

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 23-330

**SCA EFiled: Nov 01 2024
12:48PM EDT
Transaction ID 74928651**

STATE OF WEST VIRGINIA,

Respondent,

v.

KEVIN SCOTT DICKENS,

Petitioner.

BRIEF OF RESPONDENT

**PATRICK MORRISEY
ATTORNEY GENERAL**

**Katie Franklin [WVSB No. 10,767]
Assistant Attorney General
State Capitol Complex
Building 6, Suite 406
Charleston, WV 25305-0220
Email: *Katherine.H.Franklin@wvago.gov*
Telephone: (304) 558-5830
Facsimile: (304) 558-5833**

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Introduction.....	1
Assignment of Error.....	1
Statement of the Case.....	1
I. Charges	1
II. January 2023 Jury Trial and Mistrial	2
III. February 2023 Motion to Dismiss	4
IV. February to March 2023 Jury Trial	4
V. Sentencing.....	5
Summary of the Argument.....	5
Statement Regarding Oral Argument and Decision.....	5
Argument	5
I. Standard of Review	6
II. Illness—whether COVID or some other ailment—may constitute manifest necessity, and because all major participants of the trial were afflicted, it was appropriate to declare a mistrial.	6
III. The circuit court did not err in rejecting the parties’ proposal to delay the trial for a week, because it was not a reasonable alternative	9
IV. Although not directly set forth in the Argument section of his brief, Petitioner strongly infers elsewhere that the circuit court issued the mistrial as a pretext for addressing other errors throughout the trial; yet, the circuit court’s reasoning was based on neutral grounds that neither the court nor the State could have controlled.....	14
Conclusion	16

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Arizona v. Washington</i> , 434 U.S. 497 (1978).....	6, 7
<i>State ex rel. Betts v. Scott</i> , 165 W. Va. 73, 267 S.E.2d 173 (1980).....	10
<i>State ex rel. Brooks v. Worrell</i> , 156 W. Va. 8, 190 S.E.2d 474 (1972) (Haden, J., dissenting).....	6, 8, 9
<i>State ex rel. Dandy v. Thompson</i> , 148 W. Va. 263, 134 S.E.2d 730, <i>cert. denied</i> , 379 U.S. 819 (1964).....	4, 8, 9
<i>Illinois v. Somerville</i> , 410 U.S. 458 (1973).....	10
<i>Keller v. Ferguson</i> , 177 W. Va. 616, 355 S.E.2d 405 (1987).....	6, 7, 9
<i>Porter v. Ferguson</i> , 174 W. Va. 253, 324 S.E.2d 397 (1984).....	7, 8
<i>State v. Brown</i> , 210 W. Va. 14, 552 S.E.2d 390 (2001).....	14
<i>State v. Davis</i> , 31 W. Va. 390, 7 S.E. 24 (1888).....	8
<i>State v. Gibson</i> , 181 W. Va. 747, 384 S.E.2d 358 (1989).....	4, 9
<i>State v. Green</i> , 408 Wis.2d, 992 N.W.2d 56 (2023).....	10, 11
<i>State v. LaRock</i> , 196 W. Va. 294, 470 S.E.2d 613 (1996).....	6
<i>State v. Rush</i> , 11 N.W.3d 394 (2024)	13, 14
<i>State v. Swafford</i> , 206 W. Va. 390, 524 S.E.2d 906 (1999).....	7

<i>State v. Thomas</i> , 249 W. Va. 181, 895 S.E.2d 36 (2023).....	7, 12
<i>U.S. v. Graham</i> , 711 F.3d 445 (4th Cir. 2013)	6
<i>United States v. Islam</i> , 102 F.4th 143 (2024).....	7, 13, 14
<i>United States v. Perez</i> , 22 U.S. 579 (1824).....	7
<i>Wright v. Boles</i> , 275 F. Supp. 571 (N.D. W. Va. 1967)	15
Statutes	
West Virginia Code § 61-2-1	1
West Virginia Code § 61-7-12	1
West Virginia Code § 62-3-7	5, 6, 15
Other Authorities	
West Virginia Rules of Appellate Procedure Rule 18	5
West Virginia Trial Court Rule 24.01.....	3

