2014 IL App (3d) 130458-U

Order filed October 1, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
	)	Kankakee County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-13-0458
v.	)	Circuit No. 12-CF-542
	)	
JOSEPH D. COTE,	)	Honorable
	)	Kathy Bradshaw-Elliott,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Carter and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's declaration of a mistrial based upon comments and behavior of defense counsel was a manifest necessity and was not, therefore, a bar to retrial on double jeopardy grounds.

¶ 2 Defendant, Joseph D. Cote, was charged by indictment with failure to register as a sex offender. 730 ILCS 150/6 (West 2010). Both pretrial proceedings and the trial itself were tainted by various indiscretions of defense counsel. Upon the State's motion, the trial court granted a mistrial. In subsequent proceedings, defendant filed a motion to dismiss the indictment

on the grounds that further prosecution was barred by double jeopardy. The court denied the motion. Defendant appeals, arguing that the mistrial was not a manifest necessity and that principles of double jeopardy therefore preclude a second trial. We affirm and remand for further proceedings.

¶ 3 FACTS

¶ 4 Defendant was charged by indictment with failure to register as a sex offender. 730 ILCS 150/6 (West 2010). The indictment alleged that defendant failed to a register a change of address within three days of changing his place of residence.

¶ 5 On the morning of April 15, 2013, before the trial had commenced, defense counsel approached the State's Attorney and asked if he could speak with one of the State's witnesses, Dale Mathew. Mathew subsequently informed the State's Attorney that defense counsel had called Mathew an "asshole," and told Mathew that he was going to have Mathew put in jail. The case was put back on the record, at which point the State informed the court of what had just transpired. Defense counsel denied calling Mathew an asshole. When asked by the court if he had threatened to put Mathew in jail, defense counsel responded: "I might—I think I said some comment like that, but I didn't call him any name." Defense counsel admitted that he "asked [Mathew] why he was going to get up and lie?"

¶ 6 Before the jury was brought to the courtroom for commencement of the trial the next afternoon, the court brought Mathew into the courtroom. The court told Mathew that defense counsel "has no capacity to put you in jail no matter what you say up here." Mathew told the court that he was not in fear of defense counsel. The jury then entered the courtroom, and the parties proceeded with their opening statements.

¶ 7 In opening statements, the State told the jury that persons required by the Sex Offender

Registration Act to register changes of address must do so within three days of such a change. The State said that defendant was evicted on October 6, 2012, and that witnesses had seen defendant's truck at the house of Glen Hazzard from October 9 through 14.

¶ 8 In his opening statement, defense counsel argued that registration of a change of address was only required where an offender moved to a new county, telling the jury:

> "[Defendant] never changed the jurisdiction of his residence. In both of those situations you would be reporting to the Kankakee Sheriff. *** He's never changed, if you would, and that's really where the law is. He has to change out of that to a different jurisdiction. He never changed. *** That's where the State misreads its law."

The State objected to what it called "a complete and utter misstatement of the law." The court pointed out that the jury had been told that opening statements were not evidence, and that the jury would "at some point" be told what the law was.

¶ 9 The State's first witness was Thad Wells, defendant's former landlord. Wells testified that defendant rented a trailer on Wells' property, and that defendant lived in the trailer with his wife and two children. Defendant lived in the trailer from August 1 through Saturday, October 6. Wells testified that he asked defendant to leave after he noticed a pair of battery chargers had gone missing from his property. Wells made the request on a Friday, but allowed defendant and his family to remain until Saturday because defendant's wife told Wells that the family had no place to go. On Saturday, Wells observed defendant moving out of the property with his furniture on a trailer. Defendant made two separate trips. Wells testified that at this time defendant owned a white pickup truck. Following defendant's second trip, Wells never saw him on the property again.

¶ 10 The State then called Mathew. Mathew testified that he lived next door to his cousin, Hazzard, in Momence. On Tuesday, October 9, 2012, upon returning home after work, Mathew noticed two dogs outside. He knocked on the door of Hazzard's house, and defendant answered. Mathew had met defendant "back in the '90's," and recognized him immediately. Mathew initially testified that prior to this interaction with defendant, defendant had been living at Hazzard's house for approximately one month, and that Mathew had seen defendant leaving for work in the morning and arriving back at night. Defendant drove a white Ford truck.

