IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

SERAFIN REYES PABLO,
Defendant-Appellant.

Supreme Court Case No.: CRA15-006
Superior Court Case No.: CF0281-09

OPINION

Cite as: 2016 Guam 29

Appeal from the Superior Court of Guam
Argued and submitted on February 12, 2016
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

MARAMAN, J.:

[1] Defendant-Appellant Serafin Reyes Pablo appeals from a judgment of conviction finding him guilty of second degree criminal sexual conduct. In an earlier trial, Pablo was acquitted of one count of criminal sexual conduct, but the jury was unable to reach a verdict on the other count. Pablo was retried and convicted. He argues that the conviction must be reversed on double jeopardy grounds because of judicial and prosecutorial impropriety, intended to provoke a mistrial, during his first trial for the crime. Specifically, he argues that the trial court or prosecution intended to provoke a mistrial by giving the jury a verdict form which included an "unable to decide" option, and, thus, further prosecution was barred on the charge after the jury in the first trial was unable to reach a verdict.

[2] For the reasons set forth below, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] On February 22, 2013, the grand jury returned a Superseding Indictment charging Defendant-Appellant Serafin Reyes Pablo with: (1) one count of Second Degree Criminal Sexual Conduct ("CSC") for intentional sexual contact involving T.M.I., a minor under fourteen years old ("Count 1"); (2) one count of Second Degree CSC for intentional sexual contact involving A.F.S., a minor under fourteen years old ("Count 2"); (3) one count of Child Abuse (as a misdemeanor) against T.M.I.; and (4) one count of Child Abuse (as a misdemeanor) against A.F.S. Subsequently, on Pablo's motion, the trial court dismissed the two counts of misdemeanor Child Abuse.

[4] The case proceeded to trial on the remaining two counts of Second Degree CSC, i.e., Counts 1 and 2. Pablo's counsel filed proposed verdict forms. The trial court proposed its own verdict forms, and ultimately submitted its forms to the jury. The two verdict forms (one for each count of Second Degree CSC) used by the jury contained the following language:

> WE, THE JURY, in the above-entitled case find the Defendant, **SERAFIN REYES PABLO:**
>
> _____ **NOT GUILTY** of the offense of **SECOND DEGREE CRIMINAL SEXUAL CONDUCT.**
>
> _____ **GUILTY** of the offense of **SECOND DEGREE CRIMINAL SEXUAL CONDUCT.**
>
> If you unanimously find the Defendant "Not Guilty" of the offense of Second Degree Criminal Sexual Conduct, your foreperson will check the "Not Guilty" box and sign and date this form below.
>
> If, however, you unanimously find the Defendant "Guilty" of the offense of Second Degree Criminal Sexual Conduct, your foreperson will check the "Guilty" box and sign and date this form below.
>
> If you are unable to decide whether the Defendant is guilty or not guilty of this charge, your foreperson will sign and date this form below.
>
> _____ _____
> FOREPERSON Date/Time

Record on Appeal ("RA"), tab 95 (Verdict Form 1, June 4, 2013); RA, tab 96 (Verdict Form 2, June 4, 2013).

[5] In discussions between the parties and the court regarding finalizing the verdict forms, Pablo's counsel objected to the "unable to decide" paragraph found in the court's forms. Specifically, he argued:

> Okay. Now, it says at the bottom, I submit -- you know, there's such a thing as the Allen charge, which says okay, we're having trouble deciding this case go back and work on it some more, because it will never be tried any better than it's been tried, and will be tried with a different jury with a [sic] the same evidence, and they will be in the same position you are, and so the jury is a hung

> jury. I suggest that the third paragraph of the verdict form, if you are unable to decide, it makes it sound like, well, it's one, two or three, you've got to decide guilty, not guilty, or (indiscernible 10:40:55). What it does -- they can send you a note if they can't reach a verdict. We can stress it at the time, give them an Allen charge or something that (indiscernible 10:41:03). I suggest -- we suggest that it is acceptable to not reach a verdict. I think that last paragraph if you are unable to decide just sign on the paper form below.

