No. 122830

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- DAVID KIMBLE Defendant-Appellee	))))))))))	Appeal from the Appellate Court of Illinois, No. 2-16-0087. There on appeal from the Circuit Court of the Twenty-Second Judicial Circuit, McHenry County, Illinois, No. 13 CF 1123. Honorable Sharon L. Prather, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

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ORAL ARGUMENT REQUESTED

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POINTS AND AUTHORITIES

STATEMENT OF FACTS

The Statement of Facts presented by the State is argumentative and incomplete and, accordingly, the defendant presents the following Statement of Facts in its stead:

On January 22, 2014, the State filed a four-count indictment against David Kimble, alleging he committed aggravated criminal sexual abuse against S.M. (C. 10-11) The indictment charged that Kimble committed the offense on four separate occasions – August 2, November 9, November 10 and November 16, 2013 – by touching S.M.'s vagina, through her clothing, for the purpose of his sexual gratification or arousal.

The case proceeded to a jury trial before Judge Sharon Prather on November 3, 2015. Prior to trial, discovery was tendered back and forth and the cause was continued generally for status. (See, e.g., C. 16-19, 20-24, 25-30, 32-33, and 39-44) On October 22, 2014, nine months after the indictment was filed and 10 months after various interviews were conducted, the State filed supplemental discovery indicating it was in possession of three videotaped interviews of S.M. and her siblings taken at the Child Advocacy Center (CAC) in Woodstock, as well as two DVDs of interviews of the defendant. (C. 34) Copies of the videos were turned over to the defense in November of 2014. (C. 37-38)

On June 11, 2015, the State filed a motion seeking to admit at trial, under 725 ILCS 5/115-10, statements S.M. had made on December 6, 2013, to Anne Huff, the principal of Harrison Elementary School in Wonder Lake, and on December 10, 2013, to Algonquin detective Misty Marinier at the CAC. (C. 46-47) At a hearing held July 17, Principal Huff testified that on December 6, 2013, she spoke to S.M.,

then age 9, and also to S.M.'s younger stepsister Brooklyn L.,[1] at the request of Brooklyn's mother Jennifer, who had concerns the girls had been inappropriately touched by the defendant, a family friend. (R. 87-91) When Huff spoke to Brooklyn, Brooklyn told her no one had ever touched her inappropriately. Brooklyn referred to the defendant as "Dave" or "Uncle Dave," and said she felt safe at his house. Sometimes the two of them would snuggle and he would sometimes kiss her on the cheek. Dave also sometimes snuggled with S.M., and with Brooklyn's brother Noah. (R. 91-92)

After speaking to Brooklyn, Huff spoke to S.M.. S.M. said Dave was the person who babysat her. When Huff asked if she felt safe with Dave, S.M. responded, "No, not when he touches me down there," pointing to her vaginal area. (R. 91-92) She told Huff this touching had taken place about five times. (R. 92-93) Huff did not inquire further, but instead made a report of what S.M. told her. (R. 93)

Detective Misty Marinier testified she interviewed S.M. at the CAC regarding the allegations made against the defendant. (R. 105)[2] During the interview, with Marinier using body charts, S.M. disclosed that Dave had touched her in the private area with his hand, pointing to the vaginal area on the chart. (R. 106-08) S.M. told Marinier this touching happened about five times, while she was at Dave's house. (R. 111-15) S.M. and her five siblings and step-siblings were often at Dave's

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[1]Brooklyn was not actually S.M.'s stepsister, but she, her brother and mother lived with S.M., S.M.'s father, and S.M.'s three siblings, and the girls were the functional equivalent of stepsisters.

[2]At the hearing, the State did not elicit the date or location of this interview. However, it appears the interview took place on December 10, 2013, at the CAC in Woodstock. See R. 561-63.

house because he would babysit them. (R. 113-14) S.M. said the touching took place in a bedroom S.M. had at Dave's house. While this was happening, the other children would be in Dave's bedroom, where they slept at night. (R. 115) The trial court ruled the State could introduce both Huff's and Marinier's testimony at trial. (R. 119, 126-27)

On September 3, 2015, trial was set for November 2. (C. 61, R. 131) Hearings on any additional motions were set to be heard on October 15. (R. 132) On October 15, the State filed a motion asking that it be allowed to present at trial statements S.M. had made to her stepmother on December 5, 2013. (C. 90-91) The State also filed a motion asking that it be allowed, pursuant to 725 ILCS 5/115-7.3, to admit at trial evidence of uncharged conduct allegedly committed by the defendant against Brooklyn. (C. 86-89)

In the latter motion, the State referenced statements Brooklyn allegedly made to her mother on December 5, 2013, regarding the defendant inappropriately touching her, and to her elementary school principal the following day that, while the defendant had not inappropriately touched her, he had "snuggled" with her on his couch and in his bed, and would kiss her cheek. The State further related that during an interview at the CAC on December 10, 2013, Brooklyn said that when she spent the night at the defendant's house, she would usually sleep in the defendant's bed, while the other children would sleep on the floor in his bedroom and S.M. would sleep in her own bedroom. (C. 86-89) Further, the State alleged that just recently, on September 3, 2015, Brooklyn spoke to Assistant State's Attorney (ASA) Sharyl Eisenstein and told her that when she was at the defendant's house he had given her touches that made her uncomfortable. She described these

touches as the defendant rubbing her inner thigh up to her pelvis with his hand, while she and the defendant were lying on his bed. (C. 86-89, R. 191-97)

A hearing on the motion to admit S.M.'s statements to her stepmother was held on October 22, 2015. S.M.'s stepmother, Jennifer A., testified regarding conversations she had with S.M. on December 5, 2013, after speaking to her daughter Brooklyn. Jennifer recounted that, during a bedtime conversation, Brooklyn told Jennifer that Dave had touched her "weiner," Brooklyn's name for her vagina. (R. 150-53) Jennifer then spoke to S.M. and asked if anyone had ever inappropriately touched her in places they should not have. (R. 159) S.M. did not really have much to say, Jennifer said, until Jennifer asked if Dave had ever touched her. At that point, S.M. said yes, and that "every time she goes there, it's like he forgets because she does ask him to stop." (R. 159)

With respect to the State's motion to introduce evidence of uncharged conduct relating to Brooklyn, the defendant argued that the recent statements made by Brooklyn to prosecutors did not constitute evidence of sexual misconduct and therefore were not admissible under 725 ILCS 5/115-7.3. (R. 199) The court ruled that Brooklyn's recent statements were admissible because Jennifer A.'s testimony relating what Brooklyn said to her in December of 2013 described sexual conduct similar to the conduct charged in the indictment. (R. 200-01) The court found the probative value of Brooklyn's recent statements about the defendant was not outweighed by any prejudicial effect. (R. 202)

In a supplemental answer to discovery filed October 27, 2015, the State tendered a memorandum recounting an interview prosecutors had with S.M. on October 23, 2015. The memo recounted that during this interview prosecutors

asked S.M. how many times the defendant had touched her, and she told them it was about ten times. When asked if she was touched under or over her clothing, she said "both." She said the defendant would often hold her down, and would hold her down harder when her clothes were removed. (C. 123-25) The defendant filed a motion to bar this newly disclosed evidence, stating it was not covered by the charges in the indictment and thus was inadmissible at trial. (C. 121-22) In response, the State filed a motion seeking to admit the evidence as proof of other crimes pursuant to 725 ILCS 5/115-7.3. (C. 126-29)

At a status hearing on October 28, the State announced its intention to play at trial the three-and-a-half-hour videotaped interview of the defendant, with certain redactions that were agreed to by the parties or ordered by the court.[3] The court also addressed the defendant's motion to bar the State from introducing the new statements S.M. had made to prosecutors on October 23, and the State's motion to introduce these statements as other-crimes evidence. Following argument, the court ruled that S.M.'s new statements could be admitted as other-crimes evidence. (C. 131, R. 240-49)

Jury selection took place on November 2, 2015, (R. 262-484), and trial began on November 3. Jennifer A. testified that she and S.M.'s father, Jeff M., lived together with their six children in Wonder Lake. Jennifer's children were Noah, then age 11, and Brooklyn, age 9. Jeff's children were S.M., then age 11, Mikey, age 10, Kayla, age 9, and Johnny, age 5. (R. 507) David Kimble moved next door

[3] These redactions included reference to a prior burglary charge on which the defendant had been given pre-trial diversion, the defendant's offer to take a polygraph test, and his request for an attorney made at the close of the interview. (R. 234-36, 257-60)

to the M. home in 2010. Jeff and Dave worked together at Roberts Roofing, where Dave was Jeff's boss, and the two men were also friends. (R. 508-09)

All of the kids in the family were close to Dave and knew him as Uncle Dave. (R. 510) Dave watched the children four to five times a month, and sometimes they spent the night at his house. (R. 510-11) In particular, there were several dates in November of 2013, including the weekend of November 11 and 12 and November 29, 2013, when the children spent the night at Dave's house. All of the children except for the youngest had also spent the night on August 2, 2013. (R. 517-18) The kids would ask "quite often" if they could go to Uncle Dave's house, perhaps three to four times a month, but they were not allowed to go every time they asked. (R. 524) The defendant would buy clothes and shoes for the kids, and he also bought S.M. a bike. (R. 518-19)

