COURT OF APPEALS
DECISION
DATED AND FILED

August 20, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1168-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEREMY A. JANZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Wood County: EDWARD F. ZAPPEN, JR., Judge. *Affirmed.*

EICH, J.[1] Jeremy Janz seeks review of a nonfinal order of the circuit court declaring a mistrial in this misdemeanor case involving possession of drug paraphernalia.[2] At the first recess in the trial—after opening statements and the

[1] This appeal is decided by a single judge pursuant to § 752.31(2)(c), STATS.

[2] Because the mistrial order implicates Janz's double-jeopardy protection, we grant Janz's petition for leave to appeal. ***State v. Jenich***, 94 Wis.2d 74, 288 N.W.2d 114, 292 N.W.2d 348 (1980) (on motion for reconsideration).

testimony of one of the State's witnesses—the prosecutor advised the court that it had just learned of additional evidence against Janz and sought leave of the court to offer it. After considerable argument and discussion between the court and counsel regarding possible adjournment of the trial to give defense counsel an opportunity to assess and investigate the new evidence, the court stated that its calendar prohibited rescheduling the trial within a reasonable time, declared a mistrial, and directed that a new date be established for Janz's trial.

The issue is whether the trial court erroneously exercised its discretion in ordering a mistrial in light of cases indicating that, where the court grants a mistrial *sua sponte*, the State must show that such an order was a "manifest necessity" in order to avoid a double jeopardy bar to reconvening the trial. We see no error and affirm the order.

The facts are not in dispute. Janz's trial, scheduled for a single day, did not begin until mid-morning, due to an unexpected delay in impaneling the jury. After brief preliminary instructions, opening statements, and the testimony of the State's first witness, the court recessed for lunch. As the afternoon session was about to begin, the prosecutor stated to the court that he had just been made aware of the existence of incriminating evidence against Janz: a witness who, purportedly, would testify that, after Janz was charged with the offense, he telephoned the witness, asking him to acknowledge ownership of the drug paraphernalia. Defense counsel objected to allowing the witness to testify on grounds that it was untimely and violative of the discovery rules. After hearing the prosecutor's explanation of the evidence and how it came to light, the court ruled that the testimony was relevant and, finding the State to be without fault in not discovering it earlier, said that the witness could testify. The court then asked defense counsel whether he wished for a recess in the trial to give him the

opportunity to investigate this "new" evidence. Counsel responded that he thought a short recess—"something like 24 hours"—would be appropriate, and the prosecutor agreed.

The court instead declared a mistrial, reasoning that, because the trial could not possibly be concluded that day and could not resume for at least a week because the trial calendar was full, it would not be in either the State's or Janz's interest to have the jury, which had already heard a portion of the trial, remain impaneled for that length of time. To do so, the court felt, would be "outrageous" and lead to "jury contamination." The court stated that, in its opinion, there was no reasonable alternative and, under the circumstances, a mistrial was a "manifest necessity"—in apparent acknowledgment of ***State v. Copening***, 100 Wis.2d 700, 709, 303 N.W.2d 821, 826 (1981), where the court stated that, where a trial court orders a mistrial *sua sponte,* "reprosecution will be barred unless there is a 'manifest necessity' for the mistrial."

Janz argues first that the "manifest necessity" requirement wasn't met in this case. In considering such a claim, we pay "considerable deference" to the trial court's exercise of discretion in declaring a mistrial. ***Copening***, 100 Wis.2d at 709-10, 303 N.W.2d at 826. We do so because "the usual prejudicial development resulting in mistrial is of a type whose effect is best assessed by the trial court's first-hand observation." ***Id***. at 710, 303 N.W.2d at 826. The court's discretion is not unlimited however; "[its] exercise of discretion must be scrupulous and a mistrial, absent a motion by the defendant, should only be granted in the event of 'manifest necessity' or where required by the ends of public justice." ***Id.*** at 710, 303 N.W.2d at 827. The test is "whether, under all the facts and circumstances, giving deference to the trial court's firsthand knowledge, it was reasonable to grant a mistrial under the 'manifest necessity' rule." ***Id***. at

710, 303 N.W.2d at 826-27. Finally, it has been said that (a) the "manifest necessity" test requires not just necessity but a "'high degree' thereof and precludes a trial court from ordering a mistrial irrationally or irresponsibly," and (b) "trial courts considering a mistrial declaration *sua sponte* … should consider other alternatives before depriving the defendant of the valued right to keep his confrontation with society before the original tribunal." ***Id***. at 711, 303 N.W.2d at 827 (citing ***Arizona v. Washington***, 434 U.S 497 (1978)).