¶ 11 After talking to defendant about the loose dogs, Mathew called the Department of Children and Family Services (DCFS). He was concerned about Hazzard's children because he knew defendant was a sex offender. Mathew stated that DCFS came to the house the same day.

¶ 12 On cross-examination, Mathew said that he first saw defendant at Hazzard's house on October 1, but did not know if he was living at the house at that time. Defense counsel then asked Mathew: "[D]idn't you tell the sheriff on October 15th that's the day you called DCFS, October 15th?" The State objected, arguing that defense counsel was misquoting a report. The court sustained the objection.

¶ 13 Defense counsel then asked Mathew why he called DCFS rather than the sheriff's department. Mathew began to answer by explaining that Hazzard and his wife at one time "gave their kids to some guy down the street in Illiana Heights. Their kids got raped, molested." Defense counsel objected, to which the court responded, "You asked the question[.]" Defense counsel then said, "He can make up any fact he wants and he's good at doing that." After an off-the-record sidebar, defense counsel proceeded with a new question.

¶ 14 On redirect, the State attempted to refresh Mathew's memory by telling him that DCFS and the Kankakee County sheriff's department went to Hazzard's house on October 14, rather

than October 9. Mathew stated that he spoke with Detective Teresa Lanie of the Kankakee County sheriff's department, but he could not remember the date of that conversation. He told Lanie that he saw defendant's truck at Hazzard's house on October 9, and again every night after that until October 14. Mathew also reiterated on redirect that he called DCFS because he feared for Hazzard's children. Mathew testified that Hazzard's son had been sexually assaulted by a person now incarcerated for that crime.

¶ 15 On recross, defense counsel asked Mathew if he saw defendant attending to dogs in the backyard. The State objected, arguing that defense counsel was misreading something. The record does not reflect what defense counsel was reading. After the objection was apparently resolved, the following colloquy transpired:

> "THE COURT: Okay. Any—any other questions?
>
> [Defense Counsel]: Yeah. The—why are we talking about pedophiles?
>
> THE COURT: Sustained.
>
> [State]: Judge—
>
> THE COURT: Sustained. [Defense counsel]—"

Defense counsel then told the court that he had no further questions.

¶ 16 The State next called Hazzard. Hazzard testified that he allowed defendant to live at his house because defendant "was being kicked out of his house where he was living at." Hazzard recalled that DCFS and the police came to the house on a Sunday. Defendant was at Hazzard's house when police arrived that day, but Hazzard told the police that defendant was not there because Hazzard did not know what was going on. Hazzard told Corporal Rich Berns that defendant had been living at the house since Tuesday, but Hazzard suggested he may have only said this because Hazzard was having chest pains at the time.

¶ 17 On cross-examination, Hazzard testified that defendant did not stay at his house on Tuesday, October 9, or Wednesday, October 10, and that Friday was the first night he stayed there. Sunday morning, prior to the arrival of the police, Hazzard and defendant went to defendant's father's house to pick up some of defendant's belongings. Hazzard stated that a two-car garage was nearly full of defendant's belongings. While there, Hazzard observed an empty trailer.

¶ 18 On redirect, the State asked Hazzard whether he told Lanie that defendant had been staying at the house for "three or four days." Hazzard replied that he "might have."

¶ 19 Following Hazzard's testimony, the jury was dismissed, and the court proceeded to a hearing on defendant's motion to suppress statements made prior to being Mirandized. Berns testified that, with Hazzard's consent, he searched the house and discovered defendant hiding under a bed. Berns placed defendant in handcuffs, then secured him in the backseat of his squad car. Berns then asked defendant how long he had been living at the house, and defendant responded that he had been living there since Tuesday. Berns testified that defendant was not free to leave at that point. The decision to charge defendant was based not solely on defendant's statement, but also statements of witnesses.

¶ 20 On cross-examination, defense counsel asked if "everything was Kankakee County[,]" apparently referencing his prior argument in opening statements that registration was only required if an offender changed counties. The court interjected: "This has nothing to do with [the motion to suppress] and I suggest you look at the law[.]" Defense counsel continued to advocate for his interpretation of the law, but the court repeatedly admonished him that he was incorrect and that his personal interpretation was irrelevant.

