

Mistrial Misgivings?

By Rob McGuire

In Sumner County recently, a high-profile trial ended in a mistrial leading court watchers to ask the question: What happened and what happens now? Timothy Batts was charged with reckless homicide and several other offenses that resulted from the shooting death of his 11-year-old daughter, Timea. After deliberating for two days, the jury announced that they could not reach a unanimous verdict and the trial judge declared a mistrial.

WHAT IS A MISTRIAL?

A criminal mistrial occurs when something untoward happens after jury members have been sworn in to judge a criminal trial. The trial court judge is the one who has to declare a mistrial, though either the state or the defense can move for a mistrial if they believe the facts and circumstances have caused one. A mistrial can be granted for a variety of reasons, but the mistrial world generally divides into two main causes – impropriety in the trial that potentially causes an unfair result or an inability for the jury to agree on a verdict to a count of the indictment. The first main cause of a mistrial concerns the conduct of the trial itself. For example, if the court rules that a particular piece of evidence cannot be admitted before the jury and a witness refers to that piece of evidence (even unintentionally or unknowingly) a mistrial could be the remedy. The second main reason for a mistrial is far more common – the jury is deadlocked on a charge and cannot reach a unanimous verdict. There is an interesting caveat in Tennessee criminal law. If a jury acquits on a great indicted offense but is unable to reach a verdict on a lesser included offense, the acquittal is a valid verdict and will be accepted by the court. If the judge declares a mistrial, usually jeopardy does not attach and the defendant can be tried again on the charge where the jury deadlocked.

WHAT HAPPENS AFTER A MISTRIAL?

After a mistrial, the ball is firmly in the court of the state as to what happens next.

In situations where the jury has failed to reach a verdict the state must announce to the court whether or not they intend to retry the defendant within a reasonable period of time. A new trial date is selected and the trial will commence as if the first one never occurred with a few exceptions – any verdict that the jury did reach stands and any testimony at that trial can be used in the subsequent trial under the appropriate rules of evidence.

Most often, the state wants to poll the jury privately to see if they can find out what the vote was. It is not unlawful for the prosecutor or the defense (or anyone) to speak with a juror after a mistrial has been declared and the jury has been discharged. I routinely spoke with jurors after a verdict

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or mistrial and I highly recommend the practice to other attorneys. If it is not practical to speak with the jury after a verdict or mistrial, one can always try to locate the foreperson to speak with her about the jury's result (or lack thereof). Often, if the jury's vote was state's oriented – think a vote of 11 to 1 to convict – the state will almost certainly try their case again. A vote that was more defense oriented – even a vote of 7-5 to convict – would be disheartening news for the state since five jurors didn't go for the state's theory and may send the prosecutor looking for a plea bargain.

WHO DOES A MISTRIAL FAVOR?

This is a subject of great debate in the criminal legal community. Many commentators hold that a re-trial favors the defense and there is some credence in that argument. In jurisdictions where defense attorneys do not receive much in the way of

pre-trial discovery for the state, that attorney will have the ability to be far better prepared in a re-trial. As a longtime prosecutor in Davidson County however – where many ADA's provide almost the state's entire file to the defense pre-trial – I always felt that re-trial favored the state because the defense was not required to provide much that would elucidate their theory of the case pre-trial. A re-trial, after you've seen the other side's theory, approach and evidence, would give practitioners the opportunity to be far more prepared for a subsequent trial.

One last thing about mistrials – almost every criminal practitioner who has been doing it awhile hates them. Most often, practitioners go to trial hoping to resolve their case one way or the other. Mistrials are the opposite of that; they extend a case and potentially even complicate it. Regardless of the side you're on, you go into court hoping for a win. More than that, finality.

Rob McGuire, a certified criminal trial specialist and criminal defense attorney in Nashville, spent over a decade as a prosecutor in Davidson County handling some of the most complex cases pursued by the DA's office. As a gang prosecutor, he routinely worked with federal agents and prosecutors. Now, in private practice, Rob represents clients in criminal defense matters in state and federal court. He is certified as a criminal trial specialist by the National Board of Trial Advocacy and is an adjunct professor of law at Belmont Law School. He lives in Nashville with his two children.