Janz argues that the trial court's reasons for declaring the mistrial here were insubstantial and do not meet the "manifest necessity" test. He says that concern over working jurors into the night or for other cases awaiting trial simply does not suffice, and that any further proceedings against him are barred by double jeopardy considerations. We disagree.

First, we are not as sure as Janz that a trial court's assessment of the problems of working jurors into the night, or of disrupting other public business on the court's calendar by continuing the trial the next morning, is *per se* insufficient under the "manifest necessity" test. But we need not decide that, for the trial court's primary concern was the possibility of, in its words, "contamination" of the jurors by having them hear the preliminary instructions, opening statements, and the testimony of a major prosecution witness and then sending them home for a week before resuming the trial. Additionally, there was some question of possible error in one of the court's preliminary instructions which, although probably "correctable" in the court's view, would also be eliminated by starting over.

Janz last argues that the court erred in rejecting his argument that the prejudice he would suffer from giving up the jury that had been selected, and

having his case tried before another jury, precluded ordering a mistrial under the "manifest necessity" rule. Again, we disagree.

We have noted the ***Copening*** court's recognition of a defendant's "valued right to keep his [trial] before the original tribunal." ***Copening***, 100 Wis.2d at 711, 303 N.W.2d at 827. The court's remark, however, is unexplained, and Janz does not suggest how the mistrial prejudices him, aside from references to cases discussing the "increase[d] financial and emotional burden on the accused" involved in a delayed retrial and the "embarrassment, expense[] and ordeal" he or she will be put through when "compell[ed] … to live in a continuing state of anxiety and insecurity." All he states is that he told the trial court that he had "laid out a strategy of defense" and would suffer a "loss in ability to impeach witnesses who have brought forth new evidence on the day of trial," and would lose the "right to be tried by the initial tribunal." And he asserts that the trial court "paternalistically rejected [these] assertions."

The trial court saw no diminution of Janz's ability to cross-examine and impeach the "new" witness with respect to the "lateness" of the revelation, nor do we. And Janz has not suggested that he will be barred, at his retrial, from bringing the nature and timing of this evidence before the jury. He does not explain his assertion that the delay will somehow affect his defense strategy.

The trial court concluded that the only possible "prejudice" Janz had shown he might suffer as a result of the mistrial—losing a jury he "liked"—was substantially outweighed by the advantage of receiving more time to investigate the new evidence. Janz has shown us no more than he showed the trial court, and giving the court's ruling the deference to which it is entitled, we cannot say that it erroneously exercised its discretion in declaring the mistrial. It considered the

alternatives of going into the night, canceling the next day's trials, and continuing the trial for a week, explained its reasons for rejecting them, and concluded that, under the circumstances, it was manifestly necessary to declare a mistrial and begin again at a later date. "We will not reverse a discretionary determination by the trial court if the record shows that discretion was exercised and we can perceive a reasonable basis for the court's decision." ***Prahl v. Brosamle***, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987). Where the record shows that the trial court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law, we will affirm the decision even if it is not one with which we ourselves would agree. ***Burkes v. Hales***, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct. App. 1991) (citations omitted). Indeed, "we generally look for reasons to sustain discretionary decisions." ***Id***. at 591, 478 N.W.2d at 39. The court's discretionary determinations are not tested by some subjective standard, or even by our own sense of what might be a "right" or "wrong" decision in the case, but rather will stand unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion. ***State v. Jeske***, 197 Wis.2d 905, 913, 541 N.W.2d 225, 228 (Ct. App. 1995).

We are satisfied that the trial court did not in any way act irresponsibly or irrationally in ruling as it did, but rather scrupulously exercised its discretion to declare a mistrial. ***Copening***, 100 Wis.2d at 710-11, 303 N.W.2d at 827.

By the Court.–Order affirmed.

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