Transcript ("Tr.") at 7-8 (Jury Trial, June 3, 2013). In response, the People simply stated, "The last paragraph, I feel like that should have been addressed in the numerous times that we could address --." *Id.* at 8. The trial court then interjected, stating:

> Yeah. I'm inclined to have that -- while I agree, we don't want in any way to suggest to the jury they may not be able to come to a decision, of course, but that's -- it's also in the instruction which says must have a unanimous decision, or is -- yeah -- the decision must be unanimous. So I'm inclined to just probably have that portion of the verdict form remain, but I do understand the suggestion. I appreciate it, as well.

Id. Thus, the verdict forms given to the jury included the "unable to decide" language.

[6] At approximately 3:00 p.m. on June 3, 2013, after receiving its instructions from the court, the jury began deliberating. The trial court instructed the jury not to deliberate past 4:50 p.m. that day. At the end of the day, the court excused the jury for the night and instructed them to return at 9:00 a.m. the following morning to resume their deliberations. At approximately 10:05 a.m. the following day, the jury sent a note to the court requesting audio playback of certain testimony. Tr. at 2-3 (Jury Trial, June 4, 2013). After the audio was played, the jury resumed deliberations, taking a break for lunch. At 4:39 p.m., the jury sent a note to the court, stating, "We have come to our decision." Tr. at 11 (Jury Trial, June 4, 2013). The jury was brought in, and the foreperson was asked, "Has the jury unanimously agreed on its verdict?", to which the foreperson replied, "Yes, Your Honor." *Id.* After seeing the verdict forms, the court remarked, "One of the verdicts or verdict forms, there does not seem to be an indication. Mr.

Foreperson, did you intend to submit it this way?" *Id.* at 12. The foreperson replied, "Yes." *Id.* Immediately thereafter, counsel and the court engaged in a sidebar discussion.[1]

[7] After the sidebar, the court stated:

> The Court at this time is in receipt of the verdict forms associated with this trial. As to Count 1 based on an indication from the foreperson, the Court takes this count and the indication that the jury is unable to decide whether the defendant is guilty or not guilty of this charge and that is Count 1, and it is signed and dated below. Therefore, the jury technically in [sic] a hung jury as to the inability to reach a unanimous verdict as to not guilty or guilty.

Id. The foreperson then published the jury's verdict as to Count 2, indicating that the jury found Pablo not guilty of that count. The parties requested polling of the jury. The jury was discharged, but was asked to remain for a few minutes for polling.

[8] After the jury exited the courtroom, the court addressed Pablo:

> THE COURT: Again, the indication by the foreperson is that I guess unanimously they could not come to a decision. Therefore, the Court believes that it should declare a mistrial as to Count 1. This means a few things. I'll let your lawyer explain that to you, Mr. Pablo. Otherwise, you have been deemed, of course, not guilty by a jury of your peers as to the second count. The Court at this time will -- I mean, ultimately I believe it's a refiling, correct, upon a mistrial – jurisdiction, Mr. Trapp?
>
> [DEFENSE COUNSEL]: Well, you know, I like to say everything that's totally in our favor and forget about the rest. Okay, it's a mistrial and so, therefore, the Government could retry him.
>
> THE COURT: They could retry him.

Id. at 14-15. The People thereafter indicated that it intended to retry the case and asked the court to set trial dates. After the close of proceedings, counsel took turns polling the jury.