Jennifer testified that on the evening of December 5, 2013, she was putting Brooklyn, then age 7, to bed. Based on what Brooklyn said to her at that time, Jennifer decided to have a conversation with S.M., then age 9. (R. 511-12) Jennifer told S.M. she needed S.M. to be completely honest with her, and asked if anyone had ever put their hands on her in an inappropriate way. S.M. did not answer, and Jennifer then asked if Dave had ever touched her in areas where he should not have been putting his hands. S.M. said yes. She told Jennifer that "every time she asked him to stop, he would stop, but then the next time, he would go there, . . ., like he had forgotten all over again." (R. 514) The next morning, Jennifer called the girls' school and spoke to the principal, Anne Huff. (R. 516)

S.M.'s father Jeff confirmed that between 2010 and 2013, his and Jennifer's kids went over to the defendant's house "frequently," and sometimes spent the

night there. (R. 531-33) The kids called the defendant Uncle Dave, and liked going over to his house and hanging out with him because he bought them stuff, including ice cream and clothing, while Jeff and Jennifer were stricter with them. (R. 533) The kids would often ask to go over to Dave's house, both multiple times during the week and on weekends. (R. 538) This continued until Jeff had a conversation with Jennifer regarding her talk with Brooklyn and S.M.. (R. 538) As a result of this conversation, Jeff and Jennifer asked Ms. Huff to speak to Brooklyn, but not to S.M.. (R. 535, 541) Jeff said he was in disbelief following his conversation with Jennifer because, up to that time, he had not seen any indication that anything was wrong. (R. 538-39)

Harrison Elementary School principal Anne Huff testified in a manner similar to her testimony at the pre-trial hearing, except that at trial she agreed that no one had asked her to speak to S.M. (R. 542-45, 548) Huff said she decided to speak to S.M. because Brooklyn had talked about "snuggling" with Uncle Dave, although Brooklyn had also told Huff she felt safe at the defendant's house. (R. 556) Huff also followed up with Kayla, who reported no inappropriate behavior by the defendant, either. (R. 557)

Algonquin detective Misty Marinier testified that on December 10, 2013, she was asked to assist at the CAC in Woodstock by interviewing S.M., because the Center was interviewing all six children. (R. 561, 565, 571) People's Ex. No. 24, a video recording of Marinier's 34-minute interview of S.M., was played for the jury. (R. 563) At the outset of the interview, S.M. talked to Marinier about what grade she was in at school (4th grade at the time) and the fact that she did not have many friends at school. (P.Ex. 24, 10:18:40-10:20:33) Marinier showed

S.M. two dolls, a male and a female, and asked her to point out and name various parts of each doll's anatomy, and also used a chart. (P.Ex. 24, 10:22:43-10:25:46) She spoke to S.M. about "good" touches and "bad" touches, and asked if anyone had touched her in a way that was not appropriate, or a bad touch. (P.Ex. 24, 10:26:40-10:27:05) S.M. nodded, and said that Dave, one of her daddy's friends, had done that. (P.Ex. 24, 10:27:10-10:27:14)

Asked more specifically about the touching, S.M. said, "Well, he kind of like touches me in the privates, with his hand, usually," pointing on the chart to the front genital area on the female body. (P.Ex. 24, 10:27:58-10:28:26) She said that, "I try telling him not to, but he doesn't really listen, like he forgets." (P.Ex. 24, 10:28:26-10:28:36) Asked how Dave touched her with his hand, S.M. said, "Well, not hard, kind of light." She said her clothes were "usually on" when this happened, and that Dave's clothes were on. Dave did not say anything while he was touching her. (P.Ex. 24, 10:28:58-10:29:21)

The touching had happened, "Uh, maybe twice . . . or maybe like five times." (P.Ex. 24, 10:29:40) It always happened at Dave's house, and in his room. The other kids were at the house at that time, but were usually in the living room. (P.Ex. 24, 10:29:10-10:30:53) S.M. reiterated that her clothes were on when the touching took place, (see P.Ex. 24, 10:30:53-10:31:10, and 10:38:10-10:38:18), and denied that the defendant had touched her any other place she did not like. (P.Ex. 24, 10:32:22) Asked how the touching took place, S.M. put her hand in the air and wiggled her fingers. (P.Ex. 24, 10:31:18) She said Dave had never asked her to touch any part of his body, and no other part of his body had ever touched her. (P.Ex. 24, 10:38:18-10:38-20)

S.M. told Marinier she had her own room at Dave's house, and the other kids usually slept in Dave's room on a little mattress. (P.Ex. 24, 10:39:00-10:39:14) She thought it was during 2013 and "sorta warm" out, and that she was not in school, when Dave first touched her. (P.Ex. 24, 10:32:40-10:32:55) The last time he touched her might have been about five weeks ago. (P.Ex. 24, 10:37:45) She had not told anyone before now that Dave had touched her because she thought she would get in trouble, although she could not explain why she thought that. (P.Ex. 24, 10:40:30-10:42:40)

Marinier said that at the outset of the interview, S.M. was very outgoing, but her demeanor changed and her voice got lower when Marinier began talking to her about "touches." (R. 565) S.M. never told Marinier she had been held down or grabbed or that her pants had been pulled down. (R. 572-73) Marinier said it was important to her to find out specifically from S.M. how many times she was alleging an improper touching took place, and S.M. told her it happened about five times. (R. 572-73) Although S.M. told Marinier she had been scared to say something about what happened, she also said no one ever told her not to talk about it. (R. 574)

S.M. testified that she was now 11 years old and in 6th grade. She lived in Wonder Lake with her dad, Jen, and her younger brothers and sisters – Noah, Mikey, Brooklyn, Kayla, and Johnny. (R. 585-87 David Kimble used to work with her dad and S.M. last saw him "a long time ago." (R. 589) S.M. and her family used to live close to Dave in Wonder Lake, and she and her siblings would go to his house "[m]aybe every other weekend." (R. 589-90)

S.M., Brooklyn and Kayla sometimes spent the night at Dave's house, and

sometimes Mikey and Noah would as well. The defendant had two bedrooms, a living room, a kitchen, and a basement at his house. (R. 591-92) When she was there, S.M. used one of the bedrooms, the one the defendant did not use. (R. 592) Dave would buy her coloring stuff and clothes, and on one occasion bought her a bike, which she kept in his garage. (R. 609-10) Sometimes he would give her money, consisting of pennies, dimes and nickels. (R. 610)

Asked if the defendant had ever done anything that made her uncomfortable, S.M. said yes, that he had touched her on her vagina, while she was in his bedroom by the closet, getting her coloring stuff. (R. 592) She said he came into the bedroom, pushed her onto his bed, got her arms and took off her clothes, and then rubbed her in her "bad spot" with his hands. (R. 593) He did not say anything when he did this. (R. 594) She told him to stop, but he did not. She thought this touching happened about ten times, and said it was the same each time. (R. 594) The defendant would get her on the bed lying down, and then he would kneel next to the bed and touch her with his hands, rubbing his hands back and forth. (R. 612) Everyone else was in the living room when this happened, and the defendant's bedroom door was closed and locked. (R. 613) This would happen "[a]round 12:00 or in the evening" (R. 614) – not twelve o'clock at night, she said, but in "like, evening, like, when it was still light out." (R.618)

S.M. could not remember the first or last time the touching happened. (R. 594) She had told Jen, her dad, and Principal Huff what happened, and also spoke to a detective at the CAC. (R. 594-96) She told the detective everything Dave did to her, but did not think she told her about Dave taking off her clothes. She said she was not really comfortable talking to the detective. (R. 597) She could

not remember telling anyone the day before this past Halloween that Dave had only touched her over her clothes, (R. 619-20), nor did she remember if she ever told anyone before today that the defendant had locked his bedroom door. (R. 623)

In the defense case, the parties stipulated that ASAs Eisenstein and Gibbons, along with victim-witness coordinator Kelly Gallagher, spoke to S.M. at the State's Attorney's Office on October 30, 2015. During that conversation, S.M. said she was touched approximately ten times by the defendant, over her clothes. When asked if Kimble ever touched her under her clothes, she said no. When asked about her conversation with prosecutors the prior week [when she said she was touched under her clothes], she said she was confused. (R. 736-37) The stipulation further recounted that S.M. was then asked if the defendant held her down, and said yes. She was asked if her clothes were on or off when this happened, and said "both." She said the defendant would use one hand to hold her down and the other to touch her private part. When asked why she said it just happened over her clothes, she said she was embarrassed and did not want to talk about it. (R. 737)

Brooklyn L. testified she was now nine years old and in 4th grade. (R. 628) She knew David Kimble, who was her uncle, but did not see him in court. (R. 628-29) She knew someone named Dave, whom she described as "a man who kind of like works," and said Dave knew "mostly . . . everybody" in her family, but she also did not see him in court. (R. 629) In 2013, Brooklyn would spend the night at her friend's house, but not anywhere else. (R. 629-30)

Brooklyn identified photographs shown to her as pictures of her Uncle Dave's bedroom. (R. 631) She recognized the photographs because she sometimes spent

the night there. The last time she spent the night was probably two or three years ago. (R. 631) She would sometimes go to Uncle Dave's house with S.M., Kayla, Johnny, Mikey and Noah. Dave had his own bedroom at the house, and S.M. had her own bedroom. When Brooklyn went to Dave's house, she would play with toys. R. 631-32) When they stayed over, Brooklyn and her brothers and sisters usually slept in her uncle's bed or on the floor, or sometimes on the couch in the living room. (R. 633-35) Uncle Dave would sometimes rub her leg up and down with his hand when she was on the bed and he was on the floor on his knees, but he did not say anything when he did this. (R. 633-34) He did not do anything else that made her uncomfortable. (R. 634) The first time Brooklyn ever mentioned the rubbing was about a month and a half ago, when she mentioned it to one of the prosecutors. Before that, she had talked a lot to her family, including her mom and S.M., about what happened. (R. 641-43) She did not see the person who rubbed her leg in court. (R. 642) She remembered talking to someone at the CAC a couple of years ago and agreed she told that person she had never been touched in "the privates, the butt, or the boobies." (R. 641)