¶ 21 Following the evidentiary portion of the hearing, the court withheld a ruling, allowing the

parties to research case law on on-scene questioning, with directions to bring the case law in the next morning. As Berns left the witness stand, the court told him "you can do general on the scene questioning, but you can't question about a crime unless you give Miranda."

¶ 22 The next day, before the court could rule on the motion to suppress, the State moved for a mistrial. The State cited defense counsel's threatening of a witness, his accusing that same witness of being good at making facts up in open court, and his persistent arguing of a misinterpretation of the law to the jury. The State argued that the jury was "completely tainted" by this point in the trial, stating that "there are 14 people now who may think the State is—are idiots because we've misread the statute and mischarged it." The court speculated that defense counsel might be guilty of ineffective assistance of counsel because he misread the law.

¶ 23 The parties spent two hours (in the State's Attorney's approximation) arguing over these points, creating a record that spans over 115 pages. Defense counsel told the court that he had advised defendant he had two available defenses: (1) that he was not required to register within a three-day period; and (2) that he had only spent one night at Hazzard's house. After reading the statute, repeatedly, with defense counsel, the court told defense counsel that he had, in fact, misinterpreted the law. Nevertheless, defense counsel continued to argue with the court that his interpretation of the law was correct. Each time, the court told defense counsel he was incorrect.

¶ 24 Upon reconvening in the afternoon, the State added defense counsel's comment about pedophiles to its reasons for seeking a mistrial. The State argued that this was defense counsel's attempt to inform the jury that defendant's prior conviction did not involve a young child. The State then summarized all of its reasons in a formal argument.

¶ 25 In his argument, defense counsel again argued that the State was misinterpreting the registration statute. Defense counsel also admitted that he made his comment about pedophiles

because defendant was not a pedophile.

¶ 26 Following arguments, the court granted the State's motion for mistrial. In listing the reasons for granting the mistrial, the court mentioned defense counsel's: (1) repeated misinterpretation of the law; (2) comment in opening statement that the State had misread the law; (3) threat of Dale Mathew; (4) calling Mathew a liar in open court; and (5) attempt to communicate to the jury that defendant was not a pedophile. The court also noted that defendant may have been prejudiced by defense counsel's misinterpretation, alluding to the concerns it had raised earlier of ineffective assistance of counsel.

¶ 27 The court stated that it had considered alternatives to granting the mistrial, but found that "I think we might be able to cure one of these things or two of these things, but *** there's just too many things to cure." The court also stated it did not find that the State had a "bad case or a weak case." The court found that the declaration of a mistrial was a manifest necessity and was attributable to the defense.

¶ 28 On June 18, 2013, the court held a hearing on defendant's motion to dismiss on double jeopardy grounds. Here, defense counsel again argued that the State had misinterpreted the law, though now defense counsel claimed his argument all along had been that defendant had seven days to register. When the court read an excerpt from defense counsel's opening statement, in which defense counsel argued that the statute does not require registration unless an offender moves to a different jurisdiction, defense counsel accused the court of misreading his opening statement.

¶ 29 The court set forth 12 separate factors it considered in determining whether the mistrial was a manifest necessity. Addressing a number of those factors in detail, the court found the State's case was not weak. It also found that defense counsel's lack of knowledge of the law and

continued arguing of incorrect elements would amount to ineffective assistance of counsel. The court denied the motion to dismiss for a violation for double jeopardy. Immediately after the ruling, defense counsel asked the court, "[I]s it a three-day rule or a week rule?" Defendant now appeals.

¶ 30 ANALYSIS

¶ 31 The decision whether declaration of a mistrial is a manifest necessity is based on the facts of each case and left to the sound discretion of the trial court. *People v. Edwards*, 388 Ill. App. 3d 615 (2009). Generally, an abuse of discretion is found only where a court's decision is "arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Caffey*, 205 Ill. 2d 52, 89 (2001). Courts have consistently emphasized the broad discretion held by a trial court in deciding whether to declare a mistrial. *Edwards*, 388 Ill. App. 3d 615. The trial court's decision "must be afforded the 'highest degree of respect,' as the trial court 'is far more "conversant with the factors relevant to the determination" than any reviewing court can possibly be.' " *People v. Segoviano*, 189 Ill. 2d 228, 241 (2000) (quoting *Arizona v. Washington*, 434 U.S. 497, 511, 514 (1978), quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)).

