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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 09, 2026 9:04 AM
v	No. 380391 Wayne Circuit Court
STEVEN MICHAEL JOHNSTON, Defendant-Appellant.	LC No. 20-000547-01-FH

Before: GADOLA, C.J., and O'BRIEN and MARIANI, JJ.

PER CURIAM.

Defendant appeals by leave granted[1] the order declaring moot his motion to dismiss the prosecution against him on double-jeopardy grounds. This case was originally assigned to Judge Kelly Ann Ramsey, and it proceeded to a bench trial in January 2023. Trial had to be adjourned, however, and before it resumed, Judge Ramsey went on medical leave. The case was reassigned to Judge Michael M. Hathaway in April 2024. Judge Hathaway was concerned about how long the case had been pending and proposed declaring a mistrial so that the case could be resolved before a different factfinder, but defendant insisted on finishing the trial he started before Judge Ramsey. In August 2024, Judge Hathaway sua sponte declared a mistrial, claiming that "we're not going to be able to finish the trial" that started before Judge Ramsey. But before the new trial began, the case was reassigned back to Judge Ramsey, who had returned from medical leave. Defendant then moved to dismiss the prosecution against him on double-jeopardy grounds. Judge Ramsey referred the motion back to Judge Hathaway, who, in December 2025, explained that he had "a solution that renders [defendant's] motion [to dismiss] moot"—instead of ruling on whether a second prosecution against defendant could proceed, Judge Hathaway rescinded his order declaring a mistrial so that the original proceedings before Judge Ramsey could resume. Defendant challenges that order on appeal.

[1] *People v Johnston*, unpublished order of the Court of Appeals, entered May 29, 2026 (Docket No. 380391).

Resolution of this appeal turns on whether Judge Hathaway properly rescinded his prior order. MCR 6.435(B) permits a trial court to rescind an earlier order due to a substantive mistake provided that judgment has not been entered. Prior caselaw from this Court suggests that MCR 6.435(B) is limited to correcting orders that were entered on the basis of a mistaken belief of fact or law, which raises questions about Judge Hathaway's use of the rule here because, according to Judge Hathaway, he was not mistaken about any facts or the law when he declared a mistrial. That caselaw aside, MCR 6.435(B) by its plain terms only applies if a trial court concludes that its earlier order was erroneous, and it is not apparent that Judge Hathaway believed that his decision to declare a mistrial was erroneous. But even assuming that Judge Hathaway could and did properly rely on MCR 6.435(B) to rescind his mistrial declaration, we conclude that his decision to do so under the circumstances was an abuse of discretion. We therefore reinstate Judge Hathaway's order declaring a mistrial, which necessarily means that Judge Hathaway erred by declaring defendant's motion to dismiss moot. We decline to address the merits of defendant's motion to dismiss and instead remand for the trial court to address that motion in the first instance.

I. BACKGROUND

Defendant was charged with three counts of second-degree child abuse in November 2019. Trial was delayed, but Judge Ramsey eventually presided over a bench trial on January 17 and 18, 2023. The case then had to be adjourned for the parties to obtain a transcript, but due to problems with contacting the court reporter, the delay lasted for several months. During that time, Judge Ramsey went on medical leave.

The case was eventually reassigned to Judge Hathaway, who held a hearing in April 2024. At this hearing, Judge Hathaway expressed concern that the case had been pending for so long without a resolution, noted that it was unclear when or if Judge Ramsey would return from her extended medical leave, and stated his preference for declaring a mistrial so that defendant could be tried before a different factfinder. Defendant opposed a mistrial, asking that his trial before Judge Ramsey be allowed to continue. Defendant agreed that "if we have verification that Judge Ramsey is not coming back," then a mistrial may be proper, but he "ask[ed] that every effort be made" to ascertain whether Judge Ramsey would return because it was defendant's "understanding that Judge Ramsey intends to come back." Judge Hathaway noted that the court had "been getting different return dates" for Judge Ramsey, so he did not "know when that is going to happen," and he reiterated his concern that "this thing has been dragging on for a long time." Given that posture, Judge Hathaway did not "know what options [he had] other than to declare a mistrial," but he opted to not make a decision on that issue at the time.

At the next hearing in May 2024, Judge Hathaway again expressed his preference to "get this thing moving because it's been going on for too long," and he explained that, to do this, "[f]irst we would have to declare a mistrial." Defendant again objected to declaring a mistrial, and Judge Hathaway responded, "I'm going to do what I have to do[,] and I can't just let this case go on and on forever." Judge Hathaway again did not make a decision about the mistrial issue at that time.

