

**IN THE COURT OF APPEALS OF IOWA**

No. 8-086 / 07-1057  
Filed February 27, 2008

**STATE OF IOWA,**  
Plaintiff-Appellant,

**vs.**

**BRANDON MONTRESE BROOKS,**  
Defendant-Appellee.

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Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire (trial) and Mark J. Smith (motion to dismiss), Judges.

The State appeals claiming the district court erred in dismissing the charges against the defendant on double jeopardy grounds. **REVERSED AND REMANDED.**

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Michael J. Walton, Acting County Attorney, and Kelly Cunningham, Assistant County Attorney, for appellant.

Mark C. Smith, State Appellate Defender, and Jason B. Shaw, Assistant Appellate Defender, for appellee.

Considered by Mahan, P.J., and Eisenhauer and Baker, JJ.

**PER CURIAM**

On April 30, 2007, Brandon Brooks was tried before a jury for various crimes related to an incident where he allegedly assaulted a deputy sheriff. While Brooks was testifying, the trial judge, sua sponte, declared a mistrial and ordered a new trial. Brooks moved to dismiss the charge, alleging that the second prosecution constituted double jeopardy. A different district court judge granted the motion to dismiss. We now reverse that order and remand for further proceedings.

**I. Background Facts and Prior Proceedings**

The charges in this case stem from a February 7, 2007 incident involving the transfer of Brooks from the courtroom to the jail. While handcuffed and shackled in the elevator, Brooks confronted a female deputy who had recently testified against him. Brooks allegedly said, "You are the bitch that lied on me" and repeatedly cursed at her. The deputy told Brooks to be quiet, and Brooks allegedly took a step towards her. The deputy put her hand on his chest to prevent him from advancing further. Because the deputy thought Brooks was going to spit on her, she cupped her hand over his mouth. After they emerged from the elevator, Brooks allegedly told the deputy that he would find her when he got out of jail.

The State charged Brooks with the crimes of tampering with a witness, third-degree harassment, and assault on a peace officer. The matter proceeded to a jury trial, and Brooks took the stand in his own defense. Almost immediately, friction developed between the trial judge and Brooks over how Brooks was going to answer the questions asked by *his own* counsel:

THE COURT: Just hang on. He's going to ask the questions. You are going to answer them. You are only going to answer the question that's asked and no more.

THE DEFENDANT: I'm saying -- he asked me what happened?

THE COURT: Did you hear what I said? He's going to ask a question, and you are going to answer it, and you are only to answer the question that's asked. Do you understand that? Do you understand that?

THE DEFENDANT: Yeah, I understand but --

THE COURT: That's enough.

THE DEFENDANT: -- seem like you trying to --

THE COURT: That's enough.

THE DEFENDANT: -- make me hold back.

THE COURT: That's enough. You will say nothing more than answering his question. Do you understand that?

THE DEFENDANT: Yes, sir.

Moments later, the court once again rebuked Brooks by saying "You be quiet. I told you, answer only questions that are asked. It's a bad habit that you have." After another handful of questions, the court once again interrupted Brooks while he answered questions from his own counsel:

Q. You've heard the description by both, I believe, Officer Robertson—Deputy Robertson and Deputy Hoffmann that you were the last one coming out of the holding tank. Was that accurate?

A. I think we—

THE COURT: That could be answered yes or no.

THE DEFENDANT: Wow.

Shortly thereafter, the trial judge once again interjected himself into the line of questioning.

Q. Did you say anything else or in further response?

A. Yes, I did.

Q. What was that? A. I told her, "You don't have no right to talk to me like that," because the COs had already told us that they can't tell us to shut up. They got to address us in a respectful manner, and then I told her --

THE COURT: You answered the question. Okay.

THE DEFENDANT: He asked me what else did I say.

THE COURT: No. Next question. You are starting into a narrative now, Mr. Brooks. You listen to the question and answer only the question that's asked. Mr. Dusthimer.