¶ 32 When a court declares a mistrial over defendant's objection, the court deprives that defendant of his right to have a particular jury decide his fate. *People v. Dahlberg*, 355 Ill. App. 3d 308 (2005). In such situations, a defendant may only be retried where the declaration of a mistrial was a manifest necessity. *Illinois v. Somerville*, 410 U.S. 458 (1973); see also *Washington*, 434 U.S. 497. The United States Supreme Court has interpreted the term "manifest necessity" to mean a " 'high degree' " of necessity. *Edwards*, 388 Ill. App. 3d at 623 (quoting *Washington*, 434 U.S. at 506). "The doctrine of manifest necessity commands a trial judge not to

foreclose a defendant's right to have a particular tribunal decide his fate unless the ends of justice would be defeated by continuing the proceedings." *People v. LaFond*, 343 Ill. App. 3d 981, 985 (2003). In determining whether mistrials are a manifest necessity, reviewing courts have looked to both substantive and procedural factors.

¶ 33 I. Substantive Factors

¶ 34 The substantive factors reviewed by courts are those factors which give rise to the mistrial in the first place and which the trial court itself may analyze in determining whether mistrial is a manifest necessity. The factors most commonly cited by Illinois courts are: (1) whether either party is at fault in causing a mistrial to be declared (*People v. Burtron*, 376 Ill. App. 3d 856 (2007)); (2) the strength of the State's case at the time the mistrial is declared, and, relatedly, whether the mistrial will benefit the State (*Edwards*, 388 Ill. App. 3d 615); and (3) whether any subsequent conviction might be subject to reversal on appeal if a mistrial was not declared (*LaFond*, 343 Ill. App. 3d 981).

¶ 35 A. Fault of Parties

¶ 36 A mistrial is more likely to be deemed a manifest necessity when it is the conduct of defense counsel that gives rise to the declaration of mistrial. See, *e.g.*, *Burtron*, 376 Ill. App. 3d 856. Conversely, where it is the conduct of the State that causes a mistrial, the mistrial is unlikely to be found a manifest necessity. See, *e.g.*, *People ex rel. Roberts v. Orenic*, 88 Ill. 2d 502 (1981). This policy prevents a party from intentionally causing a mistrial whenever a trial might not be progressing in an ideal way. As the Supreme Court stated, "[u]nless unscrupulous defense counsel are to be allowed an unfair advantage, the trial judge must have the power to declare a mistrial in appropriate cases." *Washington*, 434 U.S. at 513.

¶ 37 In *Burtron*, 376 Ill. App. 3d 856, the court relied primarily on the conduct of defense

counsel in holding that a mistrial was a manifest necessity. Defense counsel in that case was guilty of a consistent pattern of inappropriate behavior that required near-constant admonitions from the trial court. *Id*. "From repeatedly asking irrelevant questions to becoming argumentative with a potential juror and many times with the trial judge, defense counsel's actions crossed the line from zealous representation to contemptuousness of the court and the rule of law[.]" *Id*. at 858. Defense counsel finally "succeeded in pushing the envelope off the table" when he stated, in the presence of the jury, that his client would submit to a polygraph examination. *Id*. at 859. The appellate court noted that the trial court could reasonably conclude, based on observations throughout trial, that defense counsel's misconduct would persist. *Burtron*, 376 Ill. App. 3d 856. The court declared that it would not "reward the sort of unscrupulous conduct by counsel the [*Washington*] decision declares must not be tolerated." *Id*. at 866.

¶ 38 In *Edwards*, 388 Ill. App. 3d at 625, "the discovery violation which led to the mistrial was entirely within the control of and caused by defense counsel." Defense counsel failed to tender a letter written more than 15 months prior to the commencement of trial, and the court granted a mistrial on the State's motion. *Edwards*, 388 Ill. App. 3d 615. The reviewing court relied in part on defense counsel's culpability in finding that the mistrial was a manifest necessity. *Id*.