INTRODUCTION

The first trial of Petitioner Kevin Scott Dickens ended in a mistrial because the circuit court judge, the court reporter, the prosecutor, Petitioner, Petitioner's counsel, the deputy providing security to Petitioner, and at least one juror all tested positive for COVID. Given these unforeseeable and uncontrollable circumstances, the circuit court correctly determined that there was manifest necessity to justify a mistrial. Petitioner objected, requesting a delay in the trial instead. The circuit court appropriately overruled the objection, and found that both parties would be prejudiced by a delay. The circuit court likewise found that double jeopardy had not attached, and correctly denied Petitioner's subsequent motion to dismiss. At the end of February 2023, a second trial began, and Petitioner was convicted of voluntary manslaughter. Upon these facts, this conviction should be affirmed.

ASSIGNMENT OF ERROR

Petitioner's single assignment of error is set forth, verbatim, as follows:

Petitioner shot another bar patron who had brandished a six-inch blade. Two weeks into his murder trial, several participants tested positive for COVID-19. The court declared a mistrial over Petitioner's objection.

In 2023, was a mistrial "manifestly necessary" where neither requested one, both believed a one-week recess would be appropriate, and the court expressly refused to consider the parties' position because it had decided before the hearing?

Pet'r's Br. 1.

STATEMENT OF THE CASE

I. Charges

In April 2022, Petitioner was indicted on one count of murder in the first degree, in violation of West Virginia Code § 61-2-1; and three counts of wanton endangerment involving a firearm, in violation of West Virginia Code § 61-7-12. App. 2613-15. All four charges relate to an incident occurring on December 30, 2021. App. 2613-15. Succinctly stated, "this is a bar-fight

murder case,” where the State alleged that Petitioner, “in his drunken state, had a pistol on him and he shot Jeremy Peters in the back of the head for no good reason.” App. 976, 978. Much of the case revolved around the video surveillance recordings taken from inside and outside the bar. App. 154, 980, 2612.

II. January 2023 Jury Trial and Mistrial

On January 3, 2023, the first jury trial commenced. App. 2649. On January 17, 2023, the circuit court held a status hearing by Zoom. App. 147, 2649-50. The circuit court set forth on the record that the following persons had tested “positive” for COVID: the circuit court judge, the prosecuting attorney, Petitioner, Petitioner’s attorney, the Sheriff’s deputy assigned to provide security for Petitioner, the court reporter, and at least one juror. App. 150-51. It was further noted that “a couple of [Petitioner’s] family members have tested positive as well.” App. 151-52. Petitioner’s counsel advised that Petitioner “is symptomatic,” but while he has “been experiencing some feverish-type reactions, his temperature is normal.” App. 151. Petitioner’s counsel advised that he, personally, was “95 percent symptom-free.” App. 151.

The circuit court, “upon the [c]ourt’s own motion, declare[d] a mistrial in this matter.” App. 152. The circuit court placed on the record the following grounds:

At this point, we have not had testimony for several days, since Thursday. I anticipate that we’re not going to be having testimony from that point on for, you know, several more days, if we are capable of getting everybody in a symptom-free environment. But I also have to be concerned about health conditions for jurors as they sit in the jury box, and with this taking as many of us out, quite frankly, as what it has, I do have significant concerns for the health and safety of the jurors.

App. 152.

Petitioner objected. App. 153. Instead of a mistrial, Petitioner suggested “the idea of just simply pressing the pause button for a week,” and claimed that he did not “really have any concerns [on his own behalf], as far as the jury being in limbo with this case.” App. 153. Petitioner advised

that the State was agreeable to a delay. App. 153. In support, Petitioner cited to the “somewhat simple, but somewhat complex” nature of the case, where “90 percent of what this case comes down to, is what the jury decides that video means as argued by the parties.” App. 153-54. Petitioner acknowledged the potential for the jury to conduct its own independent research during a hiatus, but noted that “the [c]ourt’s gone [to] great pains” to prevent that from occurring. App. 154.