The next hearing took place in August 2024. Immediately after the parties placed their appearances on the record, Judge Hathaway stated:

> All right. We are here for a pretrial. This matter was partially tried in front of Judge Ramsey as a bench trial on January the 18th of 2023, after which time the trial was sort of adjourned without dates. In the meantime, Judge Ramsey is no longer available to conclude the trial. We have kicked this matter down the road several times to await some way of disposing of the matter or finishing the trial. But, I guess we're not going to be able to finish the trial. Judge Ramsey continues to not to [sic] be available. (Inaudible)—I'm going to declare a mistrial[,] and we'll have to try it again.

Judge Hathaway entered an order declaring a mistrial immediately following the hearing.

Before retrial could commence before Judge Hathaway, Judge Ramsey returned from her medical leave and resumed her docket responsibilities, and this case was reassigned to her docket. Judge Ramsey held a pretrial hearing in March 2025 at which the parties agreed to an adjournment because defendant was hospitalized. During the hearing, the parties and Judge Ramsey expressed some confusion about how to proceed in light of Judge Hathaway's decision to declare a mistrial. Defense counsel noted that he had objected to that decision, and he explained that the defense was still exploring its options for how it wished to proceed.

Following this hearing, defendant moved to dismiss the second prosecution against him on double-jeopardy grounds. Defendant contended that Judge Hathaway declared a mistrial during defendant's first trial over defendant's objection, and no manifest necessity existed to support Judge Hathaway's declaring a mistrial. This was so, defendant contended, because the reason that Judge Hathaway gave for declaring a mistrial was that Judge Ramsey was unavailable to finish defendant's trial, but it should have been obvious to Judge Hathaway when he declared a mistrial that Judge Ramsey was going to be available to finish defendant's trial shortly—by the date that Judge Hathaway declared a mistrial, Judge Ramsey had already returned to the circuit court and was handling a different judge's arraignment docket.

The prosecution in response defended Judge Hathaway's decision to declare a mistrial, arguing that the declaration was indeed supported by manifest necessity because, when Judge Hathaway rendered his decision, no one knew whether Judge Ramsey would ever be physically and mentally ready to preside over a trial. The prosecution also contended that, regardless, defendant had implicitly consented to Judge Hathaway's declaring a mistrial.

Defendant's motion was heard by Judge Hathaway in December 2025. Recounting the history of the case, Judge Hathaway stated that, after he took over this case, he "came to understand that [Judge Ramsey] was not coming back," and even if she did, she would not return to her criminal docket. Judge Hathaway thus "came to the grim conclusion that Judge Ramsey was simply not going to be available to finish the trial, and so [Judge Hathaway] did declare a mistrial." Judge Hathaway further recounted that, when he found out Judge Ramsey came back, he "sent the case back to her," and all that happened since then was that defendant filed "a Motion to Dismiss on the grounds of double jeopardy." Judge Hathaway then announced that he came up with "a solution here that renders that motion moot"—Judge Hathaway decided that he was "simply going to vacate [his] order declaring a mistrial" so that the original trial before Judge Ramsey could proceed. Judge Hathaway explained that "[t]he compelling reasons for [his] declaring a mistrial have evaporated" because Judge Ramsey had returned to the bench and was "willing to continue

the trial." Judge Hathaway accordingly vacated the mistrial order and denied defendant's motion to dismiss "as moot." Following this hearing, Judge Hathaway entered two orders to reflect his rulings—one order stated that the mistrial order entered by Judge Hathaway was vacated "because the 'manifest necessity' cited by this court as a basis for same no longer exists," and the second order stated that defendant's motion to dismiss was "denied as moot."

The case is now before this Court for review.

II. MCR 6.435(B)

While defendant principally argues on appeal that any retrial is barred by double jeopardy because he did not consent to a mistrial and the declared mistrial was not supported by manifest necessity, the trial court never ruled on that issue. Judge Hathaway instead rescinded his order declaring a mistrial, which rendered moot defendant's motion to dismiss on grounds of double jeopardy. The central issue on appeal is thus the secondary argument raised by defendant—whether Judge Hathaway erred by rescinding his order declaring a mistrial.