After Brooklyn testified, defense counsel told the court he did not believe her testimony rose to the level of acts admissible under 725 ILCS 5/115-7.3 and moved for a new trial. (R. 646) The court denied the motion. (R. 647)

McHenry County detective Michelle Asplund testified that her specialty is investigating sexual crimes against children. (R. 658) On the morning of December 6, 2013, she met with Jennifer and Jeff M. and with Principal Huff. She was also present during Detective Marinier's interview of S.M. on December 10, watching through a two-way mirror. (R. 660, 675)

On December 11, 2013, Asplund called the defendant and asked him to come to the Sheriff's Office, ostensibly to talk with him about conceal and carry classes he provided in the basement of his home. (R. 660-61) After an initial discussion about his business, Asplund switched the topic to the subject of "overnight guests at his house." (R. 662) She said that when she switched topics, she observed an "180 personality change," in that the defendant became very introverted, did not make a lot of direct eye contact, and gave "very short, clipped responses" to her questions. (R. 662) After Asplund ended her questioning of the defendant, Detective Waters spoke with him. (R. 662-63) The entire interview by both detectives was videotaped. (R. 661)

The redacted version of the interview, which was about three and a half hours long, was played for the jury. At the outset, Asplund told Kimble she just needed to go over a couple things relating to his conceal and carry business. She began to read Kimble his *Miranda* rights, and the defendant interjected, "Am I being arrested?" (P.Ex. 28, 14:51:00-14:51:24) Asplund responded, "Well, no, you didn't come in in handcuffs, but if you tell me you have a dead body in the house or something, we are pretty much covered." (P.Ex. 28, 14:51:33-14:52:00)

Thereafter, Asplund discussed with Kimble how he runs his business and who attends the classes. She ascertained from him that he was single and that no kids were living at his house, and he assured her that everything at his house was "legal," and that he kept his firearms in a secure place. (P.Ex. 28, 14:52:03-14:59:50) Asplund then changed topics, telling Kimble the reason "the whole thing came about" was that a younger girl was talking at school about how her Uncle Dave teaches about guns. So, Asplund queried, "if you don't live with anyone,

who is this person knowing you have guns in your house?" (P.Ex. 28, 15:09:02-15:09:06) Kimble responded that it was probably his nieces and nephews, or the neighborhood kids, because he taught kids as well as adults. (P.Ex. 28, 15:09:06-15:09:28)

Asplund then asked the defendant if he ever had kids spending the night at his house, because "that's another issue we have to discuss. * * * How come you have kids staying over at your house?" (P.Ex. 28, 15:10:42-15:11:20) Kimble told Asplund the kids were his nieces and nephews, and that they stayed over "just whenever their parents want to get rid of them for a while." (P.Ex. 28, 15:11:34-15:11:43) He was not actually their uncle, but the kids referred to him as "uncle." When they stayed over, they slept "on the floor, on couches, all over." One of them, S.M., had a bedroom she called her own room. She was the oldest of the group and wanted her own place to stay, so they called it her room. (P.Ex. 28, 15:12:08-15:14:35) Kimble explained that S.M.'s dad, Jeff, was his employee, and he and Jeff had always been close. (P.Ex. 28, 15:14:10-15:15:20)

Over the course of the next two hours, Asplund questioned Kimble as to allegations of misconduct allegedly made against him by S.M. and Brooklyn. (P.Ex. 28, 15:16:42-17:54:00) Asplund told Kimble that both S.M. and Brooklyn told her the defendant touched them inappropriately on several occasions.[4] Kimble repeatedly denied ever doing so. (See, e.g., P.Ex. 28, 15:16:59-15:20:12; 15:21-14-15:26:28; 15:27:20-15:34:00; 15:34:24-15:35:32; 15:39:37-15:30-40; 16-10:30-16:11-35; and 16:28:26-16:29:30) He remarked that Brooklyn would sometimes jump up

[4]As of the date of this interview, Brooklyn had not made any accusations of misconduct against the defendant to anyone at the CAC.

on the bed with him and"flip and flop" around, and he would then have to push her away, but he did not recall ever touching her inappropriately on those occasions. (P.Ex. 28, 15:16:00-15:16:09; 15:26:10-16:26:28; 16:27:20-16:28:04)

Asplund suggested that perhaps Kimble had accidentally or unintentionally touched the girls inappropriately, or perhaps had touched them because he was curious but then realized what was happening was inappropriate and stopped. (P.Ex. 28, 15:17:12-15:17:24; 15:18:18-15:18:46; 15:20:12-15:22:22; 15:30:50-15:31:30; 15:44:04-15:44-07). Maybe it was just a "curiosity thing," she said; she was "unintentionally curious all the time." (P.Ex. 28, 16:01:00-16:01:25) Kimble said the only time he ever touched the kids was when they were playing. There was no "curiosity" or "weirdness" involved. He played with all of the kids and, while playing, probably touched every one of them, but if he had ever touched any of them on the vagina, it was definitely not on purpose. (P.Ex. 28, 16:10:55- 16:11:35)

Kimble agreed with Asplund that he did not think S.M. was a liar, and said he hated that she thought something inappropriate had happened. (P.Ex. 28, 16:13:27-16:13:50) Both girls were good kids, he said, and he had no idea why they would accuse him of such acts. It was horrible to be accused of this, and horrible they would think he would do something like that. (P.Ex. 28, 16:29:30-16:30:50) He felt bad for them, and felt bad they could think he had done such a thing. (P.Ex. 28, 16:31:06-16:31:33)

Asplund told Kimble she had interviewed both S.M. and Brooklyn, and that both girls were very upset about what had happened and were crying during

the interview.[5] (P.Ex. 28, 15:22:22-15:25:05; 15:40:38-15:40:49; 16:25:00-16:25:25) She suggested that Kimble write the family an apology and then, she said, the whole thing would be over with and each of them could go their own separate ways. (P.Ex. 28, 15:31:20-15:32:25; 16:25:25-16:26:28; 16:33:24-16:34:58; 16:46:35-16:49:45) The defendant said he was not going to write an apology because he was not going to admit to something he did not do. He had no idea why either Brooklyn or S.M. would say something inappropriate happened, and the allegations were "ridiculous." (P.Ex. 28, 17:45:50-17:50:50)

Asplund left the interview room and returned on several occasions to continue her interrogation; Kimble continued to deny any acts of misconduct. (P.Ex. 28, 16:14:48-16:19:55; 17:05:06-17:09:42) After Asplund left the interview room a final time, Detective Derick Waters entered and continued the questioning. (P.Ex. 28, 18:05:40-18:18:59) Waters noted that Kimble was wearing a POW bandana and asked him if he knew that, in the military, the most important thing was "being a man, standing up, doing your duty." (P.Ex. 28, 18:05:57-18:08:10) He urged the defendant to "do the right thing." and Kimble responded that Asplund wanted him to admit to something he did not do, touching a child inappropriately. (P.Ex. 28, 18:10:10-18:11:21) Upon continued questioning by Waters, Kimble continued to assert that he had never touched either girl inappropriately, that he felt bad that either of them would think that, but that he was not going to admit to something he did not do. (P.Ex. 28, 18:13:04-18:19:09)

During continued questioning on the stand, Asplund admitted she had never

[5]Asplund admitted that these claims also were not true. (R. 698-99, 717-18)

actually interviewed S.M. but said she told Kimble she had, because she was "trying out different themes." (R. 698-99) Asplund agreed she had suggested to Kimble that perhaps the touching of the girls was accidental because she wanted to see if he would admit the touching but deny he had done it on purpose. (R. 699) She told Kimble during the interrogation she was the "gatekeeper," but said that meant "nothing," and could not say why she used that term. She had attended a course on interviewing sexual "deviants" and had also attended several Reid interrogation classes, but could not off the top of her head name any of the steps involved in the Reid technique. (R. 707-08) She agreed, however, that part of the technique was to create an environment where the suspect would believe things could be really bad for him, but that there was an option available that would not be as bad if he said what the interviewer wanted to hear. (R. 709-14)

Asked when the police executed a warrant for Kimble's home, Asplund remarked, "Shortly after he invoked his right for an attorney, I called . . . ." (R. 722) Defense counsel's objection to this comment was sustained and the jury was instructed to disregard it. (R. 722) At the close of Asplund's testimony, the State announced it was resting. (R. 724) Defense counsel moved for a mistrial based on Asplund referencing Kimble's request for an attorney. (R. 724-25) The judge denied the motion, finding Asplund did not deliberately reference the defendant's statement nor did the prosecutor intentionally elicit the evidence, and any prejudice was averted by her instruction to the jury to disregard it. (R. 727) The defense then presented in its case-in-chief the stipulation described above. (R. 735-37)

On November 5, 2015, closing arguments were presented. The jury retired to deliberate at 10:50 a.m. (R. 752-804, 812-13) During deliberations, the jury

asked to see the video of S.M.'s interview at the CAC again. The court decided to bring the jurors back into the courtroom to play the video, and the parties waited while a computer was brought to the courtroom on which the video could be played. (R. 819-20) At 1:40 p.m., the jurors were brought in and the video was played. They returned to the jury room at 2:15 p.m. (R. 820-21)