THE DEFENDANT: It sounds like you don't want me to expose the truth, Your Honor.

THE COURT: Be quiet. Be quiet.

THE DEFENDANT: That's unfair.

THE COURT: Be quiet. Mr. Dusthimer, please ask your next question.

After a few more questions, the court interrupted once again in a similar fashion.

After approximately ten more questions, the following exchange took place:

Q. Did you use words which were sexual in nature?

A. Like—what do you mean by that?

Q. Well, I think that at least one of the deputies testified that you said something about either she could suck your dick or she could suck your cock or words like that. Did you use words like that? A. I didn't say cock, but --

Q. That's not my question. Did you use words like that?

A. Yes, sir. (There is a pause in the testimony.) But we were going back and forth with each other.

THE COURT: Ah, ah, ah. There is no question on the floor, and you are not to speak.

THE DEFENDANT: Why can't I tell my side of the story?

THE COURT: I said be quiet. I'm not going to argue with you about this, Mr. Brooks. You don't listen.

THE DEFENDANT: This is wrong.

After three more questions, the following incident sparked the court to declare a mistrial:

Q. Did you take any actions to try to spit on her? A. No, sir. If I was going to spit --

THE COURT: No, no, no.

THE DEFENDANT: -- it would have happened, sir.

THE COURT: You answered the question, and the answer to the question, was, "No, sir." That's all.

THE DEFENDANT: I'm just saying, Your Honor --

THE COURT: Don't say anything more.

THE DEFENDANT: -- it's obvious if I was going to spit on her, it would have happened.

THE COURT: Don't say anything more. Strike that from the record. Everything that you say that is not supposed to be said I'm

going to strike from the record. Do you understand what I'm saying?

THE DEFENDANT: Because you don't want it to come under appeal –

THE COURT: Do you understand what I'm saying?

THE DEFENDANT: -- so I have proof of your record.

THE COURT: Do you understand what I'm saying? I will not fight with you about this anymore.

MR. DUSTHIMER: Your Honor --

THE DEFENDANT: I'm just saying you don't want it on the record. Why are you trying to hide it from the record? It's obvious you didn't want to be here from what's going on, sir.

MR. DUSTHIMER: Your Honor --

THE COURT: We're going to break at this time, ladies and gentlemen. We obviously have something that is a little bit out of control here, and I need to handle that matter out of your presence, so please remember the admonition. I'll have the Court Attendant come and get you when we're ready to start again.

(The jury is leaving the courtroom.)

THE DEFENDANT: I just want to be treated fair, Your Honor.

THE COURT: Just be quiet.

THE DEFENDANT: She lied on me.

THE COURT: Don't say anything further.

THE DEFENDANT: Your Honor, she lied, and she said that I said something about a product.

MR. DUSTHIMER: Mr. –

THE COURT: No.

Folks, come back in. Come on. This has gone far enough, and it's out of control.

(The jury returns to the jury box.)

THE COURT: There is no way that I could expect you after watching this to -- folks, to render a fair and impartial verdict because I'm not acting appropriately either and I apologize for that.

I'm declaring a mistrial. This matter will be rescheduled for trial in the next order of trial setting.

Ladies and gentlemen, I really appreciate your presence here. The Defendant is out of control. He will not do what he is told to do. He knows what the rules -- this is not his first trial. I've -- I was the trial judge on the one in March. This was a problem we had in March. I apologize for my conduct to you because I've let him control that agenda, but I cannot continue to expect you to observe this and not have it affect your decision in this case.

So I genuinely apologize for this. I apologize for Mr. Brooks' conduct in this fashion. He knows better, but he's insistent on telling the story his way without regard to what the rules of

procedure are, and it's simply not going to happen that way, so I very much apologize for it.

Mistrial is declared. We will reschedule this matter for trial at a later date.

Did you order lunch, Denny?