The parties agree that resolution of this issue turns on the application of MCR 6.435(B). That rule allows a trial court to correct a substantive mistake in a prior order, stating:

> **Substantive Mistakes.** After giving the parties an opportunity to be heard, and provided it has not yet entered judgment in the case, the court may reconsider and modify, correct, or rescind any order it concludes was erroneous. [MCR 6.435(B).[2]]

MCR 6.435(B)'s use of the word "may" denotes that the rule "is permissive and therefore indicative of discretion." *People v Gubachy*, 272 Mich App 706, 712; 728 NW2d 891 (2006). See also *People v Seeburger*, 225 Mich App 385, 392; 571 NW2d 724 (1997) ("The word 'may,' as used within the statute, indicates that a trial court has discretion whether to issue a restricted license."). A trial court's decision to correct a substantive mistake under MCR 6.435(B) should therefore be reviewed for an abuse of discretion. See *People v Butka*, 514 Mich 366, 376; 22 NW3d 429 (2024) (holding that review of a trial court's decision to grant an application to set aside a conviction is reviewed for an abuse of discretion because the relevant statute granted the trial court discretion whether to grant the application). See also *People v McGee*, 247 Mich App 325, 335; 636 NW2d 531 (2001), vacated 469 Mich 956 (2003) (holding that a trial court's decision to set aside an order declaring a mistrial under MCR 6.435(B) is reviewed for an abuse of discretion).[3] A trial court abuses its discretion when it reaches a decision falling outside the range of reasonable and principled decisions. *Butka*, 514 Mich at 376. To the extent that defendant's argument requires us to address the proper interpretation and application of MCR 6.435(B), that

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[2] Defendant does not dispute that the parties were given an opportunity to be heard and that judgment had not yet entered in the case when Judge Hathaway rescinded his mistrial declaration.

[3] No portion of *McGee* is binding because it was vacated by a "majority of the Supreme Court without an expression of approval or disapproval of this Court's reasoning." *People v Akins*, 259 Mich App 545, 550 n 8; 675 NW2d 863 (2003).

presents an issue of law, reviewed de novo. *People v Winburn*, ___ Mich App ___, ___; ___ NW3d ___ (2025) (Docket No. 369323); slip op at 2.

At the outset, we acknowledge binding precedent from this Court that arguably requires us to hold that MCR 6.435(B) did not permit Judge Hathaway to rescind his prior order for the reasons the judge gave, which means that the decision to do so was necessarily an abuse of discretion. See *People v Waterstone*, 296 Mich App 121, 132; 818 NW2d 432 (2012) ("A trial court necessarily abuses its discretion when it makes an error of law.").

In *People v Jones*, 203 Mich App 74, 80; 512 NW2d 26 (1993), this Court held that a trial court is only permitted to alter an order under MCR 6.435(B) if the court made "a substantive mistake," which this Court defined as "a conclusion or decision that is erroneous because it is based on a mistaken belief in the facts or the applicable law." The *Jones* majority accordingly held that the trial court in that case could not rely on MCR 6.435(B) to modify its verdict because "the trial judge did not base his decision on a mistaken belief in the facts or law," but rather "reevaluated the evidence presented" and reached a different conclusion. *Jones*, 203 Mich App at 80. The dissent disagreed that MCR 6.435(B) was limited to "substantive mistakes" because "the term appears to merely be a 'catch line' to the rule," and the text of the rule itself applied to any substantive decision that the trial court later concluded was erroneous. *Jones*, 203 Mich App at 84 (MURPHY, J., *dissenting*). While the dissent in *Jones* may have the better argument, we have no choice but to follow the *Jones* majority because the case was decided after November 1, 1990. See MCR 7.215(C)(2) and (J)(1).

Following *Jones*'s interpretation of the rule, MCR 6.435(B) would not apply to Judge Hathaway's decision to vacate the mistrial order because, according to Judge Hathaway, that order was not based on a mistaken belief in the facts. See *Jones*, 203 Mich App at 80. Judge Hathaway explained that he ordered a mistrial because he "came to the grim conclusion that Judge Ramsey was simply not going to be available to finish the trial." And the judge reasoned that it was permissible for him to rescind that mistrial declaration because his reason for declaring the mistrial had "evaporated" as Judge Ramsey was "back, and she's willing to continue the trial." Or, as Judge Hathaway worded his reasoning in his order rescinding his mistrial declaration, "the 'manifest necessity' cited by this court as a basis for same no longer exists." It thus appears that, according to Judge Hathaway, he was not mistaken about the facts as it related to Judge Ramsey's ability to finish defendant's trial when he declared a mistrial—when Judge Hathaway declared a mistrial, it was true that Judge Ramsey was not able to preside over defendant's trial, and when Judge Hathaway vacated that order, it was true that Judge Ramsey was able to preside over defendant's trial. So, according to Judge Hathaway, his decision to order a mistrial was not based on a mistaken belief in the facts but on a subsequent change in facts, namely that Judge Ramsey was healthy enough to preside over defendant's trial again. Pursuant to *Jones*'s interpretation of MCR 6.435(B), this was not a valid use of MCR 6.435(B). That rule, according to the majority in *Jones*, can only be used to alter a ruling that was based on a mistaken belief in the facts or the applicable law, and according to Judge Hathaway, his decision to declare a mistrial was based on neither.