At 4:25 p.m., the judge called the parties back into the courtroom to advise them she had received a note from the jury. The note, which was signed by the foreperson, read: "After deliberating for 5 hours and despite our best efforts, we are at an empasse [sic]." (C. 174) The judge remarked that the jury had also earlier indicated to her bailiff, shortly after watching the CAC video, that they were at an impasse. At that time, the judge told counsel, she had instructed her bailiff to tell the jury to continue to deliberate. (R. 821-22) "So," she said, "this is the second time that I have received information from the jury that they are at an impasse." (R. 822)

The judge suggested bringing the jurors into the courtroom and asking whether they believed further deliberations would help. She said she was more than willing to ask if they would like to go home, sleep on it, and come back the next day. (R. 822) The prosecutor asked if the judge intended to send a note back to the jury which, he said, might result in multiple answers, and both parties agreed to the judge's suggestion that she speak only to the foreperson. (R. 822) The prosecutor asked that the parties be given an opportunity to discuss the matter further with the court if the foreperson indicated he did not believe more time would help, and the judge agreed. (R. 822-23)

The judge brought out the foreperson and told him she had received the

note indicating the jury was at an impasse. Asked how long the impasse had existed, the juror said, "Pretty much a good part of the day. Four and a half hours or five hours." (R. 823) During that time, he said, "[s]ome numbers changed here and there," but for the last three hours the jury had been stuck at a certain proportion. (R. 823) The judge asked if it would do any good if she sent the jurors home for the night and let them sleep on it, and the foreperson responded, "I asked that question, and it was indicated that it would not." (R. 824)

After the foreperson returned to the jury room, the parties had a further discussion. The prosecutor said that while it seemed the jury was completely deadlocked, from the State's point of view he believed the court should give a *Prim* instruction before discharging them. (R. 824-25) Defense counsel agreed the instruction should be given or, in the alternative, he said, he would ask that the judge release the jurors for the night and tell them to come back the next day. "I think," he said, "those are really the only two viable alternatives." (R. 825) The prosecutor remarked, "We could always read them the *Prim* instruction and bring them back tomorrow," and defense counsel said he had no objection to doing that. (R. 825)

The judge said she was "fearful" if she did that, "you're going to have some extremely angry jurors." (R. 825) She commented that there had been "some very loud voices back there for a period of time," that she believed it would be futile, and that she was therefore declining. (R. 825-26) She then directed that the jurors be brought back in to the courtroom. Upon their return, she thanked them for their time and attention and excused them from further service. (R. 826) After they departed, the judge declared a mistrial. (C. 203, R. 826)

The prosecutor then asked that the court set a status date for purposes of setting a new trial date. Defense counsel indicated he might want to send out subpoenas for witnesses he did not have an opportunity to subpoena earlier, and requested a December 4 status date, which the court granted. (R. 827) On December 4, the defendant filed a motion to bar prosecution. (C. 220-222, R. 831) In the motion, he argued that there was no manifest necessity for the declaration of a mistrial and asked that his reprosecution be barred.

The State was granted leave to file a response, which it filed on December 23. (C. 235-38) In its response, the State argued that the judge had not abused her discretion when declaring a mistrial, because the jury was hung and the foreperson indicated that additional deliberations would not help. (C. 237, ¶12J) Additionally, the State argued, the defendant had acquiesced to the declaration of a mistrial by failing, before the jury returned to the courtroom, to object when the judge announced her intention to declare a mistrial. (C. 237-38, ¶¶14-15)

A hearing on the motion was held on January 8, 2016, at which both parties stood on their written pleadings. (R. 835-36) The court denied the motion, giving the following basis for her ruling:

> Defendant's trial resulted in a mistrial, which did not place the Defendant in jeopardy. Foreperson of the jury indicated to the Court that any further deliberation would be useless. Therefore, a manifest necessity existed that the Court declare a mistrial. (R. 836)

ARGUMENT

The appellate court properly found that double jeopardy principles barred the defendant's retrial where: a) the trial judge declared a mistrial on her own motion, without the defendant's consent; b) the judge's refusal to consider alternatives to a mistrial, upon the jury's pronouncement that it was at an impasse, resulted from an earlier act of judicial indiscretion; and c) there was no manifest necessity for the mistrial.

After jurors in this case had been deliberating less than five hours on four counts of aggravated criminal sexual abuse brought against the defendant, they sent a note to the trial judge, Sharon Prather, stating they were at an impasse. (C. 174) Judge Prather called the parties into court to discuss the jury's note. Counsel for both sides agreed with the judge's suggestion that she question the foreperson about the jury's deliberations. Counsel also agreed that, after this inquiry, they would then discuss further the proper course of action. (R. 822-23) During her preliminary discussion with counsel, the judge revealed that two hours earlier, and without notifying anyone, she had directed her bailiff to tell the jurors to "continue to deliberate" when the bailiff told her the jurors had orally reported to him they were at an impasse. (R. 821-22)

After the judge completed her questioning of the foreperson, the prosecutor asked that the judge give a *Prim* instruction before considering the option of discharging the jury. Defense counsel said he believed either giving jurors a *Prim* instruction, or asking them to come back the next day, were "really the only two viable alternatives." (R. 825) He agreed when the prosecutor suggested that the judge both give jurors the *Prim* instruction and bring them back the next day. (R. 825) Instead, the judge remarked, "I think it would be futile to do that," and "Therefore I would decline." At that point, she called the jurors back into the

courtroom and excused them from further service. (R. 825-26) After the jurors departed, the judge declared a mistrial. (R. 826)

The defendant neither consented, nor implicitly consented, to the judge's declaration of a mistrial. In addition, the judge's refusal to consider any alternatives to a mistrial, coming after she improperly engaged in *ex parte* communications with the jury, was unreasonable and not an exercise of sound discretion. Finally, there was no manifest necessity for a mistrial simply because the jury announced it was at an impasse. For all these reasons, the appellate court correctly concluded that Judge Prather abused her discretion in declaring a mistrial and that therefore reprosecution of the defendant was barred on double jeopardy grounds.

General Double Jeopardy Principles

A defendant is protected by the double jeopardy clauses of our federal and State Constitutions against repeated prosecutions for the same offense. U.S. Const., Amends. V, XIV; Ill . Const., Art. I, §10. The protection afforded by the double jeopardy clause embraces a defendant's right to have his trial completed before a particular tribunal. *Arizona v. Washington*, 434 U.S. 497, 503 (1978) [hereafter *Washington*]. When a jury trial is involved, the clause protects a defendant's valued right to have the particular jury he has selected decide his fate. *Washington*, 434 U.S. at 503-04; *People v. Street*, 316 Ill.App.3d 205, 211 (4th Dist. 2000). Protecting a defendant against a second trial after a first trial has been improperly terminated rests on the recognition that a second trial increases the financial and emotional burden on the defendant, prolongs the period during which he is stigmatized by unresolved accusations, and enhances the risk that the defendant, although innocent, will be convicted. *Washington*, 434 U.S. at 503-04. "In the final analysis, the judge

must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his facts." *United States v. Jorn*, 400 U.S. 470, 486 (1971).

Because of the importance to the defendant of his right to his selected tribunal, before a trial court declares a mistrial without his consent, there must be a "manifest necessity" for the mistrial. *Washington,* 434 U.S. at 505; *People v. Burtron*, 376 Ill.App. 856, 862 (5th Dist. 2007). This means that, to warrant a mistrial, the circumstances must be "very extraordinary and striking," and the necessity for the mistrial must be "imperious."*Downum v. United States*, 372 U.S. 734, 736 (1963). Although a trial judge's determination to declare a mistrial is reviewed for an abuse of discretion, the judge may declare a mistrial only if a "scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." *Jorn*, 400 U.S. at 485; see also *People v. Segoviano*, 189 Ill.2d 228, 241 (2000) (a judge's decision to take the "drastic course of action" of declaring a mistrial should be made only where the ends of substantial justice cannot be attained without discontinuing the trial).

When the declaration of a mistrial is attributable to an act of judicial indiscretion, retrial of a defendant is barred. *Jorn*, 400 U.S. at 485; see also *People v. Wiley*, 71 Ill.App.3d 641, 645 (1st Dist. 1979). Consequently, if a trial judge fails to exercise "sound" discretion when determining that a mistrial is warranted, the basis for granting deference to the judge's decision disappears. *Washington*, 434 U.S. at 510. A judge who makes a decision to declare a mistrial that is clearly against logic abuses his or her discretion in doing so. *People v. Largent*, 337

Ill.App.3d 835, 839 (4th Dist. 2003).

Whether a manifest necessity exists for a mistrial must be determined on a case-by-case basis. *Illinois v. Sommerville*, 410 U.S. 458, 463 (1973); *Street*, 316 Ill.App.3d at 211. Application of the double jeopardy clause therefore is neither facile nor routine. *United States v. DiFrancesco*, 449 U.S. 117, 127 (1980). Jury deadlock has been called a "classic example" of when a second trial may be permitted after a first trial has been terminated prior to the return of a verdict. *People v. Andrews*, 364 Ill.App.3d 253, 265 (2d Dist. 2006), citing *Downum v. United States*, 372 U.S. at 735. However, the jury must be truly unable to reach a unanimous verdict before the court can properly declare a mistrial. *People v. Cearlock*, 381 Ill.App.3d 975, 987 (5th Dist. 2008) ("The question is not *why* the jury could not reach a verdict, but whether the jury was truly deadlocked with no hope of reaching a verdict, because a hopelessly deadlocked jury creates a manifest necessity for the court to declare a mistrial and discharge the jury so that another jury *can* reach a verdict."), emphasis in original.

