

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CP-41-CR-1924-2016  
vs. :  
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JEROME KENNEDY, :   
Appellant : 1925(a) Opinion

**OPINION IN SUPPORT OF ORDER IN  
COMPLIANCE WITH RULE 1925(a) OF  
THE RULES OF APPELLATE PROCEDURE**

This opinion is written in support of this court's order dated May 31, 2018 and docketed June 15, 2018, which denied the motion to dismiss filed by Jerome Kennedy (hereinafter “Appellant”). The relevant facts follow.

The Commonwealth charged Appellant with delivery of a controlled substance, three counts of possession with intent to deliver a controlled substance, two counts of possession of a controlled substance, two counts of possession of drug paraphernalia, and one count of criminal use of a communication facility.

A jury trial began on December 7, 2017. During the course of the trial, jurors reported an incident that happened on the elevator when they were leaving for their lunch break. Before the elevator doors closed, two of Appellant’s female supporters pushed their way onto the already full elevator. When the elevator arrived at the lobby, the taller lady (who was subsequently identified as Appellant’s girlfriend, Alexis Lucas)<sup>1</sup> turned away from the elevator doors and toward the six or seven jurors who were on the elevator. Ms. Lucas

put her arms out, blocking the jurors and other people who were on the elevator from exiting. Ms. Lucas did this for approximately 15 seconds, and then she turned around, walked out of the elevator, and slammed the outside door.

When the jurors came back from lunch, they reported the incident to the court. Following an in camera hearing, the court declared a mistrial, without objection from defense counsel.

Following the mistrial, defense counsel, who was privately retained, filed a motion to withdraw because Appellant was not complying with his contractual obligations. The court granted the motion to withdraw and an assistant public defender began representing Appellant.

On April 23, 2018, Appellant filed a motion to dismiss based on double jeopardy grounds. Appellant contended that there was not a manifest necessity for the court to declare a mistrial *sua sponte* and less drastic measures should have been considered, including waiting to see if Ms. Lucas would be called as a witness for the defense. On May 31, 2018, following an argument, the court denied Appellant's motion.<sup>2</sup>

On June 25, 2018, Appellant filed an appeal. The court did not require Appellant to file a concise statement of errors on appeal, as it was obvious that Appellant was asserting that the court erred in failing to grant his motion to dismiss on double jeopardy grounds.

“[T]he question whether under the Double Jeopardy Clause there can be a new trial after a mistrial has been declared depends on [whether] there is a manifest necessity

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<sup>1</sup> N.T., December 7, 2017, at 105.

<sup>2</sup> The order was filed on June 15, 2018.

for the mistrial, or the ends of public justice would otherwise be defeated.” *Commonwealth v. Diehl*, 532 Pa. 214, 615 A.2d 690, 691 (1992). “[T]here can be no rigid rule for finding manifest necessity since each case is individual. Moreover, as a general rule, the trial court is in the best position to gauge potential bias and deference is due the trial court when the grounds for the mistrial relate to jury prejudice.” *Commonwealth v. Walker*, 954 A.2d 1249, 1255-1256 (Pa. Super. 2008).

Initially, the court notes that the determination of whether to grant a mistrial is to be made at the time of the prejudicial event. See Pa. R. Crim. P. 605(B); *Commonwealth v. Boring*, 684 A.2d 561, 615 (Pa. Super. 1996). The less drastic measures discussed in the case law are not taking a “wait and see” approach but rather whether an alternative other than a mistrial, such as sustaining an objection, striking certain testimony, or a curative instruction can cure the prejudice. In this case, these types of alternatives would not have cured the prejudice.

Prior to granting a mistrial, the court conducted an in camera hearing with counsel for the parties and the jurors who were on the elevator. While the juror who reported the incident stated that she would not hold the incident against Defendant, other jurors felt intimidated by Ms. Lucas’ conduct and felt that intimidation was her express purpose. They asked if there was “something that we can do that she can’t be here?” The court then inquired of the jurors if they could assess Ms. Lucas’ credibility fairly and impartially if she testified at trial. Some jurors stated that it would be difficult to overlook the incident or it would probably influence their decision. Some jurors indicated they couldn’t answer that question or they didn’t know if they could. Only one juror stated he or she thought he or she

could put it aside. N.T., December 7, 2017, at 93-99.

After the jurors left the room, the court discussed the matter with counsel. N.T., December 7, 2017, at 99-101. The court noted, “clearly if she testifies it’s not going to work.” Defense counsel then indicated that there was “about a 75 percent chance or more” that he was going to call Ms. Lucas as a witness. The court also noted that the last juror who walked out of the hearing said, “Well is she still going to be out there and still looking at us?” Defense counsel then noted that the juror didn’t respond when the court asked whether or not they would hold it against his client. The court declared a mistrial and noted that double jeopardy would not attach because the mistrial was not caused by the Commonwealth.

Only one juror indicated that he or she could put the matter aside if Ms. Lucas was called as a witness. The other five or six jurors either indicated that the incident would influence their ability to judge Ms. Lucas’ credibility or they did not know if they could consider Ms. Lucas’ credibility fairly and impartially. The ones who said it would be an influence could not say which way it would influence their decision. Too many jurors were impacted by the incident for the court to excuse the affected jurors and continue the trial. Unlike in a civil case, the court could not proceed with a jury of less than twelve.

Furthermore, it is clear that several jurors felt unnerved and intimidated by Ms. Lucas’ actions. Those jurors were not only concerned by the prospect of Ms. Lucas being called as a witness, but also by her mere presence. Therefore, waiting to see if Ms. Lucas was called as a witness was not going to solve the problem.

The incident and its impact on the jurors made declaring a mistrial a manifest

necessity. The ends of public justice would be defeated by proceeding in a trial with a jury whose members were unnerved and intimidated by the actions of Appellant's girlfriend. It was unclear which party the incident would hurt or hinder, because most of the jurors could not overlook the incident but they did not know which way it would influence their decision. There were an insufficient number of unaffected jurors to proceed with the trial. Therefore, the court was left with no choice but to declare a mistrial.

DATE: \_\_\_\_\_

By The Court,

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Marc F. Lovecchio, Judge

cc: Nicole Ippolito, Esquire (ADA)  
Nicole Spring, Esquire (APD)  
Work file  
Gary Weber, Esquire (Lycoming Reporter)  
Superior Court (original & 1)