After Petitioner set forth the grounds for his objection, the circuit court reiterated its ruling on the mistrial: “I think that it is in the best interest of the general public at this point, and the jurors, and the Court, and parties at this point, that I have made the decision, frankly, that I have made.” App. 156. The circuit court observed that it had conducted “several jury trials” where COVID was not an issue, but with “[t]his one . . . we’ve had a lot.” App. 156. Petitioner moved for dismissal of the charges based on to double jeopardy, which the circuit court denied, finding that “this is not something that was caused by the State, this is something that was caused by a virus.” App. 157.

The written order echoed the circuit court’s oral pronouncement that “[t]he basis for the mistrial is in direct response to the Covid-19 outbreak which occurred during the second week of trial requiring jurors, the court reporter, the prosecuting attorney, the Judge and Judge’s staff, along with [Petitioner] and [Petitioner’s] counsel to quarantine as a result of all testing positive.” App. 2665.¹ The circuit court found that “[b]ecause of this unforeseen and unexpected health crisis finalizing the trial became impossible for an extended period of time, which causes obvious

¹ Due to a violation of West Virginia Trial Court Rule 24.01 (App. 2654, 2660), there were three orders incorporated into the record which were substantially similar in language, and which relate to the January 17, 2023, proceedings. App. 2649-51 (filed February 21, 2023), 2662-64 (filed at 8:40 a.m. March 6, 2023), and 2665-67 (filed at 9:24 a.m. on March 6, 2023). Respondent will cite exclusively to the order filed last-in-time.

prejudice for both [Petitioner] and to the State of West Virginia.” App. 2665-66. Accordingly, “[i]n the face of the unforeseen and unexpected delay and the prejudice caused thereby, [the circuit court] is of the opinion that a manifest necessity exists and does hereby declare a mistrial.” App. 2666. The circuit court cited to *State ex rel. Dandy v. Thompson*, 148 W. Va. 263, 134 S.E.2d 730, *cert. denied*, 379 U.S. 819 (1964), and *State v. Gibson*, 181 W. Va. 747, 384 S.E.2d 358 (1989), in support of its denial of Petitioner’s motion to dismiss for double jeopardy reasons. App. 2666.

III. February 2023 Motion to Dismiss

On February 21, 2023, the matter reconvened for a pretrial hearing. App. 2660-61. There, Petitioner set forth a multitude of arguments relating to the circuit court’s decision to declare a mistrial, and moved for a dismissal on the grounds of double jeopardy. App. 250-54, 257-61. In response, the State argued that the COVID outbreak “was completely outside of our control.” App. 255. The circuit court again denied the motion, setting forth that “[t]he mistrial was declared based upon general safety,” and “that was the reason” for the mistrial. App. 261, 2660. When Petitioner asked for clarification on how many jurors tested positive, the circuit court advised that it was only aware of one, noting that “the health department does not do contact tracing anymore . . . but [the jurors] were in very close quarters with one another,” in the jury box, and were “no more than a few inches apart” from one another.” App. 262.

IV. February to March 2023 Jury Trial

Retrial began on February 28, 2023, and concluded on March 21, 2023. App. 2947-53. At its conclusion, the jury returned a verdict of voluntary manslaughter in the death of Jeremy Peters. App. 2613, 2953. Petitioner was acquitted on the three counts of wanton endangerment. App. 2953.

V. Sentencing

On April 25, 2023, Petitioner was sentenced to a determinate sentence of fifteen years in prison for the offense of voluntary manslaughter. App. 2954-55. It is from this order that Petitioner now appeals.

SUMMARY OF ARGUMENT

The circuit court did not abuse its discretion in granting a mistrial. Because so many of the key court participants—the judge, the prosecutor, the defense counsel, the court reporter, a deputy acting as security, a juror, and Petitioner—tested positive for COVID, those unusual circumstances justified a finding of manifest necessity to declare a mistrial pursuant to West Virginia Code § 62-3-7. A delay in the proceedings was not an appropriate alternative, and the circuit court did not err in overruling Petitioner’s objection upon a finding that a failure to declare a mistrial would constitute prejudice to the parties. The circuit court’s rulings were reasonable and consistent with West Virginia law, and were not, as Petitioner suggests, the product of a desire to end the proceedings. Because there was manifest necessity, and because a delay in the trial was not an appropriate alternative, double jeopardy did not attach, and retrial was lawful.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary, and this case is suitable for disposition by memorandum decision, because the record is fully developed, and the arguments of both parties are adequately presented in the briefs. W. Va. R. App. P. 18(a)(3) and (4).