¶ 39 Defense counsel's misconduct in the present case more closely resembles that of defense counsel in *Burtron* than that in *Edwards*. Defense counsel admitted to threatening a witness and admitted to declaring in court "[W]hy are we talking about pedophiles?" in an attempt to sway the jury. He also accused a witness of being good at making up facts. Finally, defense counsel

in opening statements argued incorrect law[1] and accused the State of misreading the law. Indeed, while defendant makes a number of arguments on appeal that these mistakes are curable, there can be no argument that anyone other than defense counsel caused the trial court to grant the mistrial in the first place.

¶ 40 B. Strength of the State's Case

¶ 41 Reviewing courts are less likely to find that a mistrial was a manifest necessity where " 'the evidence presented by the prosecution prior to the mistrial suggested a weakness in the prosecution's case.' " *Edwards*, 388 Ill. App. 3d at 624 (quoting 5 J. Israel, N. King & W. LaFave, Criminal Procedure § 25.2(c), at 654 n.18 (2d ed. 1999)). This factor reflects the policy that—independent of which party, if any, caused the mistrial—the State should not be able to improve its position via mistrial. See *Washington*, 434 U.S. 497.

¶ 42 In *Edwards*, 388 Ill. App. 3d at 625, the court found that "the evidence presented during the State's case-in-chief was strong and contained no obvious weaknesses which could have motivated the State to seek a mistrial." The court also noted that the State had not "obtained a substantial preview of the defense's tactics and evidence." *Id*. In finding that the mistrial was a manifest necessity, the court determined that the mistrial would not provide the prosecution with a more favorable opportunity to secure a conviction on retrial. *Edwards*, 388 Ill. App. 3d 615.

[1] On appeal, defendant insists defense counsel's agreement that he could not proceed with such argument if barred by the court sufficiently negates this concern. However, the record shows that defense counsel continuously and repeatedly argued for his interpretation of the law with the court, even after being told it was incorrect, and even in situations where such argument was wholly irrelevant. The trial court was reasonable in its concern that defense counsel would persist if the trial continued.

¶ 43 In the present case, defendant contends that the State's case was weak when it moved for a mistrial. While we cannot say that the State's case "contains no obvious weaknesses," defendant overstates these weaknesses. Wells testified unequivocally that defendant had left his trailer, permanently, on October 6. Though Mathew struggled to recall precise dates, he still testified that defendant had been at Hazzard's house for more than the three days required for registration. Hazzard was an uncooperative witness, but the State was able to effectively impeach him with prior statements to the police. Importantly, the trial court explicitly stated that it did not find the State's case to be weak. Determination of the relative strengths and weaknesses of a case is a context in which the trial court is clearly in a better position than a reviewing court to make a decision. Based on the record, it appears reasonable that the trial court would find that the case was not weak.

¶ 44 Defendant also contends that the State only sought a mistrial after it became apparent that the case would become even weaker as a result of the suppression of defendant's statements to Berns. The court, however, had withheld ruling on the motion to suppress so that the parties could research case law to present the next day. Nevertheless, defendant states in his brief that it was "readily apparent" that the court was going to suppress his statement. Even assuming, *arguendo*, that the court would have suppressed defendant's statements, it is unclear how the State's position would have improved as the result of a mistrial. If defendant's statements were inadmissible in the first trial, they would have been equally inadmissible in the next trial.

¶ 45 C. Possibility of Reversal on Appeal

¶ 46 A mistrial may be a manifest necessity where, if the trial were to proceed, any subsequent conviction would be subject to reversal upon appeal. See *LaFond*, 343 Ill. App. 3d 981. This consideration allows a court to avoid proceeding with a fatally flawed trial in which any result

would not be lasting. In *LaFond*, for example, the reviewing court put great weight on this factor where the trial court declared a mistrial rather than proceeding with 11 jurors. *Id.* Had the trial resulted in a guilty verdict from 11 jurors, the resulting conviction would have been overturned on appeal. *Id.*

¶ 47 In the case at hand, the trial court found that defense counsel's misunderstanding of the law would constitute ineffective assistance of counsel. On appeal, defendant first argues that he could not have been prejudiced because he had not been convicted, and the court's determination of ineffective assistance was premature. For the purposes of the manifest necessity inquiry, however, the question is hypothetical. In other words, had the trial proceeded, and had defendant been convicted, would he have been successful in claiming ineffective assistance on appeal?