Here, the appellate court determined that: 1) the defendant did not consent to nor acquiesce in the trial court's declaration of a mistrial; 2) the trial court's decision to declare a mistrial resulted from an act of judicial indiscretion; and 3) there was no manifest necessity for the mistrial. *People v. Kimble*, 2017 IL App (2d) 160087, ¶¶ 28, 42, 56. These conclusions were all correct, and the State's efforts to persuade this Court to the contrary should be rejected.

Lack of Consent

A defendant who requests or consents to a mistrial is presumed to have deliberately chosen to forego the opportunity to obtain a verdict from the tribunal

he has selected and, in such circumstances, there is no bar to reprosecution. *People v. Dahlberg*, 355 Ill.App.3d 308, 312 (2d Dist. 2005); *People v. Bagley*, 338 Ill.App.3d 978, 981 (2d Dist. 2003). On the other hand, when the court declares a mistrial without the defendant's consent, a retrial is not allowed unless a manifest necessity existed for it, because the court has necessarily deprived the defendant of his right to have the tribunal he has selected decide his fate. *Jorn*, 400 U.S.at 484; see also *Dahlberg,* 355 Ill.App.3d at 312.

The State cites *People v. Camden*, 115 Ill.2d 369 (1987) and *People v. Segoviano*, 189 Ill.2d 228 (2000), for the proposition that the double jeopardy clause does not bar the retrial of a defendant where the defendant has consented to or acquiesced in the declaration of a mistrial. (St. Br., pp. 8-9) Extrapolating from this proposition, the State submits that this Court should find the defendant consented to Judge Prather's declaration of a mistrial because: 1) he had the opportunity to object when the judge declared a mistrial but failed to do so; and 2) he moved unsuccessfully for a mistrial, on unrelated grounds, on the first and again on the second day of trial, and these actions therefore constituted express consent to Judge Prather's subsequent declaration of a mistrial when the jury told her it was at an impasse. (St. Br., pp. 8-15) These claims do not hold up under even minimal scrutiny.

a) The defendant did not expressly consent to a mistrial by virtue of having moved for a mistrial on different grounds earlier in the trial.

The defendant will address the State's second proposition first – that by seeking a mistrial earlier in the midst of the trial, on unrelated grounds, the defendant expressly consented to Judge Prather's subsequent declaration of a

mistrial when the jury announced it was at an impasse. The defendant's initial inclination is to argue that the State has forfeited this particular argument because it never raised it before the trial court, before the appellate court, or even before this Court in its petition for leave to appeal. See *People v. Carter*, 208 Ill.2d 309, 318 (2003) (State forfeited argument made on appeal from appellate court's ruling granting defendant relief, where argument was not made in appellate court or in State's petition for leave to appeal but instead was made for first time in State's brief before Supreme Court). However, a review of the cases upon which the State relies for this proposition reveals the argument to be without merit, and thus this Court may simply reject the State's argument outright without any need to address whether it has been forfeited.

The primary, and only Illinois, cases the State cites in support of this proposition are *People v. Mosley*, 74 Ill.2d 527 (1979), and *People v. Orenic*, 88 Ill.2d 502 (1981). (St. Br., p. 14) Neither is analogous to the defendant's case. In *Mosley,* defense counsel moved several times for a mistrial on grounds directly related to those on which the trial court eventually declared the mistrial – the publishing of a prejudicial newspaper article about the defendant. While the defense argued a mistrial was warranted because the prosecutor was responsible for the appearance of the article, the trial court found a mistrial was necessary to insure the defendant received a fair trial with unbiased jurors. *Mosley*, 74 Ill.2d at 535-36.

Orenic presents a similar situation. At the defendant's trial on a charge of attempt murder, the trial court refused the defendant's tendered instructions on self-defense. During deliberations, the jury sent out a note asking whether it could consider the defense of self-defense in resolving the charge. At that point,

defense counsel told the court the defendant's position was that "we would move to dismiss with prejudice and if that is not allowed, we would move for a mistrial." *Orenic,* 88 Ill.2d at 505-06. The trial court refused to dismiss with prejudice, but did grant a mistrial. *Orenic* at 506-07. Thereafter, Orenic brought a mandamus action, asking this Court to enter an order precluding his retrial on double jeopardy grounds. Citing *United States v. Jorn*, 400 U.S. 470, as setting forth the applicable standard, this Court refused to bar a retrial, noting that, "It is clear that the defendant sought, or at least consented to, *the mistrial that the court declared*." *Orenic*, 88 Ill.2d at 508, emphasis added.

In other words, "the mistrial that the court declared" in *Orenic* was one based on the same grounds on which the defendant had sought it – that is, the jury's tendering of a note reflecting it was considering a defense on which the trial judge had earlier refused to instruct it. The same is true with respect to each of the other cases cited by the State. In each instance, the defense sought a mistrial based on the same grounds upon which the judge ultimately declared it. See, e.g., *United States v. Buljubasic*, 808 F.2d 1260 (7th Cir. 1987) (trial court declared mistrial after determining it had improperly failed to sever defendant's case from the co-defendant's case; defendant had earlier sought a mistrial on those grounds); and *State v. Saunders*, 267 Conn. 363 (2004) (defendant repeatedly moved for mistrial based on jury deadlock; court initially denied request and gave jury equivalent of a *Prim* instruction, but thereafter declared mistrial when jury remained unable to reach a verdict).

In this case, defense counsel moved for a new trial on the first day of trial on the basis that the testimony of S.M.'s stepsister, Brooklyn, did not qualify as

"other crimes" evidence and that this evidence therefore should not have been admitted at trial. (R. 646) The court denied the motion. (R. 647) On the second day of trial, counsel moved for a mistrial when McHenry County detective Michele Asplund volunteered to the jury that the defendant had asked for an attorney at the close of his interrogation. (R. 724-25) The trial judge denied this motion as well, finding Asplund did not deliberately reference the defendant's statement nor did the prosecutor intentionally elicit it, and that any prejudice was averted by her instruction to the jury to disregard it. (R. 727) Trial continued thereafter, with the defense presenting its evidence, closing arguments being presented, and the jury being instructed and retiring to deliberate. Prior to the jury beginning its deliberations, defense counsel made no other requests for a mistrial, nor did the defense reiterate the earlier requests the court had denied.

By the time the trial ended and the jury began deliberating, then, the landscape of the case had changed. It is clear at this point – as reflected by defense counsel's statement to the court when discussing the jury's note that giving jurors a *Prim* instruction and directing them to return the next day to continue deliberating were "really the only two viable alternatives" (R. 825) – that the defendant had by then made a conscious choice to continue to a verdict with the jury he had selected. The correctness of this decision was likely only reinforced when the jury, less than three hours into its deliberations, asked to see once again the video of S.M.'s interview at the CAC, (R. 819-20), a request which indicated that at least some of the jurors had questions about S.M.'s credibility.

It would be remarkable indeed– after a trial court has denied a defendant's motion for a mistrial on a particular ground; after trial has continued and closing

arguments have been presented; and after the jury has retired to deliberate – that a defendant would to be deemed to have consented to a court's *sua sponte* declaration of a mistrial, on any ground whatsoever, by virtue of his earlier unsuccessful motion based on entirely different and wholly unrelated grounds. Here, when the issue of jury impasse (on the second occasion of its happening) became known to the defendant, he elected not to ask for a mistrial but, instead, to ask that the jury be given a *Prim* instruction and be told to continue to deliberate. As the appellate court recognized, at that point in time,"defense counsel's position that he wanted the trial to continue could not have been clearer." *Kimble*,¶ 28. The State's contention– that any prior defense motion for a mistrial, on any ground whatsoever, constitutes express consent to any mistrial declared thereafter, on any other ground – is not only unsupported by any law, but contrary to common sense.

b) The defendant did not implicitly consent to the trial court's declaration of a mistrial.

Relying primarily on *People v. Camden*, 115 Ill.2d 369 (1987), and *People v. Escobar*, 168 Ill.App.3d 30 (1st Dist. 1988), the State argues that the defendant implicitly consented to a mistrial because he had the opportunity to object when Judge Prather declared the mistrial but failed to do so. Notably, although the State argued this same theory in the trial court (see C.235-38, ¶¶ 14-15), Judge Prather never found the defendant "implicitly consented" to the mistrial but instead found only that there was a manifest necessity for it. (R. 836) Moreover, neither *Camden* nor *Escobar* is on point. The facts in *Camden* bear no resemblance to the facts of our case. The facts of *Escobar* likewise are dissimilar and, in addition,

the appellate court here agreed with the defendant that *Escobar* is poorly reasoned and inconsistent with federal double jeopardy principles. Neither of these cases supports the State's claim that the defendant implicitly consented to the mistrial here.

In *Camden,* the defendant, an admitted alcoholic, was charged with several violent crimes based on an incident that took place at a tavern. During a trial that began in late June, the court learned that one of the jurors had made comments, overheard by all the other jurors, regarding his inability to render an impartial verdict because of his own prior drinking problem. *Camden*, 115 Ill.2d at 372-73. After learning of this, the court questioned the juror in open court, who confirmed his doubts about his ability to render an impartial verdict. The court then offered defense counsel the opportunity to question the juror, but counsel declined and asked for a recess to speak with the prosecutor. After the recess, defense counsel made no further comment about the juror, and the court declared a mistrial. *Camden*, 115 Ill.2d at 373-75.