ARGUMENT

The essence of Petitioner’s sole assignment of error is this: Because Petitioner objected to the mistrial, “Double Jeopardy bars retrial unless the State can prove ‘manifest necessity’ compelled the mistrial,” and, here, there was no manifest necessity in the face of the parties’ agreement to delay the trial for a week. Pet’r’s Br. 11-14. To better address this matter,

Respondent will break down its argument to the following areas: (1) standard of review; (2) whether illness constitutes manifest necessity; (3) whether the circuit court was required to accept the requested delay; and (4) whether the circuit court ordered the mistrial as a pretext.

I. Standard of Review

West Virginia Code § 62-3-7 allows that “in any criminal case the court may discharge the jury, when it appears that they cannot agree in a verdict, or that there is manifest necessity for such discharge.” In West Virginia, “[i]t is established beyond question . . . that in matters where the [L]egislature has reposed discretion in the lower court, the appellate court will not and should not substitute its judgment for that of the lower court unless there has been an abuse of discretion.” *State ex rel. Brooks v. Worrell*, 156 W. Va. 8, 15, 190 S.E.2d 474, 478 (1972) (internal citations omitted) (Haden, J., dissenting). “In general, an abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the circuit court makes a serious mistake in weighing them.” *State v. LaRock*, 196 W. Va. 294, 307, 470 S.E.2d 613, 626 (1996) (citation omitted). As the Fourth Circuit Court of Appeals acknowledged, “[t]he abuse of discretion standard is highly deferential, and a reviewing court should not reverse unless the ruling is ‘manifestly erroneous.’” *U.S. v. Graham*, 711 F.3d 445, 453 (4th Cir. 2013) (internal citations omitted).

II. Illness—whether COVID or some other ailment—may constitute manifest necessity, and because all major participants of the trial were afflicted, it was appropriate to declare a mistrial in this instance.

Respondent agrees that because Petitioner objected, manifest necessity must be proven, otherwise double jeopardy is implicated. *See Arizona v. Washington*, 434 U.S. 497, 505 (1978) (“The prosecutor must demonstrate ‘manifest necessity’ for any mistrial declared over the objection of the defendant.”); syl. pt. 4, *Keller v. Ferguson*, 177 W. Va. 616, 355 S.E.2d 405 (1987) (“Termination of a criminal trial arising from manifest necessity will not result in double jeopardy

barring a retrial.”). Accordingly, this case turns on whether there was, in fact, manifest necessity to justify the mistrial.

“[T]he realities of litigation preclude a precise definition of ‘manifest necessity.’” *United States v. Islam*, 102 F.4th 143, 149 (2024) (internal citations omitted). “Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded,” the phrase “manifest necessity” does “not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge.” *Washington*, 434 U.S. at 505-06. To this end, “the law has invested [trial courts] with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.” *United States v. Perez*, 22 U.S. 579, 580 (1824). “[I]t is impossible to define all the circumstances, which would render it proper.” *Id.*

In this jurisdiction, it has been held that “manifest necessity” is “within the sound discretion of the trial court,” syl. pt. 2, *State v. Thomas*, 249 W. Va. 181, 895 S.E.2d 36 (2023) (internal citations omitted), “to be exercised according to the particular circumstances of each case,” syl. pt. 3, *Porter v. Ferguson*, 174 W. Va. 253, 324 S.E.2d 397 (1984). Such circumstances are “various,” syl. pt. 3, *State v. Swafford*, 206 W. Va. 390, 524 S.E.2d 906 (1999) (internal citations omitted), and “[t]he term ‘manifest necessity’ covers a broad spectrum of situations which in some instances bear little relationship to the literal meaning of this phrase.” *Keller*, 177 W. Va. at 620, 355 S.E.2d at 409.