But even under the broader interpretation of MCR 6.435(B) advocated for by the dissent in *Jones*, it is questionable whether Judge Hathaway's decision was permitted by the rule. The *Jones* dissent opined that MCR 6.435(B) allows a trial court to alter any decision that the court

later comes to believe was erroneous. Judge Hathaway, however, never concluded that his decision to declare a mistrial was erroneous[4]; he reasoned that "the 'manifest necessity' cited by this court as a basis for [declaring a mistrial] no longer exists." Elsewhere, Judge Hathaway explained that his decision to rescind his order declaring a mistrial was not to correct an erroneous ruling but was "a solution . . . that renders [defendant's motion to dismiss] moot." MCR 6.435(B)'s broadest interpretation allows it to be used by a court to correct a decision that the court concludes was erroneous; if a court does not conclude that its original decision was erroneous, then it is unnecessary and, more importantly, impermissible for the court to use MCR 6.435(B) to alter that decision. Because it appears that Judge Hathaway did not believe that his order to declare a mistrial was erroneous, he could not use MCR 6.435(B) to alter that decision.

That said, even if Judge Hathaway could and did properly rely on MCR 6.435(B) to rescind his order declaring a mistrial, we would still conclude that, under the circumstances here, the decision to do so was outside the range of reasonable and principled outcomes. Before rescinding his declaration of a mistrial, Judge Hathaway recounted how, when he found out "that Judge Ramsey was back . . . in the Criminal Division," he "sent the case back to her." But Judge Hathaway did not rescind his order declaring a mistrial at that time. He instead waited nine more months to vacate his declaration of a mistrial. Even then, Judge Hathaway took this action only after defendant moved to dismiss the second prosecution of him on double jeopardy grounds. Meanwhile, in the 16 months after Judge Hathaway declared a mistrial in defendant's first trial, defendant spent time and resources preparing for his impending second trial. While jeopardy had not yet "attached" at defendant's second trial,[5] we still find it significant that (1) defendant was forced to spend time and resources litigating a second trial for a significant period of time before Judge Hathaway rescinded his order declaring a mistrial, and (2) Judge Hathaway only rescinded his mistrial declaration after defendant moved to dismiss the second prosecution of him on double-jeopardy grounds. Under these circumstances, rescinding the mistrial declaration 16 months after it was entered was outside the range of reasonable and principled outcomes.

We therefore conclude that Judge Hathaway's order rescinding his declaration of a mistrial was erroneous and must be reversed. This necessarily means that we must vacate Judge Hathaway's order denying as moot defendant's motion to dismiss. That motion is no longer moot because Judge Hathaway's declaration of a mistrial is still in effect. While we could address the substance of that motion in this appeal, we believe it improper to do so because the trial court never addressed the substance of defendant's motion to dismiss. We therefore remand this case for the trial court to address defendant's motion to dismiss in the first instance.

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[4] The judge also never cited MCR 6.435(B), so it is difficult to even infer that he was implicitly finding that his prior order was erroneous such that his decision to rescind that order would fall within the text of the rule.

[5] See *People v Hicks*, 447 Mich 819, 826-827; 528 NW2d 136 (1994) (opinion by GRIFFIN, J.) (explaining that jeopardy in a bench trial "attaches once the court begins to hear evidence"); *People v Dawson*, 431 Mich 234, 251; 427 NW2d 886 (1988) (explaining that jeopardy attaches in a jury trial once the jury is sworn in).

The order rescinding the August 20, 2024 order that declared a mistrial is reversed, the order denying as moot defendant's motion to dismiss is vacated, and the case is remanded for the trial court to address the substance of defendant's motion to dismiss. We do not retain jurisdiction.

/s/ Michael F. Gadola
/s/ Colleen A. O'Brien
/s/ Philip P. Mariani