This Court found that the defense had several opportunities to voice objections to the declaration of a mistrial but instead remained silent throughout the time the judge was questioning the juror and up to the time a mistrial was declared. Not only did defense counsel decline to question the juror who expressed doubts as to his ability to be impartial, but he failed to suggest any course of action to the court to address the problem. When the court thereafter called the jurors out, declared a mistrial, and discharged them, defense counsel did nothing other than thank them. *Camden*, 115 Ill.2d at 375-79.

Along with defense counsel's utter silence and inaction when notified of

the juror problem, this Court found further evidence that the defendant had acquiesced in the trial court's decision to declare a mistrial by virtue of his attorney's actions following declaration of the mistrial. Immediately after the trial court declared the mistrial, defense counsel agreed with the prosecutor that a new judge might be required to hear the case and expressly waived the defendant's speedy trial demand. A few weeks thereafter, on July 19, the case was set by agreement for a retrial on November 13. The original trial judge recused himself on July 25, and the case was assigned to a new judge. On August 30, the defendant filed a motion for substitution away from the new judge. It was not until September 11, after the parties had appeared in court several times and the defense had acted in numerous ways showing its consent to a retrial, that the defendant filed a motion to bar her reprosecution. *Camden*, 115 Ill.2d at 375-79.

Here, unlike *Camden*, when informed of the jury note defense counsel immediately informed the trial judge of the defendant's desire to continue with the tribunal he had selected. (R. 824-25) Moreover, here, once the judge declared a mistrial, defense counsel did not agree to the setting of a new trial date but instead asked that a status date be set. (R. 827) On that status date, which was the very next time the parties appeared in court, the defendant filed his motion to bar reprosecution. (C. 220-22, R. 831) None of the indicia of consent that existed in *Camden* were present here.

Escobar is also inapt. In *Escobar*, the defendant was charged with first degree murder. During the jury's deliberations, it was brought to the attention of the trial judge that the jury had inadvertently been given "street files" containing inadmissible and potentially prejudicial information. When this fact was discovered,

the judge asked defense counsel if he wished the court to declare a mistrial, but counsel told the court the defendant wanted to continue the proceedings. The court thereafter called the jurors into court and instructed them that they should consider only materials admitted into evidence in reaching their verdict. Upon inquiry, each juror told the court that, notwithstanding the materials inadvertently given to them, they still believed they could reach an impartial verdict. *Escobar*, 168 Ill.App.3d at 36.

The jurors continued their deliberations and were sequestered for the evening. They deliberated again all the next day. At 10:00 a.m. the following day, they told the court they were unable to reach a verdict. Defense counsel requested a *Prim* instruction but, instead, the judge, *sua sponte*, declared a mistrial. *Escobar,* 168 Ill.App.3d at 37-38. On the defendant's appeal from the trial court's order refusing to bar his re-prosecution on double jeopardy grounds, the First District found the defendant had impliedly consented to the declaration of a mistrial. Even though defense counsel had made clear the defendant's desire to have the jury continue its deliberations, the First District concluded that, once the trial court announced its intention to declare a mistrial, the defendant had a further obligation to specifically object, on double jeopardy grounds, to the court's proposed action. *Escobar*, 168 Ill.App.3d at 39.

Escobar is distinguishable on numerous grounds, both factual and legal. First, as a factual matter, it presents a case where the court allowed the jury to engage in protracted deliberations, over several days, before deciding it was necessary to declare a mistrial. In addition, as was also true in *Camden*, an issue arose as to the jury's ability to be impartial, thereby creating a manifest necessity

for the mistrial regardless of the defendant's desire to have the jury continue deliberating.

Escobar is also inapt because the court there was wrong in its analysis of the law. As the appellate court here recognized – see *Kimble*, ¶ 26 – the *Escobar* Court misunderstood, and accordingly misapplied, double jeopardy principles by holding that, even though the defendant had made clear his desire to have the jury continue its deliberations, he implicitly consented to the trial judge's declaration of a mistrial simply because he failed to specifically object, on double jeopardy grounds, when the court announced its intention to declare a mistrial.

Upon federal habeas review of Escobar's conviction, the Seventh Circuit pointed out the legal flaws in the First District's reasoning:

> We believe that the . . . Illinois appellate court employed an overly broad definition of consent in holding that Escobar impliedly consented to the mistrial declaration. The Supreme Court has never required that an objection to a mistrial [which the Court construed counsel's request for a *Prim* instruction to be] contain an explicit reference to "double jeopardy" or "re-trial" to preserve a defendant's double jeopardy rights. Neither has this Court ever imposed such a requirement. When the possibility of a mistrial is raised, defendant's obligation is to indicate "whether [he or she] wants a verdict." [cite omitted] As long as the defendant's desire that the first jury continue deliberating is clear, there is no additional obligation to broach the topic of re-trial. *Escobar v. O'Leary*, 943 F.2d 711,715-16 (7th Cir. 1991).[6]

Escobar is distinguishable on yet another ground. In that case, after denying defense counsel's request for a *Prim* instruction, the trial judge specifically announced, before directing that the jury be brought back out, his intention to

[6]The Seventh Circuit went on to find that, even though the defendant did not consent to the mistrial, there was a manifest necessity for it because of the possibility of juror bias. *Escobar*, 943 F.2d at 718.

declare a mistrial. See *Escobar*, 168 Ill.App.3d at 38 ("In light of what went on, what went back to the jury room and everything else, I'm going to declare a mistrial."). That did not happen here. Here, after questioning the jury foreperson, the judge engaged in the following exchange with trial counsel:

THE COURT: Mr. Gibbons [Assistant State's Attorney]?

MR. GIBBONS: Judge, I do understand the foreperson's comments. I understand it seems as though they are completely deadlocked at this point and it might be futile for future further deliberation. However, I believe that procedurally, from the State's point of view, we should at least attempt the Prim instruction before we discharge the jury.

MR. HAIDUK (Defense Counsel):

I would agree with the State, your Honor.

THE COURT: Pardon?

MR. HAIDUK: I would agree with the State.

THE COURT: You agree with the State?

MR. HAIDUK: I do. Or I guess, in the alternative, my argument would be we - - despite them saying it won't make a difference, come back tomorrow. I think those are really the only two viable alternatives.

MR. GIBBONS: We could always read them the Prim instruction and bring them back tomorrow.

THE COURT: Mr. Haiduk?

MR. HAIDUK: I don't have any objection to that, Judge.

MR. GIBBONS: Just suggestions, Judge. I'm not saying that's the right method that we believe but - -

THE COURT: I am fearful, folks, if I do that, you're going to have some extremely angry jurors.

MR. GIBBONS: I understand, Judge.

THE COURT: There has [sic] been some very loud voices back there for a period of time. I think it would be futile to do that. Therefore, I would decline.

MR. GIBBONS: Understood, Judge.

THE COURT: Bring the jurors back, please.

(Whereupon, the following proceedings were held in open court in the presence of the jurors.)

THE COURT: Ladies and gentlemen of the jury, the Court is going to excuse you from further service in this case. I thank you for the time and attention that you've given to the Court and the lawyers and for the efforts that you've made. You are free to go.

(Whereupon, the following proceedings were held out of the hearing and presence of the jury.)

THE COURT: The Court would declare a mistrial. (R. 824-26)

As the above reflects, the judge did not announce her intention to declare a mistrial before calling the jury back into the courtroom and discharging them. Indeed, it was not until after the jury had been discharged and left the courtroom that the judge formally declared a mistrial, a point at which making an objection would have been futile. While one could read Judge Prather's comments as indicating her intention to declare a mistrial, they could also be read as indicating that, while she would not require jurors to return the next day, she would not outright refuse to even give them a *Prim* instruction. It was, after all, only 4:30 in the afternoon when the jury was called back out. Thus, even if defense counsel did not expect that the judge would allow the jury to continue to deliberate past that day, it was not unreasonable for him to believe the judge was amenable to giving jurors a *Prim* instruction and allowing them to continue their deliberations that day to

see if a verdict could be reached.

The record further reflects that Judge Prather called jurors back into the courtroom immediately after ending her discussion with counsel and then abruptly discharged the jury immediately upon its return. Even assuming defense counsel knew it was a possibility the judge would declare a mistrial, he had little time (nor did it make much sense) to re-state the defendant's position before the jury returned. As the appellate court recognized, defense counsel "could not have been clearer" that the defendant wanted the jury's deliberations to continue and, as such, there was no need for him "to make a *pro forma* objection when the court declared the mistrial." *Kimble*, ¶¶ 28, 30. And counsel could have reasonably refrained from making a further objection in the jury's presence because of the risk that the jurors would hold the defendant responsible for compelling them to continue their deliberations. See *Henderson v. Wright*, 533 F.Supp. 1373, 1376 (D. Me. 1982), and *Camden v. Cir. Ct. of Crawford Cty,* 892 F.2d 610, 615, fn. 6 (when defense counsel objects to a mistrial based on jury deadlock in the jury's presence, he creates the risk that the jury will be disposed against his client for compelling further deliberations, contrary to the wishes of the judge and the jurors). In sum, where there was little reason, before the jury was brought back in, to re-state a position presented minutes earlier, and where defense counsel had no opportunity to object once the jury was brought back in, no implicit consent can reasonably be found. See *Dahlberg*, 355 Ill.App.3d at 315 (court will not find implicit consent where defendant is not given sufficient opportunity to object to court's declaration of a mistrial).