Petitioner asserts that the circuit “court below placed undue weight on the fact it declared a mistrial for reasons unrelated to the prosecution.” Pet’r’s Br. 11. Yet, the reason for the mistrial is especially relevant. This Court has found that the State “should not be permitted to move for or

obtain a mistrial,” “[u]nless the occasion for mistrial is a manifest necessity beyond the control of the prosecutor or judge.” Syl. pt. 2, *Porter*, 174 W. Va. 253, 324 S.E.2d 397. Here, the State did not move for the mistrial, but, rather, the circuit court issued it upon its own motion. App. 152. Further, the cause of the mistrial—the rampant illness amongst all major participants, including one juror—was certainly beyond the control or will of both the State and the circuit court. App. 150-51.

Although Petitioner points out that “the judicial system had dealt with COVID for three years” at the time, this Court has long recognized that *any* illness can constitute sufficient cause for a mistrial. Pet’r’s Br. 12. “While the term ‘manifest necessity’ has not been abstractly defined, [this Court] view[s] it as the happening of an event, beyond the control of the court, which would require the discharge of the jury and would permit a new trial without justifying a plea of double jeopardy.” *Dandy*, 148 W. Va. at 268-69, 134 S.E.2d at 734. “Such occurrences [including] the illness or death of a juror, the accused, the judge or counsel exemplify cases in which a manifest necessity exists which would warrant the discharge of the jury.” *Id.*; *see also State ex rel. Brooks v. Worrell*, 156 W. Va. 8, 11-12, 190 S.E.2d 474, 476 (1972) (“Under the provisions of the Code and decided cases, it has been held that where unforeseeable circumstances arise during the trial of a case, such as, illness or death of a juror, the accused, the judge or counsel, making the completion of the trial impossible, a manifest necessity to discharge the jury will exist and the declaration of a mistrial will be justified.”); and *State v. Davis*, 31 W. Va. 390, ___, 7 S.E. 24, 27 (1888) (“This is emphatically the case of necessity contemplated in the authorities we have referred to; as where the prisoner became too sick to attend to his defense, or one of the jury was rendered physically unable to discharge his duty.”).

Here, it was not “the illness . . . of a juror, the accused, the judge or counsel,” but instead it was the illness of a juror *and* the accused *and* the judge *and* counsel for *both* the accused *and* the State, *plus* two other essential court employees. *Brooks*, 156 W. Va. 8, 11-12, 190 S.E.2d 474, 476; App. 150-51. This exemplifies “unforeseeable circumstances [which] arise during the trial, making its completion impossible,” such that “a manifest necessity to discharge the jury exists and the defendant may again be tried.” *Brooks*, 156 W. Va. 8, 11-12, 190 S.E.2d 474, 476. It is not unreasonable for a circuit court judge—herself ill—to “have significant concerns for the health and safety of the jurors,” particularly as they are “in very close quarters with one another” in the jury box, sitting “no more than a few inches apart” from one another. App. 152, 262. As the circuit court found in its order, the illness constituted an “unforeseen and unexpected health crisis,” which necessitated the mistrial. App. 2665-65. In support, the circuit court relied upon *Dandy*, and *Gibson*—which favorably cites to *Dandy*—further illustrating that the lower court conducted a careful analysis, and reached its decision based upon established West Virginia precedence. Whether it was COVID, the flu, or some other ailment, the widespread affliction of illness upon all major participants of the trial unquestionably constituted manifest necessity justifying the mistrial. Because such manifest necessity existed, double jeopardy does not attach, and retrial was appropriate. Syl. pt. 4, *Keller*, 177 W. Va. 166, 355 S.E.2d 405.

III. The circuit court did not err in rejecting the parties’ proposal to delay the trial for a week, because it was not a reasonable alternative.

Petitioner claims that the circuit court should have at least granted the five day continuance, because “accepting the parties’ alternative and pausing the trial a few days would not have irrevocably committed the court,” and “if more people fell ill rather than the apparent full recovery”—a disputed claim, in itself—“then the court could always declare a mistrial at that point.” Pet’r’s Br. 13. This Court has held “that before a midtrial break on manifest necessity

grounds will be upheld, it must be shown that the trial court explored reasonable alternatives to a mistrial before granting a mistrial.” *State ex rel. Betts v. Scott*, 165 W. Va. 73, 79, 267 S.E.2d 173, 177 (1980). Although circuit courts should consider alternatives, that does not mean that the alternatives must be granted.