[9] Ten days later, Pablo filed a motion to dismiss Count 1 on double jeopardy grounds, arguing that the mistrial on that count "resulted from judicial and prosecutorial impropriety

[1] Unfortunately, the sidebar was inaudible for transcription purposes. Thus, we do not have the benefit of reading the substance of the discussion or verifying the subsequent statements made in reference to the sidebar (discussed further below).

designed to avoid an acquittal." RA, tab 102 at 1 (Mot. Dismiss, June 14, 2013). Specifically, Pablo alleged that the inclusion of the "unable to decide" language, over his objection, amounted to prosecutorial and judicial misconduct as the language "was contrary to and called into question the duty of the jurors to deliberate in an effort to reach a verdict of not guilty or guilty." RA, tab 101 at 2 (Mem. Supp. Mot. Dismiss, June 14, 2013). Pablo also argued that the "unable to decide" language foreclosed the jury from retiring and continuing its deliberations, because at that point, "The verdict form was signed and dated. The jurors had reached their decision. Their decision was final. And all after only one day." *Id.* at 3.

[10] In response, the People indicated that it had "had no objection to the Court's proposed verdict forms and left it for the Court to decide how to construct the final version of the verdict form." RA, tab 105 at 2 (People's Resp. to Defense's Mot. to Acquit & Dismiss the Charge, June 21, 2013). The People then recounted the details of the sidebar discussion that took place immediately after the court received the signed verdict forms from the jury:[2]

> The Court called the foreperson to the bench with both counsel present. The foreperson explained that there were two entrenched positions on the jury and that they would not be able to reach a unanimous verdict even if given time to deliberate further. There was a discussion amongst counsel and the Court as to whether to order the jury to continue to deliberate. The Defense specifically asked the Court not to order the jury to further deliberate and instead to declare a mistrial based on a hung jury. The Court then declared a mistrial.

Id. The People then argued that Pablo's motion to dismiss was without merit:

> [T]hough Defendant certainly made a strong pitch to use its provided verdict form, Defense counsel specifically did not ask the Court to instruct the jurors to continue deliberating. So even though Defense initially objected, by not objecting to the Court not ordering the jurors to continue to deliberate, Defendant concurred

[2] In his reply to the People's response, Pablo did not refute the veracity of the People's recitation of the substance of the sidebar discussion. However, as there is no transcript of the sidebar, we are unable to verify whether this is in fact an accurate account of what took place.

> that the outcome was proper. The only case Defendant cites is *Jorn*. The *Jorn* decision specifically dealt with the situation when the Court aborted the proceedings prior to the verdict without the Defendant's consent. This is not the situation in this case. There was no *sua sponte* declaration of a mistrial. . . .
>
> Second, Defendant is asserting that the Court, by putting forth a verdict form that allows the foreperson to sign without selecting guilty or not guilty, and the People, by not objecting to this form, are encouraging hung juries, which in the Defendant's position is judicial and prosecutorial misconduct. Defendant's argument that a decision to use one verdict form over the other constitutes judicial misconduct falls significantly short of the mark, especially under the high "abuse of discretion" standard. Instead, Defendant wants to have his cake and eat it too: he did not object and in fact concurred that the Court should declare a mistrial based on a hung jury, rather than requiring the jury to continue to deliberate, and now he wants to use that ruling that he concurred with to try to obtain a dismissal based on double jeopardy. Such a motion must fail.

Id. at 4.

[11] During the hearing on Pablo's motion to dismiss, the People mentioned that "the Court was there when the foreperson came and told them that there were two intrenched [sic] camps, and that led to the hung jury." Tr. at 3 (Mot. Hr'g, June 28, 2013).

[12] Pablo's counsel argued that after he heard that the jury's note had said, "we have come to our decision," "there was no way [he] was going to ask to have the jury sent back out." *Id.* at 6. He further stated, "I don't even know that an Allen charge would be appropriate. Your Honor did announce that the bench -- and it's on the record that you're not a fan of the Allen charge. I think that's almost verbatim of what you said."[3] *Id.* Pablo's counsel then continued:

> And the reason that I did not want them to go off and deliberate some more is because they had been deliberating from the very beginning under an instruction that said, well, you don't really have to try all that hard, so in the meantime, knowing that option, seven jurors supposedly -- or at least not a majority of the jurors. They simply said, well, we think this and you know, they said that, and they had been deliberating up to that point under that conception.

