

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2003-0268, State of NH v. Barry Gallant, the court on December 2, 2004, issued the following order:

Following a jury trial, the defendant, Barry Gallant, was convicted on two counts of conspiracy to sell a controlled drug. See RSA 629:3 (Supp. 2003); RSA 318-B:2 (2004). On appeal, he contends that the trial court erred in requiring his counsel to elect between a mistrial or curative instruction before affording a “full hearing” on whether the mistrial remedy would be with or without prejudice. We affirm.

Absent an unsustainable exercise of discretion, we will not reverse a trial court’s decision on whether to hold a hearing. See State v. Roy, 138 N.H. 97, 98 (1993); cf. State v. Lambert, 147 N.H. 295, 296 (2001) (explaining unsustainable exercise of discretion standard). The same standard of review applies to a trial court’s decision on a mistrial. See State v. Zwicker, 151 N.H. 179, 188 (2004). Generally, when a defendant’s request for mistrial is granted, retrial is permitted “unless the defendant, by conduct or design of the State, has been painted into a corner leaving a motion for mistrial as the only reasonable means of avoiding becoming a victim of unlawful tactics or inadmissible evidence.” *Id.* “Whether the prosecution so intended is a matter of fact to be decided by the trial court.” *Id.*

We will assume without deciding that a mistrial without prejudice would have been warranted in this case had the defendant requested it. In response to the defendant’s objection to the testimony, the trial court offered him the option of either a curative instruction or mistrial without prejudice. The trial court found, based upon its observation of the prosecutor and witness and the way the question was posed and answered, that there had been no intentional, malicious prosecutorial misconduct. The court also received argument from both the State and the defendant about the scope of any remedy. The court polled each of the jurors individually and released one juror who was unsure whether the witness’s response would affect his consideration. The court also indicated that, if the defendant elected a mistrial, the court would hold a subsequent hearing on whether it should be granted with or without prejudice.

The defendant contends that the trial court erred in denying his request for a hearing prior to his determining whether to request a mistrial. We note that the defendant has not indicated what further evidence the trial court might have considered at any additional hearing. Having reviewed the record, we find the decision of the trial court was sustainable. See State v. Roy, 138

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N.H. at 98. That the trial court offered the defendant more relief than required does not alter our conclusion.

Affirmed.

BRODERICK, C.J., and NADEAU and DALIANIS, JJ., concurred.

**Eileen Fox,
Clerk**

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