THE COURT ATTENDANT: Not yet.

THE COURT: I wish it didn't have to be that way, and it wouldn't have had to have been that way, and Mr. Brooks does know better, and we have orderly procedures to do things, and the reason why we do that is that there is evidence that is admissible and there is evidence that's not admissible. Mr. Brooks knows that. He very clearly knows that, but he chooses to want to run it in his own fashion, and we simply cannot have that. We can't have an orderly way of conducting proceedings that are not orderly. They are out of control.

And so I see no other alternative except to make another effort to retry this case at a later date. I very much appreciate your being here. Thank you for your attention. You are free to go.

After trial, Brooks filed a motion to dismiss, arguing that his case be dismissed on double jeopardy grounds. The State resisted, arguing double jeopardy did not bar retrial because: (1) the mistrial was the direct result of Brooks's conduct, (2) manifest necessity existed for the declaration of the mistrial, and (3) the actions of the trial court could be characterized as an error in the proceedings.

A different district court judge granted the motion to dismiss and denied a further retrial on double jeopardy grounds. In so ruling, the court found there was no manifest necessity for a mistrial and denied the State's claim that the trial judge's actions constituted errors in the proceedings.

On appeal, the State claims there was a manifest necessity for the mistrial or, in the alternative, the mistrial was the result of a procedural error.

## II. Standard of Review

Our review of a trial court's grant of a motion to dismiss criminal charges on double jeopardy grounds is for errors of law. *State v. Dixon*, 534 N.W.2d, 435, 438 (Iowa 1995), *receded from on other grounds by State v. Huss*, 657 N.W.2d 447, 453-54 (Iowa 2003).

## III. Merits

The former-jeopardy clause of the Fifth Amendment of the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." A criminal defendant is placed in jeopardy once he or she is put to trial before the trier of fact, whether the trier is a judge or jury. *United States v. Jorn*, 400 U.S. 470, 479, 91 S. Ct. 547, 554, 27 L. Ed. 2d 543, 553 (1971). Brooks was placed in jeopardy when the jury was sworn. See *Dixon*, 534 N.W.2d at 439. At that time, he gained a valued right to have his trial completed by that particular tribunal. *Wade v. Hunter*, 336 U.S. 684, 689, 69 S. Ct. 834, 837, 93 L. Ed. 974, 978 (1949). Thus, "as a general rule, the prosecut[ion] is entitled to one, and only one, opportunity to require an accused to stand trial." *Arizona v. Washington*, 434 U.S. 497, 505, 98 S. Ct. 824, 830, 54 L. Ed. 2d 717, 727-28 (1978).

However, the prohibition against former jeopardy does not prohibit a retrial following mistrial when there is "manifest necessity" to terminate the first trial. *Dixon*, 534 N.W.2d at 440. Our supreme court has interpreted the phrase "manifest necessity" to mean that a court has a duty to declare a mistrial when the ends of public justice demand it. *Id.* at 439-40.

The State contends there was a manifest necessity for the sua sponte declaration of a mistrial because the court believed the jury could no longer render a fair and impartial verdict after witnessing the exchanges between the judge and the defendant. We agree.

A trial judge must “preserve an attitude of impartiality [and guard] against giving the jury the impression that the court believes the defendant is guilty.” *Id.* at 441 (quoting *United States v. Scott*, 26 F.3d 1458, 144 (8th Cir. 1994)). Therefore, it is clear that when a trial judge makes prejudicial remarks about the defendant in front of the jury, the judge may order a mistrial and any subsequent prosecution for the same offense will not violate the prohibition against double jeopardy. 21 Am. Jur. 2d *Criminal Law* § 395, at 436 (1998) (“Where a trial judge makes prejudicial remarks within the hearing of the jury, he or she may order a mistrial; under such circumstances, a subsequent prosecution of the defendant for the same offense will not violate the prohibition against double jeopardy.”); see also *Dixon*, 534 N.W.2d at 441. Similarly, there is manifest necessity when an error in the proceeding would make reversal on appeal a certainty because “it would not serve ‘the ends of public justice’ to require that the Government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court.” See *Dixon*, 534 N.W.2d at 440 (quoting *Illinois v. Somerville*, 410 U.S. 458, 464, 93 S. Ct. 1066, 1070, 35 L. Ed. 2d 425, 431 (1973)).