[3] It is unclear when this statement was allegedly made by the trial court, as we could not find such a statement in the transcripts. We presume it was made during the sidebar discussion that took place during the reading of the verdicts.

> And apparently some of them drew conclusions, took positions that they might not have taken if they thought that they really had to listen to the other side and reconsider their -- and carefully reconsider their positions instead of simply saying, well, we vote this way and we vote that way, so okay, we have done the third option. It was too late. We were entitled to unspoiled [sic] jury, a jury that understood that they had to break their butts to get a verdict here and kick it back and forth until they did.
>
> And instead for all the time they deliberated up to the end of the first full day they were under the impression that, well, let's see, should we vote guilty, not guilty or just state that we have certain positions. It was too late, too late, to unspoil what had happened to that jury. And there's no question but what we objected to it.

Id. at 7-8; *see also id.* at 13 ("I know lots of cases where the jury is unable to decide. They passed in a note and say, we can't decide. But, to my amazement they passed in, we have come to our decision. They reached a verdict, the verdict is that they couldn't find guilty or not guilty. That's the verdict. It's signed by the foreperson. It's dated, it's too late to send them back anymore. It is their verdict. It says verdict form, that's their verdict. And it was provoked, and I say intentionally because it wasn't accidental. It was intentional to put that language in there. It has to be intentional because I argued up one side and down the other against it." (argument by defense counsel)).

[13] After hearing the arguments on the motion, the trial court stated that it would "examine the record further. As there's some citation to -- in your argument about what may have been said at the bench when the foreperson came forward with the verdict forms."[4] *Id.* at 14-15.

[14] On October 2, 2013, the trial court issued a Decision and Order denying Pablo's motion to dismiss. The court determined that Pablo "fail[ed] to provide any evidence that the verdict forms were *intended* to provoke a mistrial." RA, tab 109 at 4 (Dec. & Order, Oct. 2, 2013). The

[4] Presumably, this is a reference to defense counsel's allegation that the trial court had indicated that it was not a fan of the *Allen* charge.

court also noted that other jurisdictions have used similar language in their verdict forms. *Id.* (citing *State v. Daniels*, 156 P.3d 905, 908 (Wash. 2007); *State v. Christian*, 184 Ohio App. 3d 1, 2009-Ohio-4811, 919 N.E.2d 271, at ¶ 21).[5]

[15] On October 14, 2013, Pablo filed an amended petition for permission to appeal, reiterating his arguments below that the "unable to decide" language in the verdict form was judicial and prosecutorial impropriety designed to avoid an acquittal, and that further prosecution on Count 1 was barred by the Double Jeopardy Clause. *See* People v. Pablo, CRA13-019 (Second Am. Verified Pet. Permission Appeal at 4 (Oct. 14, 2013)).

[16] This court issued an order denying Pablo's petition. People v. Pablo, CRA13-019 (Order (Nov. 12, 2013)). We noted that in our decision in *People v. Torres*, 2008 Guam 26, we held that in order to exercise discretionary review of a denial of a motion to dismiss on double jeopardy grounds, the defendant must first surmount a "quasi-appellate-pleading-requirement" hurdle. People v. Pablo, CRA13-019 (Order at 2) (citing *Torres*, 2008 Guam 26 ¶ 13). A defendant, therefore, must satisfy a threshold requirement of putting forth a "colorable claim" of double jeopardy in order to obtain interlocutory review. *Id.*

[17] Reviewing the single case cited by Pablo in support of his petition, *Oregon v. Kennedy*, 456 U.S. 667 (1982), as well as the limited record provided to this court, we determined that Pablo failed to make a colorable claim of double jeopardy. People v. Pablo, CRA13-019 (Order at 3). We read *Kennedy* to stand for the proposition that a defendant may assert the bar of double jeopardy after moving for a mistrial where the cause of the mistrial is misconduct on the part of

