PODCAST NOTES-DECLARING A MISTRIAL/*ALLEN* CHARGES

* Welcome everyone to another session of The Good Judge-Ment Podcast
* We have asked you to contact us at goodjudgepod@gmail.com and tell us issues that you would like to hear us address on the podcast.
	+ Please continue to let us know the content that you want to hear
* One of our colleagues indicated that he would like to hear us discuss when and how a judge should declare a mistrial and discuss *Allen* charges
	+ This episode will deal with exactly that!
* I also received a call from one of our colleagues on Wednesday on this topic where an alternate juror raised a question with the bailiff that potentially caused the judge to think about a mistrial. It is a topic that we confront on a regular basis and which judges obviously need to consider *BEFORE* it becomes a reality.
* When discussing how and when to declare a mistrial, there is one over-arching issue that the judge needs to keep in mind
	+ If you declare a mistrial and it is ultimately determined that you should not have, there is a real possibility that double jeopardy will bar a retrial of the defendant. *Otis v. State*, 298 Ga. 544, 545 (2016); *Smith v. State*, 263 Ga. 782, 783 (1994); *Blake v. State*, 304 Ga. 747, 749 (2018); See O.C.G.A. §16-1-8(a)(2)
	+ Remember that a mistrial can only be declared where the court is satisfied that there is a “manifest necessity” for doing so. *Parker v. State*, 352 Ga. App. 93, 95 (2019); *Harvey v. State*, 296 Ga. 823, 831 (2015)
	+ If trial court abuses its discretion and grants a mistrial when it should not have, retrial is barred based upon double jeopardy. *Meadows v. State*, 303 Ga. 507 (2018).
	+ Once a jury is sworn, the defendant has the right to have *that particular jury* make a decision to acquit or convict the defendant. Declaration of a mistrial over the defendant’s objection will bar a retrial unless the record shows that the mistrial resulted from “manifest necessity.” *Harvey v. State*, 296 Ga. 823, 830 (2015); *Honester v. State*, 336 Ga. App. 166, 170-171 (2016).
* Remember that if the defendant consents to a mistrial being declared, unless the mistrial was caused by bad faith actions of the prosecutor, defendant cannot seek to bar retrial. *Akery v. State*, 237 Ga. App. 549 (1999)
	+ More on defendant’s consent later in the episode
* Mistrials usually fall within one of two broad categories:
	+ deadlocked jury
	+ things that occur during trial that are impossible to “fix”
* DEADLOCKED JURY
* It is pretty common for a jury to send out a note to the judge that indicates that they cannot reach a verdict or are deadlocked *Glass v. State*, 250 Ga. 736, 738 (1983)
* But just because the jury claims they are deadlocked does not mean that the judge should simply take them at their word and declare a mistrial
	+ Regardless of how many times the jury claims it is hopelessly deadlocked *Sears v. State*, 270 Ga. 834, 836 (1999); *Todd v. State*, 243 Ga. 539, 542 (1979); *Honester v. State*, 336 Ga. App. 166, 170-171 (2016).
* The trial judge has discretion to declare a mistrial when the jury indicates that this is hopelessly deadlocked, “but that discretion is not unbridled.” *Parker*, at 96, citing *Honester v. State*, 336 Ga. App. 166, 170 (2016) and *Haynes v. State*, 245 Ga. 917. 819 (1980)
* Exercise of the discretion to declare a mistrial “requires the trial court to take certain steps before concluding that the jury is hopelessly deadlocked and that a mistrial is necessary.” *Parker*, at 96.
	+ “For example, in deciding whether to declare a mistrial or require further deliberation the trial court should:
		- inquire of the jury whether additional time for deliberation would be helpful;
		- consider whether the jury ‘is so exhausted that the minority might be induced to vote for a verdict which they otherwise would not support;’
		- and consider the length and complexity of the trial and the length of the deliberations” *Parker*, at 96. See *Sanders v. State*, 290 Ga. 445, 449-450 (2012); *Humphreys v. State*, 287 Ga. 63, 80 (2010).