In the wake of COVID, understanding and grace toward mistrials due to illness have been generally upheld across the country. “As the COVID-19 pandemic made clear, a mistrial may be manifestly necessary in varying and often unique situations arising during the course of a criminal trial.” *State v. Green*, 408 Wis.2d, 248, 274, 992 N.W.2d 56 (2023) (internal quotations omitted) (quoting, in part, *Illinois v. Somerville*, 410 U.S. 458, 462 (1973)). Such was the precise issue raised on appeal in *United States v. Dennison*, where the First Circuit Court of Appeals observed that “[m]anaging a jury trial at a time dominated by a pandemic poses difficult challenges for the presiding judge.” 73 F.4th 70, 72 (1st Cir. 2023). In *Dennison*, the district court granted a mistrial after the government’s first witness tested positive for COVID-19 during a break in testimony. *Id.* at 73-74. The defense indicated that it wanted to proceed with the trial, but to subject the witness to standard safety protocols. *Id.* at 73. The government was not opposed to reaching an alternative solution. *Id.* The district court, however, granted a mistrial on its own motion, finding that it would be required to advise the jury of the witness’s status, “which could be a source of some concern for one or more of the jurors,” and even if the jurors “indicate a willingness to continue,” the court remained concerned that “there is some health risk of us all continuing to proceed.” *Id.* at 73-74.

The First Circuit found that the witness “testing positive for COVID-19 was a random bit of misfortune, not the kind of ‘foreseeable possibility’ that the government should have been

obliged to anticipate at the time the jury was sworn.” *Dennison*, 73 F.4th at 77. The court carefully considered the suggestion that a delay should have been granted:

It is by no means clear that a seven-to-ten day adjournment, as the defendant now proposes, would have either been feasible under the circumstances or resolved the problem with which the district court was confronted.

We start with the obvious: nothing guaranteed that [the witness’s] mandated quarantine would be brief. The course of COVID-19 in any given individual is unpredictable. It was, therefore, anyone’s guess when [the witness] would again be available to testify; that would depend on the severity and duration of his symptoms—variables that were unknown and unknowable when the district court made its decision.

Id. at 80. “Given this constellation of factors, the district court faced a possible continuance of indeterminate length,” and, therefore, the court could “discern no abuse of discretion in the [district] court’s determination that a mistrial was manifestly necessary.” *Id.* at 81. Upon these findings, the court handedly determined that there was no error, and retrial was appropriate. *Id.*

Here, Petitioner claims that “had the [circuit] court followed the parties’ plan the trial would have continued,” because “[a]ll necessary court personnel had recovered within the week.” Pet’r’s Br. 13. In support of this contention, Petitioner cites to the transcript for the February 21, 2023, hearing. Pet’r’s Br. 13 n.137. The actual statement on the record at that hearing was by Petitioner’s counsel, who argued that, “It may have been if we came back in a week we would’ve still had too many people that were either needing to be quarantined or [were] still sick or whatever the case [may] have been.” App. 259. Counsel proceeded to advise that he, the assistant prosecuting attorney,² and the circuit court judge were “back” the “following week.” App. 259.

² At the January 17, 2023, hearing, the circuit court did not list the assistant prosecuting attorney as one of the many people infected with COVID. App. 150-51. It is unclear from counsel’s statement at the February 21, 2023, hearing whether Petitioner meant that the assistant prosecuting attorney was later determined to have also tested positive for COVID, or whether counsel believed that in the stead of the prosecutor, the assistant could have proceeded to trial solo. App. 259-60.

The record does not reflect the well-being of Petitioner, the prosecuting attorney, or the court reporter, and, in his brief, Petitioner acknowledges that he cannot speak to the status of the infected juror—or any other juror—the week after the mistrial was granted. Pet’r’s Br. 13 n.137; App. 259-60. This further fails to account for whether the subpoenaed witnesses would have been available upon a one-week delay of trial. Upon this record, it is simply disingenuous to claim that all major participants were well enough to proceed to trial the week following the mistrial. This is nothing more than unsupported supposition. Moreover, the circuit court was not required to grant a delay based on “variables that were unknown and unknowable.” *Dennison*, 73 F.4th at 80.