[5] The court's Decision and Order did not address the court's alleged statement that it was not a fan of the *Allen* charge.

the government intended to "goad" the defendant into seeking a mistrial. *Id.* (citing *Kennedy*, 456 U.S. at 676). We noted that from the limited record in Pablo's case,

> it appears that Pablo did not object to the court's decision to declare a mistrial after the foreperson of the jury informed the trial court that the jury was deadlocked and would be unable to reach a unanimous verdict even after further deliberation. *See* People's Verified Answer at 6 (Oct. 23, 2013). It is difficult for this court to see how the bare allegation that the trial court's use of this particular verdict form – where the jury informed the court it was unable to reach a unanimous verdict, and where Pablo asked that the trial court not make them deliberate further and instead declare a mistrial – amounted to misconduct designed to subvert Pablo's double jeopardy protections. As such, we cannot find that Pablo has met the threshold requirement of making a colorable claim of double jeopardy.

Id.

[18] Pablo was retried on and found guilty of Second Degree Criminal Sexual Conduct. Judgment was entered, and Pablo timely filed a notice of appeal.

II. JURISDICTION

[19] This court has jurisdiction over an appeal from a final judgment of conviction pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 114-222 (2016)), 7 GCA §§ 3107 and 3108(a) (2005), and 8 GCA § 130.15(a) (2005).

III. STANDARD OF REVIEW

[20] We review a claim of double jeopardy *de novo*. *People v. Quenga*, 2015 Guam 39 ¶ 8 (quoting *People v. San Nicolas*, 2001 Guam 4 ¶ 8).

IV. ANALYSIS

[21] Pablo argues that he is entitled to reversal of his conviction on double jeopardy grounds. He contends that the inclusion of the "unable to decide" language in the verdict forms in his first trial amounted to impropriety on the part of the trial court and the prosecutor as it was intended

to and did provoke a mistrial. *See* Appellant's Br. at 14-15 (June 8, 2015). Pablo argues that the decision to include the "unable to decide" language "could not have been intended for anything other than to provoke a mistrial." *Id.* at 14. He queries:

> Why . . . did the verdict form say that "[i]f you are unable to decide whether the Defendant is guilty or not guilty of this charge, your foreperson will sign and date this form below"? Was it accidental? Or course not. Was it intentional? Of course. There must have been **some** intention. Was the intention to provoke a mistrial? What else? Why else instruct the jury [this way]? Especially as Pablo's objection that it could provoke a mistrial was fully understood? **Neither the prosecution nor the [S]uperior [C]ourt has ever said.**

Id. at 15 (first alteration in original) (citations omitted). Finally, Pablo contends that neither *Daniels* nor *Christian*, the cases cited by the trial court as examples of other jurisdictions that have used similar language in their verdict forms, addresses the issue he raises in any way. *Id.*

[22] In its three-page response, the People argue that under *Kennedy*, Pablo is required to show "'intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause.'" Appellee's Br. at 2-3 (July 23, 2015) (quoting *Kennedy*, 456 U.S. at 676). The People state that there is no evidence to suggest that either the prosecution or the court intended to induce a mistrial by use of the verdict form. *Id.* at 3. Citing to *Christian* and *Daniels*, the People also contend that "[v]erdict forms contemplating the inability of the jury to reach a verdict are not misconduct *per se*." *Id.* at 3.

[23] "The Double Jeopardy Clause of the Fifth Amendment protects a criminal defendant from repeated prosecutions for the same offense." *Kennedy*, 456 U.S. at 671 (footnote omitted) (citing *United States v. Dinitz*, 424 U.S. 600, 606 (1976)). "As a part of this protection against multiple prosecutions, the Double Jeopardy Clause affords a criminal defendant a 'valued right to have his trial completed by a particular tribunal.'" *Id.* at 671-72 (quoting *Wade v. Hunter*, 336

U.S. 684, 689 (1949)). However, the Clause does not "guarantee to the defendant that the State will vindicate its societal interest in the enforcement of the criminal laws in one proceeding." *Id.* at 672 (citing *United States v. Jorn*, 400 U.S. 470, 483-84 (1971) (plurality opinion); *Wade*, 336 U.S. at 689). "[O]therwise, 'the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again.'" *Id.* (quoting *Wade*, 336 U.S. at 689).