¶ 48 Nevertheless, the question of whether a conviction might be reversed for ineffective assistance is inherently more speculative than in *LaFond*, where it was certain that an 11-juror verdict would be subject to reversal. As our supreme court has pointed out, "there is no way to determine if counsel's errors have affected an outcome that has not yet occurred[.]" *People v. Jocko*, 239 Ill. 2d 87, 93 (2010). While the trial court might conclude that defense counsel's failure to understand the law and insistence on arguing an incorrect interpretation of the law constitute deficient performance, the question of prejudice[2] is far more difficult to answer before the trial has run its course. The issue of prejudice would be affected by unresolved questions such as at what point would defense counsel cease arguing the incorrect law, and what role would defendant's factual defense—that he had not been at Hazzard's house for three days—play

[2] In order to prove ineffective assistance of counsel, a defendant must show both deficient performance by counsel and prejudice flowing from that deficient performance. *Strickland v. Washington*, 466 U.S. 668 (1984).

in the remainder of the case.

¶ 49 Though we cannot say with certainty that a conviction would be subject to reversal for ineffective assistance of counsel, we point out that this factor alone is not dispositive. Indeed, in Illinois cases examining manifest necessity, it is not uncommon for this issue to hold secondary importance (see *Edwards*, 388 Ill. App. 3d at 630 (noting the risk that a guilty verdict "*could* have been reversed on appeal" (emphasis added))), or to go unaddressed completely. See, *e.g.*, *People v. Street*, 316 Ill. App. 3d 205 (2000) (listing possibility of reversal as a factor to be considered but not addressing it).

¶ 50 II. Procedural Factors

¶ 51 In analyzing whether a mistrial was a manifest necessity, reviewing courts have put great emphasis on the process by which trial courts reach that decision. See, *e.g.*, *Dahlberg*, 355 Ill. App. 3d 308. Perhaps because this inquiry naturally requires less deference than the substantive inquiry, procedural deficiencies have been a more common ground upon which reviewing courts have overturned a finding of manifest necessity. See, *e.g.*, *United States v. Jorn*, 400 U.S. 470 (1971); *Dahlberg*, 355 Ill. App. 3d 308; *Street*, 316 Ill. App. 3d 205.

¶ 52 A. Hastiness of Decision

¶ 53 A trial court's declaration of mistrial is less likely to be upheld where " 'the trial judge acted during the "heat of the trial confrontation" ' " in declaring the mistrial. See *Edwards*, 388 Ill. App. 3d at 624 (quoting 5 J. Israel, N. King & W. LaFave, Criminal Procedure § 25.2(c), at 654 n. 18 (2d ed. 1999)). The *Dahlberg* court explained that "[a] hasty decision, reflected by a rapid sequence of events culminating in a declaration of a mistrial, tends to indicate insufficient concern for the defendant's constitutional rights." *Dahlberg*, 355 Ill. App. 3d at 315.

¶ 54 The *Dahlberg* court found the trial court had acted hastily in declaring a mistrial.

Dahlberg, 355 Ill. App. 3d 308. The trial court acted out of anger at defense counsel's failure to file a motion *in limine*, did not give defense counsel an opportunity to argue on the State's motion for mistrial, and granted that request for a mistrial almost immediately. *Id*. Similarly, the court in *People v. Ortiz*, 151 Ill. 2d 1 (1992), granted the defense's motion to dismiss immediately upon request. The supreme court, which treated the dismissal as "functionally indistinguishable" from a declaration of mistrial, found that the trial court acted with haste and without proper reflection on the case. *Id*. at 12.

¶ 55 In *Burtron*, following defense counsel's suggestion that defendant would submit to a polygraph examination, the parties spent less than two minutes in chambers before the court declared a mistrial. *Burtron*, 376 Ill. App. 3d 856. Finding that the mistrial was nevertheless a manifest necessity, the reviewing court pointed out the fact that defense counsel's polygraph comment was just one in a long line of indiscretions that had spanned the entire length of the trial. *Id*. "[W]e do not believe that the record supports the conclusion that the judge in this case conceived and executed the remedy of a mistrial in less than two minutes." *Id*. at 865.

