

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 14, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-2392-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MILTON L. WRIGHT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed.*

WEDEMEYER, P.J.¹ Milton L. Wright appeals from a judgment of conviction for resisting an officer, contrary to § 946.41, STATS. Wright claims the trial court violated his constitutional right against double jeopardy by permitting him to be retried after a mistrial was declared. Specifically, Wright claims that the

¹ This appeal is decided by one judge pursuant to § 752.31(2), STATS.

court erred by refusing to hear oral arguments before declaring the mistrial. Because it was within the sound discretion of the trial court whether to declare a mistrial, and the record supports the trial court's actions, it was not error for the trial court to declare a mistrial in the manner in which it did. This court, therefore, upholds the decision of the trial court and affirms Wright's conviction.

I. BACKGROUND

The pertinent facts relate to the events leading to the trial court's declaration of a mistrial. A jury trial was held on May 22-23, 1995, to decide the issue of Wright's charge of resisting an officer. The jury began deliberating at approximately 5 p.m. on May 22. After roughly ten minutes, the judge sent the jury home, instructing them to return at 8:30 a.m. the following morning to resume deliberations.

The next morning, one of the bailiffs informed the judge that he witnessed Wright, the defendant, having contact with one of the jurors, Zatria Hill. The bailiff observed Wright walk with Hill for some distance and attempt to engage her in conversation.

After learning of this contact, the judge conducted a voir dire of Hill. She indicated that Wright tried to strike up a conversation with her and discussed the trial with a third person in her presence. Hill assured the judge that this improper conduct on the part of the defendant would not prevent her from fulfilling her duty as a juror.

Initially, the judge was prepared to allow the deliberations to continue. However, she subsequently, and off the record, learned that the entire

jury was aware of Wright's contact with Hill. Finding this to be unacceptable, the judge declared a mistrial without allowing either side to be heard on the issue.

Wright now appeals on the basis that the trial judge erred in refusing to hear oral arguments before declaring the mistrial, that he was denied an opportunity to respond to the juror's allegations, and that the trial judge failed in her "duty to exercise discretion."

II. ANALYSIS

The decision whether to declare a mistrial is within the sound discretion of the trial court. *See State v. Mendoza*, 101 Wis.2d 654, 659, 305 N.W.2d 166, 169 (Ct. App. 1981). Trial court decisions on motions for mistrial are upheld unless they are based on an erroneous exercise of discretion. *See State v. Pankow*, 144 Wis.2d 23, 47, 422 N.W.2d 913, 921 (Ct. App. 1988). The sanctity of the jury is of utmost importance and the trial court is allowed great latitude in protecting this institution. *See Arizona v. Washington*, 434 U.S. 497, 509 (1978).

When a court declares a mistrial without the consent of the defendant, the constitutionality of a retrial depends on whether the mistrial was declared for a manifest necessity. *See State v. DuFrame*, 107 Wis.2d 300, 303-04, 320 N.W.2d 210, 211 (Ct. App. 1982). The burden of showing this manifest necessity is on the state when it seeks to retry a defendant. *See Arizona*, 434 U.S. at 505. When a defendant requests a mistrial, he or she waives his or her double jeopardy rights. *See State v. Jenich*, 94 Wis.2d 74, 92, 288 N.W.2d 114, 122 (1980).

The judge did not err by declaring a mistrial in this case because there was a manifest necessity for it. Wright purposefully initiated contact with Hill. He attempted to strike up a conversation with her. This behavior persisted in spite of Hill's refusal to respond. Hill described Wright as trying to get on her "good side." Additionally, and even more disturbing, Wright discussed the case with a companion in the presence of Hill. Although the conversation did not include Hill, she stated that, "[I]t was obvious that they wanted me to hear what they were saying...." It would be improper to allow Wright to benefit from such misconduct. Although the trial court initially felt that juror Hill would be able to put that contact aside and render an impartial verdict, once it became known that the entire jury was aware of the contact, the trial court implicitly found that the jury must be dismissed. Because the entire jury was infected by Wright's contact, the mistrial was an appropriate remedy in this case.

Even without a manifest necessity, retrial of Wright would not have been unconstitutional. The prosecution points out, and this court agrees, that when the defendant's improper conduct provides the impetus for a mistrial, the defendant waives his or her double jeopardy protection. *See Jenich*, 94 Wis.2d at 92, 288 N.W.2d at 122. In this case, Wright's deliberate attempt to influence a juror by getting on her "good side" and discussing the case in her presence was the impetus for the declaration of the mistrial. Wright, therefore, waived his right to receive a verdict from this jury and any subsequent double jeopardy claim. Consequently, Wright's retrial and conviction can not be deemed unconstitutional.

This court does note the fact that Wright was denied an opportunity to present oral argument opposing the declaration of a mistrial. Notwithstanding this fact, this court infers from the record that the proper principles were applied in making the decision. *See Steinbach v. Gustafson*, 177 Wis.2d 178, 185, 502

N.W.2d 156, 159 (Ct. App. 1993) (The appeals court will look for reasons to uphold discretionary determinations). The trial court stated that, “[litigants] can have no contact with the jurors,” and that the rules had been “breached.” This court concludes from these statements that the trial court applied the proper legal standards in administering to this case. Although it would have been preferable to allow argument and perhaps voir dire the entire jury, it was not unreasonable for the trial court to conclude that, with the entire jury infected, the panel would be incapable of rendering a fair and impartial verdict.

Based on the record, this court concludes that the declaration of mistrial was proper in this case. Additionally, Wright’s subsequent retrial and conviction did not violate his constitutional rights because (1) there was a manifest necessity for the declaration of mistrial, and, alternatively, (2) Wright provided the impetus for the trial court’s declaration of mistrial, thus waiving any double jeopardy claim. Finally, this court infers from the record that the trial court applied the proper analysis in exercising its discretion.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