Yet, even if everybody was well enough to proceed to trial after a five-day delay, that does not address the impact that long continuances have on juries. “Before a manifest necessity exists which would warrant the declaring of a mistrial and discharging of the jury and ordering a new trial, the circumstances must be prejudicial, or appear to be prejudicial, to the accused or the state.” Syl. pt. 8, *Thomas*, 249 W. Va. 181, 895 S.E.2d 36 (internal citations omitted). To that end, the circuit court explicitly found that “[b]ecause of this unforeseen and unexpected health crisis finalizing the trial became impossible for an extended period of time, which causes obvious prejudice for both [Petitioner] and to the State of West Virginia,” thus constituting manifest necessity. App. 2665-66. It was the circuit court’s reasonable conclusion that such a lengthy delay created “obvious prejudice.” App. 2665-66.

In this case, it would have been longer than the delay caused by the illnesses, because “four days had already passed” at the time of the status hearing, apparently due, in part, to “a long holiday weekend.” Pet’r’s Br. 13. Therefore, the issue was not a delay of one week, but rather a twelve-day delay—a significant amount of time for a jury to idle. At the January 17, 2023, hearing, Petitioner’s counsel touched on the fact that even before the requested delay, the circuit court was

already concerned of the possibility that the jury would engage in “independent research.” App. 154. The Fourth Circuit Court of Appeals has further held that “it is proper for a district court to consider factors such as juror fatigue, inability to concentrate, frustration, and length of service in an analysis of manifest necessity.” *Islam*, 102 F.4th at 151 (internal citations omitted). Certainly circuit courts are allowed to use common sense to consider how a delay would impact the psyche of the jury, how it would allow jurors to forget key pieces of evidence, and how it would enable jurors to engage in potentially well-meaning but errant conduct, such as perusing social media or the internet to find more information about the case.

This appeal is similar to a recent Nebraska case, where the circuit court granted the State’s motion for a mistrial when, after “several days” of trial, the trial judge and three subpoenaed witnesses tested positive for COVID-19. *State v. Rush*, 11 N.W.3d 394, 442 (2024). Because “[t]he jury was unsequestered, and it was still unclear when the judge would be asymptomatic and test negative for COVID-19,” the State moved for a mistrial upon “concerns about the jurors’ ability to have a fresh recollection of the arguments and evidence presented and its ability to secure witnesses beyond the period of their subpoenas, based on the original estimation of the duration of the trial.” *Id.* The circuit court granted the motion, finding “that a mistrial was necessary to avoid manifest prejudice and injustice to *both* [the defendant] and the State.” *Id.* (emphasis added). On appeal, the court noted that “[i]n several cases in state and federal courts, mistrials granted by the court because of delays in trial due to COVID-19, especially when of indeterminate length, have been held to be not only proper, but manifest necessity.” *Id.* at 443. Therefore, it was not improper for trial counsel to consent to the mistrial. *Id.* Of some note, the mistrial granted and upheld in *Rush* occurred in August 2022, only five months before the mistrial in the case herein. *Id.* at 413; App. 150-51.

Here, the circuit court did not abuse its discretion in rejecting Petitioner's and the State's request to delay the trial for a week. To be sure, its ruling is far from an aberration, but rather it is consistent with other courts. *Dennison*, 73 F.4th 70; *Islam*, 102 F.4th 143; and *Rush*, 11 N.W.3d 394. "The course of COVID-19 in any given individual is unpredictable." *Dennison*, 73 4th at 80. The circuit court—who is neither an epidemiologist nor a clairvoyant—was faced with an overwhelming number of trial participants who were sick, and determined that it was necessary to grant a mistrial, and that failing to do so could not only endanger lives, but would result in prejudice to *both* parties.³ App. 150-51, 2665-66. This decision does not constitute error.

IV. Although not directly set forth in the Argument section of his brief, Petitioner strongly infers elsewhere that the circuit court issued the mistrial as a pretext for addressing other errors throughout the trial; yet, the circuit court's reasoning was based on neutral grounds that neither the court nor the State could have controlled.