In an effort to justify Judge Prather's precipitous declaration of a mistrial,

the State contends that the parties' discussion of the jury note shows that: 1) defense counsel agreed with the prosecutor that the jury was "completely deadlocked"; 2) defense counsel simply acquiesced in the prosecutor's suggestion that a *Prim* instruction be given but did not seek the instruction himself; and 3) defense counsel's silence when the prosecutor said he was "not saying" either of the alternatives proposed by the court was "the right method" signaled acceptance of the prosecutor's view that a mistrial was necessary. (St. Br., pp. 18-20) The State's interpretation of the parties' discussion is not only illogical, but is not borne out by the record.

First, defense counsel did not agree with the prosecutor that the jury was completely deadlocked. Instead, he agreed only that a *Prim* instruction was warranted ("despite" the jury's comments, defense counsel said, he believed the court should give jurors a *Prim* instruction). More significantly, not only did defense counsel ask that a *Prim* instruction be given and ask, if further deliberations were not fruitful, that the jury be instructed to return the next day, he also told the court that *"those are really the only two viable alternatives,"* (R. 825), a fact the State fails to mention at any point in its entire argument. Defense counsel's words and actions undermine both the State's claim that the defendant did not affirmatively seek a *Prim* instruction, and its claim that the defense agreed with the prosecution that the jury was "completely deadlocked" and a mistrial was necessary.

Judicial Indiscretion

Both the United States Supreme Court and an Illinois court have held that when the declaration of a mistrial is attributable to an act of judicial indiscretion, retrial is barred. See *United States v. Jorn*, 400 U.S. at 485, and *People v. Wiley*,

71 Ill.App.3d at 645. Here, when discussing with the parties the note she had received from jurors announcing they were at an impasse, Judge Prather revealed that she had received a similar communication through her bailiff shortly after the jury re-watched the video of S.M.'s interview at the CAC, and had told her bailiff at that time to tell the jury to continue its deliberations. (R. 821-22) No notice was given to the parties, nor was the defendant or his attorney present, when this communication between the judge and the jury took place. The defendant therefore had no input into what the jury should be told, or what action should be taken, at that time.

While the judge may not have acted out of any inappropriate motive or intent, her actions nevertheless constituted an improper *ex parte* communication which contributed to her subsequent decision to declare a mistrial. Thus, in this case, Judge Prather used the fact that the jury, after less than three hours of deliberations, had expressed the view it was at an impasse to justify her view that, after an additional two hours of deliberations without a verdict, further deliberations would be "futile." (R. 825-26) As the appellate court noted, it was the very fact of the judge's *ex parte* communication with the jurors that "tipped the scales in the judge's decision to *sua sponte* abort the trial rather than give the *Prim* instruction." *Kimble*, ¶ 36. In short, any purported necessity to declare a mistrial on the basis that the jury's impasse had now lasted for five hours was created by the trial judge herself, by failing to notify the parties of the jury's earlier statement, in order to give them the opportunity to request the *Prim* instruction at that time, before the judge could conclude that jurors were too entrenched in their opinions for a *Prim* instruction to have any effect.

Wiley presents an analogous situation. In that case, the State, after calling a police officer to testify at the defendants' jury trial, sought an overnight continuance in order to bring in its remaining witnesses. The trial judge refused to grant the continuance and then announced it was acquitting the defendants and dismissing the case. The State appealed from the judge's order, stating that the judge had not actually acquitted the defendants, but instead had effectively dismissed the complaints against them. *Wiley*, 71 Ill.App.3d at 642-43.

On appeal, the Court found that, regardless of whether the trial court's order was construed as an acquittal or as a dismissal of the complaint, double jeopardy barred a retrial. While acknowledging that retrials were allowed in instances where a mistrial was declared at a defendant's request, the case before it was different, the Court reasoned, because "the defendants presented no motion and in fact sat as silent observers while the trial judge, Sua sponte, reached his decision." *Wiley,* 71 Ill.App.3d at 644. Quoting *United States v. Jorn*, 400 U.S. at 484, the Court concluded:

> The defendants, as in *Jorn*, did nothing to initiate the dismissal of the case. It was the sole, unprompted act of the trial judge. * * * Under the facts in this case, whether the trial judge's action is viewed as an acquittal or as a dismissal resulting from judicial indiscretion, the defendants cannot be retried.

Wiley, 71 Ill.App.3d at 644-45.

The appellate court here, relying on both *Wiley* and *Jorn*, agreed that Judge Prather's decision to abort the defendant's trial rather than consider other available alternatives was a direct consequence of her *ex parte* communication with the jury. The court stated:

> When we read *Wiley* in light of *Jorn*, we interpret *Wiley* to mean that a mistrial is improper where the trial judge is responsible for the difficulty and alternatives are available. . . . In our case, the judge's *ex parte* jury communication led to the precipitous declaration of a mistrial without considering available alternatives. * * * The judge disclosed the *ex parte* communication to emphasize that the 4:25 p.m. note from the jury was "the second time" the court "received information from the jury that they . . . are at an impasse." Hence, the judge concluded that it would be "futile to give the *Prim* instruction and allow further deliberations. Without the earlier *ex parte* communication, the court could not reasonably have believed that giving the *Prim* instruction would be futile.

Kimble, ¶¶ 35-37.

The State submits that the appellate court erred in finding Judge Prather's refusal to consider alternatives to the declaration of a mistrial resulted from an act of judicial indiscretion. It contends that this Court's decisions in *People v. McLaurin*,235 Ill.2d 478 (2009), and *People v. Johnson*, 238 Ill.2d 478 (2010), are "directly on point," and that the appellate court failed to consider this "controlling precedent" in determining that the judge abused her discretion. (St. Br., pp. 22-25) *McLaurin* and *Johnson*, however, are in no way "directly on point" and, as such, can hardly be considered controlling precedent.

McLaurin and *Johnson* are not only factually distinct, but legally inapt. In *McLaurin*, both the defendant's attorney and the prosecutor were present when the jury's notes were discussed, and defense counsel thus had an opportunity for input into the proper way to respond. 235 Ill.2d at 483-84, 488. In *Johnson*, although neither counsel nor the defendant was present when the judge directed the jury to continue its deliberations, this Court found no prejudice inured to the defendant when the jury thereafter returned a verdict of guilt because the evidence against him was overwhelming and there was thus no basis upon which to believe the

outcome would have been different had the defense been present when the court communicated with the jury. *Johnson*, at 485-86.

The present case is distinct from *McLaurin* and *Johnson* for an even more significant reason: contrary to how the State frames the issue, the error here is not simply that the trial judge engaged in *ex parte* communications with the jury in the absence of both the defendant and his attorney. Rather, it is that she used the fact of her prior *ex parte* communication as the basis for refusing the parties' request for a *Prim* instruction and further deliberations, and thereby deprived the defendant of the opportunity for a verdict from his chosen tribunal. In both *McLaurin* and *Johnson*, by contrast, the juries *did* deliberate to a verdict, and this Court found no evidence that the judge's exhortation to those jurors to continue their deliberations prejudiced the defendant's ability to obtain a fair and impartial verdict. Here, the prejudice to Kimble is the very absence of a verdict, because the judge short-circuited the jury in its deliberations based on her belief that giving the jurors a *Prim* instruction or directing them to continue deliberating would have been futile since she had already told them to "continue to deliberate" and no verdict had yet resulted.

The State submits that the judge's earlier exhortation to the jury to continue to deliberate "echoes *Prim's* directive that it is the jurors' duty 'to consult with one another and to deliberate,'" and that the defendant therefore suffered no prejudice from the *ex parte* communication. Relatedly, it argues that the remainder of the *Prim* instruction either "simply repeat[s] instructions the jurors had already heard that morning," or "ha[d] no meaningful application here because the jury did not reach a verdict. . . ." (St. Br., p. 26) Neither of these contentions explains

or justifies the court's refusal to give a *Prim* instruction.

The first paragraph of the *Prim* instruction tells jurors that their verdict must be unanimous, a directive that is also included in the instructions given prior to the start of the jury's deliberations. (See I.P.I. Crim. No. 26.01, and C. 194) The remainder of the instruction, however, tells them more. Most significantly, it admonishes jurors of their duty to communicate with each other, reexamine their views, and change their opinions if they are able to do so without surrendering their honest convictions:

> The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.
>
> It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.
>
> You are not partisans. You are judges – judges of facts. Your sole interest is to ascertain the truth from the evidence in the case.

See *People v. Prim*, 53 Ill.2d 62, 75-76 (1972), and I.P.I. Crim. No. 26.07 (2015).

The appellate court rightly recognized the important function a *Prim* instruction serves, noting:

> Whereas the *Prim* instruction encourages jurors to reexamine their opinions and to abjure them if the evidence warrants it, the direction to "continue to deliberate" conveys a different message: "Keep doing the same thing you're already doing." *Kimble*, ¶ 41.

While the trial judge's observation – that her earlier admonishment to the

jury to "continue to deliberate" did not result in a verdict– may have been accurate on its face, her conclusion that giving a *Prim* instruction consequently would be a futile gesture was neither correct nor reasonable. Notably, the foreperson, when asked if anything had changed during the course of the jury's deliberations, told the judge that "[s]ome numbers changed here and there," but that the jury had been stuck at a certain proportion for about three hours. (R. 823) The fact that "some numbers changed here and there" shows that jurors were still willing to reexamine their views and change their opinions, even if they were moving in different directions. Moreover, even if the judge's belief that a *Prim* instruction would have no effect was within the realm of possibility, that belief arose only because of the judge's failure to provide the opportunity for the giving of the instruction when first informed of the jury's impasse. As such, the judge's decision to declare a mistrial resulted from an earlier act of judicial indiscretion and precludes a retrial in this case.