For unknown reasons, the trial judge limited Brooks to staccato responses to questions from his own counsel. The court had not made similar demands of the State’s witnesses, and we can discern no reason why Brooks’s responses to

his own counsel's questions would violate any existing evidentiary ruling. Also, during one exchange in front of the jury the trial judge told Brooks "You don't listen." This testimonial comment was likely detrimental to Brooks's case because, moments earlier, Brooks had tried to explain to the jury that the deputy was the one who started the altercation when she pushed him and told him to be quiet. Similarly, the trial judge's comment that Brooks had a "bad habit" of giving more than just an answer to the specific question posed supports the State's argument that the deputy had to struggle to keep Brooks quiet prior to the time of the alleged assault.

These comments, when combined with the other antagonistic interactions between the judge and the defendant, are in stark contrast to the "cold neutrality" demanded of an impartial judge. See, e.g., *In re S.P.*, 719 N.W.2d 535, 539 (Iowa 2006) ("The record in the present case simply does not display what Edmund Burke described as 'the cold neutrality of an impartial judge.'"). Undoubtedly, these interactions colored the jury's view of the defendant. Upon reflection, the trial judge recognized that he had not been acting appropriately and stated there was "no way" he could expect the jury to render a fair and impartial verdict in light of his exchanges with Brooks. We find this observation prescient because had this trial gone forward and the jury found Brooks guilty as charged, the aforementioned comments and decisions to limit the defendant's trial testimony would certainly have led to a subsequent reversal and remand for a new trial.

We are also mindful of the interest of the citizens of our state. "A retrial is permissible when a defendant's interest in a single trial is 'outweighed by the

competing and equally legitimate demand for public justice.” *State v. Huss*, 657 N.W.2d at 450 (quoting *United States v. Givens*, 88 F.3d 608, 611 (8th Cir. 1996)). Double jeopardy will thus not bar retrial “when the defendant’s interest in proceeding to verdict is outweighed by the competing and equally legitimate demand for public justice, as, for instance, when an error occurred during the proceedings that would require reversal on appeal.” *Givens*, 88 F.3d at 611. “The manifest necessity standard does not require us to look at the mistrial dilemma from a single point of view. It is a flexible standard which seeks fairness to the defendant, the government, and the public interest alike.” *Givens*, 88 F.3d at 613. Had this trial proceeded and Brooks been found guilty, he undoubtedly would have sought and received a new trial putting him in exactly the same position he is now. The judge’s actions alone required this mistrial. The State played no role and the public has an interest in further proceedings.

For the reasons discussed above, we conclude there was a manifest necessity for the judge to declare a mistrial because his own actions and remarks sullied any appearance of judicial neutrality and made reversal on appeal a certainty.<sup>1</sup> Accordingly, we conclude the district court erred when it determined the mistrial barred the State from further prosecuting Brooks for these offenses. We therefore reverse the dismissal order and remand for further proceedings.

**REVERSED AND REMANDED.**

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<sup>1</sup> We acknowledge that a judge should normally not declare a mistrial without first considering all available alternatives to preserve the defendant’s right to a trial by the present jury. See *Dixon*, 534 N.W.2d at 441-42. The record indicates this trial judge did try to excuse the jury from the room to “handle” the situation outside the presence of the jury, but Brooks refused to stop arguing, even while the bailiff tried to usher the jury out of the room. Because the court attempted to pursue other alternatives, we dismiss any argument that he should have done more.