The substance of Petitioner's argument, appropriately, focuses on the legal standard for mistrials, including the application of manifest necessity. Pet'r's Br. 10-14. Yet, throughout his Statement of the Case, Petitioner makes various allegations against the prosecutor, and strongly infers that the circuit court was seeking a mistrial after she made a comment that "something's got to change." App. 142; Pet'r's Br. 1-9. Respondent is not in a position to respond to the accusations that the prosecutor "mismanage[d]" the case,⁴ but the record is clear that the circuit court granted the mistrial based on her concern for the well-being of the court participants based on a serious

³ Petitioner makes additional claims that "[t]he parties' plan [to delay] was also more protective of public health." Pet'r's Br. 13. This is far too speculative to warrant a response.

⁴ Respondent does not have either the pending disciplinary action against the prosecutor, or the full transcript for the first trial. Respondent is fully cognizant that Petitioner had difficulties obtaining the trial transcripts for the first trial, and ascribes no blame on this matter. Syl. pt. 9, *State v. Brown*, 210 W. Va. 14, 552 S.E.2d 390 (2001) ("Omissions from a trial transcript warrant a new trial only if the missing portion of the transcript specifically prejudices a defendant's appeal." (internal citations omitted)).

Covid outbreak, regardless of Petitioner's current unsupported allegations that the court somehow threw the State a bone in declaring a mistrial. Pet'r's Br. 5; App. 2665-66.

"It was within the discretion of the trial court to declare a mistrial for manifest necessity under the above cited Code Section 62-3-7 on its own motion, in the absence of a motion by the Petitioner." *Wright v. Boles*, 275 F. Supp. 571, 574 (N.D. W. Va. 1967). "When, through the happening of a fortuitous event, outside the control of the court, manifest necessity and the ends of justice require it, the trial court may discharge the jury and grant a new trial. When the jury is discharged, in accordance with this statute, jeopardy is set at naught." *Id.* at 575 (footnote omitted). Here, there was "a fortuitous event," which neither the circuit court nor the prosecutor could have created or controlled. Whatever the circuit court's annoyances with the prosecutor may have been, the judge, prosecutor, Petitioner, defense attorney, court reporter, security, and juror did not all get COVID as an elaborate scheme to create manifest necessity. The far-reaching spread of the illness was very real, and was never a mere pretext for a mistrial. To infer otherwise is to impugn the circuit court's integrity based purely on speculation.

Despite the tenor of his brief, Petitioner does not appeal any of the circuit court's pretrial rulings, does not raise any irregularities during the course of the second trial, and does not claim insufficiency of the evidence to sustain the conviction. The only issue before this Court is whether the circuit court abused its discretion in granting a mistrial, over Petitioner's objections. Complaints as to the prosecutor's competency and the circuit court's supposed concerns therewith are little more than a red herring, with no bearing on the matter at hand. As it relates to the only assignment of error, the circuit court appropriately rejected Petitioner's and the State's request for a delay of trial, and determined that manifest necessity required the issuance of the mistrial. Upon such, the conviction should stand.

CONCLUSION

For the foregoing reasons, Respondent respectfully asks this Court to affirm Petitioner's conviction.

Respectfully submitted,

PATRICK MORRISEY
ATTORNEY GENERAL

/s/ Katie Franklin

Katie Franklin [WVSB No. 10,767]

Assistant Attorney General

State Capitol Complex

Building 6, Suite 406

Charleston, WV 25305-0220

Email: *Katherine.H.Franklin@wvago.gov*

Telephone: (304) 558-5830

Facsimile: (304) 558-5833

Counsel for Respondent

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 23-330

STATE OF WEST VIRGINIA,

Respondent,

v.

KEVIN SCOTT DICKENS,

Petitioner.

CERTIFICATE OF SERVICE

I, Katie Franklin, do hereby certify that the foregoing Brief of Respondent is being served on counsel of record by File & Serve Xpress this 1st day of November, 2024.

Matthew Brummond, Esq.
Public Defender Services
One Players Club Drive, Suite 301
Charleston, WV 25311
Matt.d.brummond@wv.gov
Counsel for Petitioner

/s/ Katie Franklin
Katie Franklin
Assistant Attorney General