¶ 56 In *Edwards*, the reviewing court found that the declaration of mistrial was not made in haste. *Edwards*, 388 Ill. App. 3d 615. The court pointed out that both parties had ample opportunity to be heard regarding the propriety of the mistrial, citing over 40 pages of record devoted to the discovery violation and possible remedies. *Id*. The court also pointed out that the record indicated that the trial judge had remained patient with defense counsel, showing no signs of anger. *Id*.

¶ 57 In the present case, the trial court's decision to declare a mistrial was neither hasty nor made in the heat of the moment. Indeed, the mistrial was not even requested immediately upon one of defense counsel's transgressions. Instead, the State moved for the mistrial at the

beginning of a new day, before the jury had reentered the courtroom. The trial court cannot be said to have acted in the heat of trial confrontation.

¶ 58 Further, the sheer length of the record reflects that the trial court provided the parties with ample opportunity to argue for and against the mistrial. The court also had the opportunity to consider the issues during a break for lunch. Even when defense counsel devoted much of his time arguing his interpretation of the law, the trial court remained patient and continued to entertain his arguments. After lengthy discussions, the trial court provided a clear and detailed explanation as to why the mistrial was being granted.

¶ 59 B. Consideration of Alternatives

¶ 60 Related to the hastiness of decision factor is the requirement that the trial court consider alternatives to mistrial before declaring one. In cases determining the manifest necessity of mistrials, this factor is most heavily relied upon. See, *e.g.*, *Jorn*, 400 U.S. 470 (no manifest necessity where trial court failed to consider a continuance as an alternative to mistrial); *Dahlberg*, 355 Ill. App. 3d at 316 (no manifest necessity where "record reveal[ed] a lack of consideration for any alternatives"); *Edwards*, 388 Ill. App. 3d 615 (manifest necessity found where court considered numerous alternatives to mistrial and explained why each was insufficient).

¶ 61 Here, the trial court stated on the record that it had considered alternatives to declaring a mistrial and found them to be inadequate. Specifically, the court mentioned the possibility of curing each of defense counsel's transgressions, concluding that the sheer number made cure impossible: "I think we might be able to cure one of these things or two of these things, but *** there's just too many things to cure." The court even reiterated later that there was no alternative available that would cure everything.

¶ 62 On appeal, defendant contends that each of defense counsel's missteps was cured or curable. Defense counsel's misstatement of law to the jury (as well as his assertion that "the State misreads its law") was curable by instructing the jury that opening statements were not evidence. Defense counsel's threat to put Mathew in jail was cured when Mathew stated that he was not in fear from the threat. Defense counsel's statement that Mathew was good at making up facts was cured when the State proved Mathew's comments to be true. Defense counsel's spontaneous question about pedophiles—which he admitted was asked in an effort to let the jury know defendant was not a pedophile—was cured when the jury was told to disregard it.

¶ 63 First, we note that defendant's contentions that each error may have been curable does not address the trial court's decision that the *cumulative effect* of the errors was such that the trial could not be salvaged via cure. See *People v. Barfield*, 288 Ill. App. 3d 578 (1997) (cumulative errors made mistrial manifest necessity even where no error individually would have been sufficient). Further, we find it satisfactory that the trial court gave due and explicit consideration to cure as an alternative to a mistrial. Indeed, our task here is not to determine if this court " 'would have made the same decision if placed in the position of the trial court[,]' " but rather if the decision of the trial court was " 'was arbitrary [or] made without conscientious judgment[.]' " *Edwards*, 388 Ill. App. 3d at 632 (quoting *Burtron*, 376 Ill. App. 3d at 863).

¶ 64 The need for a mistrial in this case was caused exclusively by the conduct of defense counsel. The mistrial did not result in the possibility of the State improving its position on retrial. The trial court made an informed, deliberate decision to declare the mistrial after hearing extensive arguments from the parties and after giving due consideration to alternatives. We therefore find that the mistrial here was a manifest necessity, and is thus not a bar to further prosecution of defendant.

¶ 65 CONCLUSION

¶ 66 The judgment of the circuit court of Kankakee County is affirmed. The cause is remanded for further proceedings.

¶ 67 Affirmed; cause remanded.