[24] Where a trial is terminated over the defendant's objection, "the classical test for lifting the double jeopardy bar to a second trial is the 'manifest necessity' standard." *Id*. The most common form of "manifest necessity" is a mistrial declared by a judge following the jury's declaration that it was unable to reach a verdict. *Id.* "The 'manifest necessity' standard provides sufficient protection to the defendant's interests in having his case finally decided by the jury first selected while at the same time maintaining 'the public's interest in fair trials designed to end in just judgments.'" *Id.* (quoting *Wade*, 336 U.S. at 689).

[25] Different principles come into play in the case of a mistrial declared at the request of the defendant. *Id.* Where the defendant himself has elected to terminate the proceedings, the "manifest necessity" standard does not apply. *Id.* Thus, generally, a mistrial declared on the defendant's motion is not a bar to retrial. *See id.* at 672-73. There is, however, a narrow exception to the rule that the Double Jeopardy Clause does not bar retrial where the defendant moves for a mistrial. *Id.* Where a mistrial arose from prosecutorial or judicial actions done "in order to goad the [defendant] into requesting a mistrial," the general rule does not apply. *Id.* at 673 (alteration in original) (quoting *Dinitz*, 424 U.S. at 611). "In such a case, the defendant's valued right to complete his trial before the first jury would be a hollow shell if the inevitable

motion for mistrial were held to prevent a later invocation of the bar of double jeopardy in all circumstances." *Id.*

[26] Rejecting its earlier notions that the test in such a situation is a generalized standard of "bad faith conduct" or "harassment" on the part of the judge or prosecutor, the Court in *Kennedy* held that the standard to be applied must examine the intent of the governmental actor:

> Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, therefore, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause. A defendant's motion for a mistrial constitutes a "deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact." *United States v. Scott*, 437 U.S. 82, 93 (1978). Where prosecutorial error even of a degree sufficient to warrant a mistrial has occurred, "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error." *Dinitz*, 424 U.S. at 609. Only where the governmental conduct in question is intended to "goad" the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.

Id. at 675-76 (alteration in original); *see also id.* at 679 ("We do not by this opinion lay down a flat rule that where a defendant in a criminal trial successfully moves for a mistrial, he may not thereafter invoke the bar of double jeopardy against a second trial. But we do hold that the circumstances under which such a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial.").

[27] While the present case involves a hung jury, which the *Kennedy* Court described as the "prototypical" example of a situation in which the "manifest necessity" standard applies, 456 U.S. at 672, the circumstances of this case require this court to go beyond mere application of the "manifest necessity" standard. Additionally, while Pablo did not object to the declaration of a

mistrial (and by some accounts, he may have even asked for one), simple application of the general rule—that retrial may be had where the mistrial was declared at the defendant's request—is likely not warranted. Pablo makes a persuasive argument about the reasons he chose not to object to the mistrial declaration and why that choice should not be counted against him. He argues that by the time the jury rendered its "decision," any further deliberations would have been fruitless because the jury was already tainted by the suggestive language in the court's verdict form, having operated under the notion that it did not really have to work towards a unanimous verdict but instead could just indicate that it was unable to decide.