			* While the length of deliberations is not the sole decisive factor, it is an important point for the judge to consider before granting a mistrial. *Phillips v. State*, 238 Ga. 632, 634 (1977) (declaring mistrial after only 2.5 hours of deliberation is not per se inappropriate)
	+ It is appropriate for the judge to poll the jurors individually *or* question them as a group
		- During that poll, the judge may ask the jury to advise how close they are to an agreement and/or whether one or more of the jurors is refusing to deliberate. *Sanders v. State*, 290 Ga. 445, 449-450 (2012); *Humphreys v. State*, 287 Ga. 63, 80 (2010).
			* Judge can ask the jury how the jury stands numerically but avoid asking about the nature of that numeric breakdown (i.e. ok to ask the numerical divide but do not ask how many for guilty and how many for not guilty) *Gibson v. State*, 272 Ga. 801, 802 (2000); *Honester v. State*, 329 Ga. App. 406, 410 (2014), citing *Sears v. State*, 270 Ga. 834, 839 (1999)
				+ BUT, if the jury sends a note that shows how many jurors are voting for guilty and how many for not guilty, the court MUST share that note with the parties. *Dowda v. State*, 341 Ga. App. 295 (2017)
		- It is also advisable to ask the jurors whether they feel that additional deliberations would be helpful. *Thornton v. State*, 145 Ga. App. 793, 795 (1978).
	+ While there are no mechanical steps the trial judge has to follow before declaring a mistrial, the judge should slow down and consider the totality of the circumstances. *Hines v. State*, 320 Ga. App. 854, 867 (2013) (following the exact steps above is not mandatory)
		- AND MAKE A RECORD!
	+ The judge should put his observations on the record where the jurors appear exhausted, angry with one another or display other non-verbal indications of being both deadlocked and entrenched.
* Before the judge decides whether to order a mistrial, “it is highly important that the trial court undertake a consideration of alternative remedies.” *Parker*, at 96, n.5.
	+ n.5 from *Parker*: “Alternative remedies can include, but are not limited to, polling or questioning the jury about improper influence or whether the jurors are hopelessly deadlocked, taking a break in the proceedings, sending the jury home for the evening, admonishing the jurors to keep their deliberations civil and respectful, and admonishing or removing a specific juror if it can be determined that the person is responsible for creating a volatile environment. See generally *Meadows v. State*, 303 Ga. 507, 514-515 (2018).”
* PLEASE, PLEASE, PLEASE—ask the parties on the record for their input as to alternative remedies. It is entirely possible they will come up with a potential remedy the judge did not even consider.
* The fact that reasonable judges might have a different opinion as to whether a mistrial should be declared is not the test. *Blake v. State*, 304 Ga. 747, 749 (2018)
* There is no requirement that the trial judge make explicit findings of manifest necessity before granting a mistrial, but the record must show that the trial court actually exercised its discretion. *Parker*, at 96-97, citing *Blake*, at 749.
* THINGS THAT OCCUR DURING TRIAL THAT CANNOT BE “FIXED”
* There is a limitless number of things that occur during a trial that cannot be cured with a curative instruction or other remedy
	+ (see Examples of cases where a mistrial was declared below)
* If one of these things occur, ensure you make an exhaustive record
	+ Consider whether the matter is “important” or merely a collateral matter
	+ Consider whether a proper curative instruction can cure the error
		- “Where inadmissible evidence is introduced or otherwise comes to the attention of the jury, and curative instructions cannot free the jury's mind of prejudice, it is error not to declare a mistrial.” *Varner v. State*, 285 Ga. 334 (2009)
	+ Ensure that each party is allowed to give their position on whether a mistrial would be appropriate
		- Remember that if the defendant consents to a mistrial being declared, unless the mistrial was caused by bad faith actions of the prosecutor, defendant cannot seek to bar retrial. *Akery v. State*, 237 Ga. App. 549 (1999)
		- Consent to the grant of a mistrial can be express or implied. *Howell v. State*, 266 Ga. App. 480, 488 (2004). Consent to the grant of a mistrial is implied where defendant does not object timely to a mistrial declaration. *State v. Stockhoff*, 333 Ga. App. 833 (2015); *Bellew v. State*, 304 Ga. App. 529 (2010).