Lack of Manifest Necessity

In *People v. Andrews*, 364 Ill.App.3d 253 (2d Dist. 2006), the court identified six factors to be considered when determining whether a manifest necessity exists for a mistrial based on juror deadlock. Those factors are: 1) the jury's collective opinion that it cannot agree; 2) the length of the jury's deliberations; 3) the length of the trial; 4) the complexity of the issues presented to the jury; 5) any proper communications the judge has had with the jury; and 6) the effects of possible exhaustion and the impact that coercion of further deliberations might have on the verdict. *Andrews*, 364 Ill.App.3d at 266-67. Applying these six factors to the defendant's case, the appellate court properly concluded that no manifest necessity

existed for the mistrial. *Kimble*, ¶ 56.

1) Factor One: The jury's collective opinion that it is deadlocked

In determining that a mistrial was warranted, Judge Prather relied heavily, if not exclusively, on the statement of the jury foreperson that he did not believe further deliberations would be fruitful. (R. 825-26) While a trial judge ordinarily has discretion to determine how long a jury should be permitted to continue its deliberations, the jury's own view of its inability to reach a verdict is only one factor to be considered and is not sufficient, in and of itself, to warrant a mistrial. *People v. Logston*, 196 Ill.App.3d 30, 33 (4th Dist. 1990) (jury's assessment of its own inability to reach a verdict is not determinative of whether jurors are hopelessly deadlocked); *People v. Willmer*, 396 Ill.App.3d 175, 180 (3rd Dist. 2009) (a trial court is not required to accept a jury's own assessment of its ability to reach a verdict or to declare a mistrial simply because jurors have not been able to return a unanimous verdict immediately).

In *Willmer,* the defendant was charged with one count of aggravated criminal sexual abuse based on the allegation that he had engaged in sexual intercourse with a 15-year-old girl. All of the evidence on the charge was presented in a single day of trial. *Willmer*, 396 Ill.App.3d at 177. The sole issue before the jury was whether the defendant reasonably believed the complainant was 18 at the time he engaged in sexual relations with her. Conflicting evidence was presented on this issue. *Willmer*, 396 Ill.App.3d at 177.

The jury retired to deliberate and, after deliberating less than three hours, sent a note to the judge stating it was deadlocked and asking for transcripts. The judge declined the request for transcripts, and told the jury to continue its

deliberations. Two hours later, the jury advised the judge of the current status of its deliberations and, over defense objection, the judge gave a *Prim* instruction. An hour later, the jury sent a note stating it was "hopelessly deadlocked." The defendant requested a mistrial but the judge discharged the jury for the day with directions to return the next morning. After less than two hours of deliberation the next morning, the jury returned a verdict finding the defendant guilty. *Willmer,* 396 Ill.App.3d at 178.

The appellate court found that the trial judge acted properly in denying the defendant's motion for a mistrial, despite the fact that the jury on three separate occasions expressed its belief that it was deadlocked and, on the final occasion, told the judge it was "hopelessly" deadlocked. *Willmer*, 396 Ill.App.3d at 179-80. In finding the judge acted properly in *refusing* to declare a mistrial based on ostensible jury deadlock, the court remarked: "While the case was not overly complex and the evidence was presented in a single day, the charge alleged was a serious one and the jury's determination involved a very difficult assessment of which witnesses to believe and what inferences to draw from the evidence presented." *Willmer*, 396 Ill.App.3d at 180.

Similar, but more compelling, circumstances existed here. Trial lasted three days, there were four separate counts before the jury, and the question of whether S.M. was a credible reporter was hotly contested. Under these circumstances, the trial judge could not reasonably conclude that the jury's mere pronouncement that it was at an "impasse" signaled that it was "hopelessly deadlocked" and that further deliberations, with the assistance of a *Prim* instruction, would be of no use.

2) Factors two through four: length of deliberations, length of trial, and complexity of issues

The State submits that "the trial was short" and the question before the jury was simple, in that "the case presented only a single issue: whether S.M. was telling the truth. . . ." (St. Br., p. 30) Contrary to the State's characterization, the trial was not short nor were the issues to be resolved simple. As noted above, the presentation of evidence and arguments took the better part of three days (see R. 485, 684, and 741) and involved four separate acts of sexual misconduct alleged against the defendant, purportedly committed at a time when all or most of S.M.'s siblings were also present. (C. 10-12) The State presented six witnesses (R. 506, 542, 559, 585, 627, and 657) and, in addition, presented a 34-minute videotaped interview of the complaining witness, S.M., as well as a three and a half hour video of the interrogation of the defendant by two McHenry County detectives, during which he consistently denied any misconduct. (See P. Exs. 24 and 28) After only a short period of deliberation, the jury asked to see S.M.'s videotaped interview again, signaling that at least some jurors had doubts about the credibility of her accusations.

Thus, as in *Willmer*, while the trial boiled down to a credibility contest between S.M. and the defendant, there were numerous factors impacting S.M..'s credibility that the jury had to assess. These included: that Kimble persistently and insistently denied, over the course of the three and a half hour interrogation, any improper conduct toward S.M. or her siblings (P.Ex. 28); that S.M. gave inconsistent versions of what happened and, two years after her initial complaint, dramatically changed her claim as to the nature of the conduct allegedly engaged

in by the defendant, then recanted that claim, then reasserted it (C. 123-25, R. 736-37); that there was no physical evidence, or testimony of independent witnesses, corroborating S.M.'s allegations that the defendant had abused her at his home; and that even her own father testified that, until S.M. made a complaint to his girlfriend in December of 2013, he had never seen any indication that anything was wrong and, moreover, that the couple's six children wanted to go to the defendant's house for visits, including overnight visits, all the time, including the time after when S.M. claimed an act of misconduct had first taken place. (R. 531-39) In view of all these facts, the appellate court itself noted that, even though the issue the jury had to resolve was S.M.'s credibility, "That issue was anything but straightforward." *Kimble*, ¶ 51.

Nor were the jury's deliberations so unduly lengthy that the trial judge could find there was no reasonable alternative other than to declare a mistrial. Jurors asked to see the video of S.M.'s interview again after less than three hours of deliberation. (R. 812-13, 820-21) After watching the video and deliberating an additional two hours, they sent out the note stating they were at an impasse. (C. 174, R. 820-22) This note was not an unequivocal statement that jurors were "hopelessly deadlocked," but only an indication that they had not yet been able to come to a unanimous verdict and were looking for guidance – guidance a *Prim* instruction would have provided. Indeed, in light of the foreperson's acknowledgment that the numbers had "changed here and there" over the course of the jury's last three hours of deliberations (R. 823), any conclusion that the giving of a *Prim* instruction would have no effect was not only premature but entirely unreasonable.

3) Factor five: communications between judge and jury

The defendant has already discussed this factor above when discussing whether Judge Prather's decision to declare a mistrial resulted from an act of judicial indiscretion, and he therefore relies on that argument here.

4) Factor six: jury exhaustion and possible coercive effect of continued deliberations

There is no indication in this case that jurors were suffering from exhaustion. They had been deliberating less than five hours and it was still early in the day when they announced they were at an impasse. In fact, Judge Prather herself noted that she could hear "some very loud voices" emanating from the jury room, (R. 825-26), indicating not that the jurors were "exhausted" but, rather, that they were still engaged in vigorous debate – exactly what one would hope to be the case when 12 people are tasked with deciding a person's fate on serious criminal accusations he has vehemently denied. The appellate court recognized as well that the loud voices (which it characterized as "angry," although Judge Prather did not characterize them as such) were just a reflection of "tempers flar[ing] in the emotional atmosphere of a criminal trial" and did not "necessarily signal a hopelessly deadlocked jury." *Kimble*, ¶ 48. And, since there was no indication of juror exhaustion or a refusal to communicate with each other but, instead, indications that jurors were still debating the case, any fear that the giving of a *Prim* instruction would have a coercive effect was unfounded.

Taking all the foregoing into consideration, the appellate court correctly concluded: that the defendant did not consent, or impliedly consent, to the trial judge's declaration of a mistrial; that any conclusion that there was a necessity

for a mistrial came about as a result of the judge's own earlier improper communication with the jury; that there was no manifest necessity otherwise for the mistrial; and that the judge therefore abused her discretion in declaring the mistrial and denying the defendant's motion to bar reprosecution. *Kimble*, ¶ 56. This Court should affirm the appellate court.

CONCLUSION

For the foregoing reasons, David Kimble, defendant-appellee, respectfully requests that this Honorable Court affirm the judgment of the appellate court finding that the trial judge abused her discretion in declaring a mistrial and that it further affirm the appellate court's order barring his reprosecution on double jeopardy grounds.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Josette Skelnik, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 49 pages.

/s/Josette Skelnik
JOSETTE SKELNIK
Assistant Deputy Defender

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IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- DAVID KIMBLE Defendant-Appellee	))))))))))	Appeal from the Appellate Court of Illinois, No. 2-16-0087. There on appeal from the Circuit Court of the Twenty-Second Judicial Circuit, McHenry County, Illinois, No. 13 CF 1123. Honorable Sharon L. Prather, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On August 6, 2018, the Brief and Argument of Defendant-Appellee was filed with the Clerk of the Supreme Court of Illinois using the Court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the Court's electronic filing system. One copy is also being mailed to the defendant-appellee in an envelope deposited in a U.S. mailbox in Elgin, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the Court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

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