[28] As provided in *Kennedy*, the relevant inquiry is whether the conduct giving rise to the mistrial in this case was *intended to provoke* a mistrial. On that point, we believe Pablo's appeal ultimately fails. He argues that intent is shown by the fact that the giving of the verdict form with the "unable to decide" language was an intentional act; that the inclusion of the language was not merely accidental, particularly in light of the fact that it was included over Pablo's objection. Appellant's Br. at 15. He further contends that the intent behind including the language was clearly to provoke a mistrial, because there could have been no other reason behind the decision to keep the language in, especially after he argued that the language could encourage a hung jury. *Id.*

[29] While it is clear that the inclusion of the language was intentional, as in there was a conscious decision on the part of the trial court to keep the language in, over Pablo's objection, it is not clear that the reason behind this decision was to provoke a mistrial. After listening to Pablo's objection to the "unable to decide" language, the court decided:

> Yeah. I'm inclined to have that -- while I agree, we don't want in any way to suggest to the jury they may not be able to come to a decision, of course, but

> that's -- it's also in the instruction which says must have a unanimous decision, or is -- yeah -- the decision must be unanimous. So I'm inclined to just probably have that portion of the verdict form remain, but I do understand the suggestion. I appreciate it, as well.

Tr. at 8-9 (Jury Trial, June 3, 2013). It appears the court believed that the jury instruction regarding the requirement of a unanimous decision would negate any potential suggestiveness of the "unable to decide" language in the verdict form. Putting aside the questionable wisdom of that decision, we are hard-pressed to find that behind the trial court's decision to include the language was its intent to provoke a mistrial. The record, although a cold one,[6] lacks any suggestion that either the trial court or the prosecutor intended to provoke a mistrial by keeping in the "unable to decide" language.[7]

[6] In the typical case, the accusation of misconduct is made against the prosecutor, and the appellate court has the benefit of the trial court's finding of fact as to whether the prosecutor's conduct was intended to provoke a mistrial. *See Kennedy*, 456 U.S. at 675. In this case, however, because Pablo's primary allegation of misconduct is lodged against the trial court itself, we cannot simply rely on the trial court's determination that Pablo "fail[ed] to provide any evidence that the verdict forms were *intended* to provoke a mistrial." RA, tab 109 at 45 (Dec. & Order).

[7] Because this case can be decided through application of the test set forth in *Kennedy*, we need not determine whether the "unable to decide" should have been included in the verdict form. It is worth noting, however, that both cases cited by the trial court and reiterated by the People to suggest that the inclusion of the language in this case was not improper, are distinguishable from this case. The trial court in its Decision and Order and the People in its appellate brief rely on the fact that other jurisdictions have included similar language in their verdict forms. However, both cases cited, *Daniels* and *Christian*, are distinguishable from the circumstances of this case, as those cases involved lesser included offenses while this case did not. In *Daniels*:

> At trial the jury was given two verdict forms: verdict form A pertained to the homicide by abuse charge and verdict form B pertained to the second degree murder charge. The jury was instructed to fill in not guilty or guilty on form A if it unanimously agreed on a verdict as to the homicide by abuse charge, otherwise it should leave it blank. If the jury either found Daniels not guilty of homicide by abuse or could not agree as to that charge, the jury was then instructed to consider the second degree felony murder charge.

156 P.3d at 908 (footnote and citation omitted). Similarly, in *Christian*, "[v]erdict form (A) [pertaining to charges of felonious assault] instructed the jury to proceed to verdict form (C) [pertaining to charges of complicity to commit felonious assault] if the verdict in form (A) was not guilty or if they were 'unable to decide on a verdict.'" 184 Ohio App. 3d 1, 2009-Ohio-4811, 919 N.E.2d 271, at ¶ 7. Neither party points to a case outside the lesser-included-offense context in which the "unable to decide" language was used.

V. CONCLUSION

[30] For the reasons set forth above, we find that retrial on Count 1 was not barred by the Double Jeopardy Clause. Although it may have been the case that the "unable to decide" language led the jury to not take its role as seriously as it would have had it not been suggested that the jury could simply say that it was unable to decide, it does not appear from the record that the trial court's decision to include the language (and the prosecutor's concurrence with this decision) was motivated by intent to provoke a mistrial. Accordingly, we **AFFIRM**.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
KATHERINE A. MARAMAN
Associate Justice

/s/
ROBERT J. TORRES
Chief Justice