			* “No matter how erroneous a ruling of a trial court might be, a litigant cannot submit to a ruling or acquiesce in the holding, and then complain of the same on appeal. He must stand his ground. Acquiescence deprives him of the right to complain further.” *State v. Grayson*, 332 Ga. App. 862, 865 (2015).
* BAD FAITH OF PROSECUTOR WILL BAR RETRIAL
	+ If a prosecutor acts in bad faith and essentially goads the defendant into having the request a mistrial, that bad faith of the prosecutor will bar a retrial. *Allen v. State*, 302 Ga. App. 852 (2010), citing *Brinson v. State*, 245 Ga. App. 479, 481-482 (2000), *Williams v. State*, 258 Ga. 305, 313 (1988) and *Anderson v. State*, 285 Ga. App. 166, 167 (2007).
* EXAMPLES OF CASES WHERE A MISTRIAL WAS DECLARED AND…
	+ *Carman v. State*, 304 Ga. 21 (2018)—during a death penalty trial, defense counsel’s niece attempted suicide. Parties wanted to delay trial for 13 days, court ordered mistrial instead. Retrial allowed
	+ *Blake v. State*, 304 Ga. 747 (2018)—juror performed outside research and shared findings with remainder of jury. Mistrial declared. Retrial allowed.
		- Consider *Hodges v. State*, 302 Ga. 564, 568-569 (2017) and *O’Donnell v. Smith*, 294 Ga. 307, 309-310 (2013)—where a juror conducted outside research and did not share the findings with the other jurors, convictions were upheld.
	+ *Meadows v. State*, 303 Ga. 507 (2018)—the bailiff came to the court on 4 occasions, expressing concern about how contentious the deliberations in the jury room were. The trial court declared a mistrial without asking the jurors if any of them felt unsafe or threatened. Also, jury had declared a deadlock after 3 hour deliberation on a 4 day trial. RETRIAL BARRED.
	+ *Cuyler v.* *State*, 344 Ga. App. 532 (2018)—no error where trial judge refused requested mistrial due to witness interjecting character evidence of the defendant during his testimony (“defendant has been doing chain-gang time” and “defendant told me he did robberies and stuff like that”)
	+ *Laguerre v. State*, 301 Ga. 122 (2017)—where jury was told expected length of trial would be 7-9 days and, during trial, the estimated length was extended to more than 15 days (during Christmas season) and jurors indicated that most had travel plans and other obligations that would prevent all jurors to be available AND where judge extensively looked for alternatives and made all of those findings and observations on the record. Retrial allowed.
	+ *Edwards v. State*, 336 Ga. App. 595 (2016)—during trial, it was determined that defense counsel had a conflict of interest because he had previously represented an important state witness and, during that representation, had learned confidential information that could be used to impeach the witness. Defendant agreed to waive the conflict and allow counsel to keep the confidential information. Judge determined that defendant’s attempted waiver was insufficient and declared a mistrial over defendant’s objection. Retrial allowed.
	+ *Harvey v. State*, 296 Ga. 823 (2015)—where court granted motion in limine and during opening statement, defense counsel made a direct reference to the evidence that was excluded in limine, mistrial declared over defendant’s objection. Retrial allowed.
		- *McCabe v. State*, 318 Ga. App. 720 (2012)—during closing argument, defense counsel argued evidence that the trial court had ruled inadmissible. Retrial allowed.
