved for a mistrial. The trial court granted the motion, reasoning that the jury was so prejudiced by the improper reference to the other accusation of rape involving members of the families that it could not be impartial. Before the date scheduled for defendant's second trial, he moved to dismiss the charges, arguing that double jeopardy barred retrial because there was no manifest necessity for a mistrial. The trial court denied the motion.

Under both the Michigan and the federal constitutions, an accused is protected from being twice put in jeopardy for the same offense. US Const, Ams V, XIV; Const 1963, art 1, §15. In the case of a jury trial, a defendant is placed in jeopardy when a jury is impaneled and sworn. *People v Booker (After Remand)*, 208 Mich App 163, 172; 527 NW2d 42 (1994). If a trial court declares a mistrial after jeopardy has attached, the Double Jeopardy Clause may bar a retrial. *People v Dawson*, 431 Mich 234, 251-252; 427 NW2d 886 (1988). Retrial is not foreclosed if the declaration of the mistrial was manifestly necessary. *Id.*

When the prosecutor moves for a mistrial on the basis of improper conduct by defense counsel, the prosecutor bears the heavy burden of demonstrating manifest necessity for a mistrial, *i.e.* a "high degree" of necessity. *Arizona v Washington*, 434 US 497, 505-506; 98 S Ct 824; 54 L Ed 2d 717 (1978). Whether manifest necessity exists is determined on a case by case basis and involves a balancing test. *Dawson, supra* at 252. The defendant's interest in having his guilt decided by the jury impaneled to try him and in avoiding harassment in the form of repeated prosecution is balanced against the people's interest in having one full and fair opportunity to try the defendant. *Id.* The trial judge must exercise "sound discretion" in declaring a mistrial; that is, the judge must act responsibly and deliberately and accord careful consideration to the defendant's interest in having his trial concluded before the impaneled jury. *Washington, supra* at 514-516.

Defendant initially contends that there was no manifest necessity for a mistrial because the evidence was relevant and its probative value outweighed any prejudice. We agree with the trial court that a distinction should be made between the rule of defendant's parents, which defendant contended precluded the victim from being in his parents' home overnight, and the purported reason for the rule, an accusation of rape made against defendant's brother. We agree with defendant that the existence of the rule was relevant because it made it less probable that the incident described by the victim took place at

that location. However, the reason for the defendant's parent's rule had marginal probative value that was substantially outweighed by the danger of unfair prejudice. MRE 403. Even if the prosecution had disputed the existence of the rule, the reason could have been explained to the jury without referring to the identities of the alleged perpetrator and victim. The explanation given by defendant improperly injected the veracity of complainant's family and the sexual misconduct of defendant's family into the trial. Therefore, we agree with the trial court that the evidence was inadmissible.

Upon review of the proceedings, we further conclude that the trial court exercised its sound discretion in granting a mistrial. Defense counsel did not argue that defendant's response to counsel's question "Why?" came as a surprise. Rather, it appears that defense counsel made a decision to introduce evidence concerning the rape accusation as a matter of strategy.¹ Defendant argues on appeal that the testimony concerning a prior accusation of rape "might in fact be prejudicial", but if it was "it has equal potential to cause prejudice to both sides in this case." However, "neither party has a right to have his case decided by a jury which may be tainted by bias," *Washington*, at 516. The fact that defendant was willing to risk the possibility that the jury might have improperly used the evidence against him does not mean that the mistrial was unnecessary. We recognize that in this case, as in *Washington*, the extent of bias created by defense counsel's actions cannot be measured, and it is possible that some trial judges would have proceeded with the trial after giving appropriate cautionary instructions. *Id.* at 511. "Nevertheless, the overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment." *Id.* Giving the trial court's determination that the jurors' impartiality would be affected by the evidence the "highest degree of respect," we conclude that the trial court behaved rationally and responsibly in granting the mistrial. *Id.* at 514-516. The trial court listened to the parties' arguments, and considered defendant's interest in having his trial concluded in a single proceeding when it examined alternative methods to eliminate the prejudice before making its decision. *Id.*; *People v Hicks*, 447 Mich 819; 528 NW2d 136 (1994). Because the trial court exercised sound discretion in handling the problem of possible juror bias resulting from the prejudicial testimony, we conclude that a mistrial was supported by the highest degree of necessity. *Washington, supra* at 516. Accordingly, retrial is not barred by double jeopardy, and the trial court properly denied defendant's motion to dismiss. *Booker, supra* at 172.

Affirmed and remanded for trial. We do not retain jurisdiction.

/s/ Maureen Pulte Reilly

/s/ David H. Sawyer

/s/ William E. Collette

¹ In the discussion that followed the prosecution's motion for a mistrial, defense counsel argued, "There was an accusation against him. Doesn't it show that these people accuse people of rape every time they want to accomplish something?" When the prosecution stated that the matter was collateral, defense counsel responded, "I mean, when the family goes out and makes allegations like this that are unfounded –."