	+ *Julian v. State*, 319 Ga. App. 808 (2013)—mistrial declared over defendant’s objection when a witness for state, who was not under subpoena, refused to come to court or testify. RETRIAL BARRED.
	+ *Gonzalez v. State*, 310 Ga. App. 348 (2011)—not error for trial court to refuse requested mistrial when juror, who was fluent in Spanish, told bailiff that the translation of defendant’s custodial statement was incorrect.
	+ *Ogletree vv. State*, 300 Ga. App. 365 (2009)—where important state witness became unavailable after jury was selected and sworn, court declared a mistrial. Retrial allowed.
* EXAMPLES WHERE MISTRIAL NOT REQUIRED
* *Although* a defendant has the right to be free of the atmosphere of partiality created by the use of excessive guards or shackles in the courtroom, the mere fact of seeing an indicted accused in custody—not in the courtroom, as in the instant case, is not grounds for an automatic mistrial, but is addressed to the sound discretion of the trial court. *Hight v. State*, 302 Ga. App. 2010.
	+ There are literally dozens of cases that repeat this holding. *Stott v. State*, 304 Ga. App. 560, 561–62, 697 S.E.2d 257, 259 (2010); *Edwards v. State*, 180 Ga. App. 177, 178, 348 S.E.2d 725, 726 (1986); *State v. Crews*, 343 Ga. App. 289 (2017)
* *ALLEN* CHARGE
	+ Also known as the “dynamite charge” or “logjam charge”
		- *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).
	+ The primary issue with an *Allen* charge is whether the charge is unduly coercive. *McMillan v. State*, 253 Ga. 520. 523 (1984)
* If you decide to give an *Allen* charge, USE THE PATTERN CHARGE!
	+ 1.70.70 is the pattern that has repeatedly been upheld as appropriate
	+ Important part of the pattern charge that removes the charge from being deemed unduly coercive:
		- No juror is required to surrender his honest opinion for the purpose of reaching a verdict
* Once you commit to using the pattern charge, the only real question for the judge is:
	+ When to give the charge; and
	+ Whether to give the charge
		- “The decision of whether to give a jury in disagreement the ‘*Allen*’ charge is generally left in the discretion of the trial judge” *Caldwell v. State*, 167 Ga. App. 692 (1983)
* *Do not* include language which has been a part of older *Allen* charges (but later ruled inappropriate) such as:
	+ “this case must be decided by some jury…and there is no reason to think a jury better qualified than you would ever be chosen,” (*Burchette v. State*, 278 Ga. 1 (2004); *Lowery v. State,* 282 Ga. 68 (2007)); (that is not true—the case could end in a mistrial) or
	+ make any reference to any additional expense the county might incur if a verdict is not returned by this jury. (*Driver v. State*, 155 Ga. App. 726, 728 (1980)) (expense or expenditure of time should NEVER be a part of a juror’s consideration of guilt) or
	+ “it appears that someone is being a little unreasonable and stubborn” (*Riggins v. State*, 226 Ga. 381, 384 (1970)) (really?) or
	+ the judge “feels there is enough evidence…for you to reach a verdict one way or another.” (*McClinic v. State*, 172 Ga.App. 54 (1984), overruled by *Wallace v. State*, 175 Ga.App. 685 (1985)).
* In *Daniel’s Georgia Criminal Trial Practice*, §24:26, they reference a related but different type of charge that is referred to as a “time fuse” charge
	+ Essentially, the judge tells the jury that they have until “X” time to reach a verdict or the court will declare a mistrial.
		- While our judges would probably see the error in giving such a charge generally, think about what you tell the jury about the break at the end of the day or the lunch break.
		- Ensure you are not conveying that they have a time limit to reach a verdict or the court will grant a mistrial.
			* Just tell them you plan to break at a certain time and ask if they want to continue or to break at the planned time (if you ask them at all)