

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

No. 2009-0408

State of New Hampshire

v.

Raymond Paul Thomas, Jr.

**Appeal Pursuant to Rule 7 from Judgment
of the Hillsborough County Superior Court / South**

BRIEF FOR THE DEFENDANT

**David M. Rothstein
Deputy Chief Appellate Defender
Appellate Defender Program
2 White Street
Concord, NH 03301
NH Bar No. 5991
(603) 228-9218**

(5 Minutes 3JX Panel Oral Argument)

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QUESTION PRESENTED

Whether the trial court erred when it refused to declare a mistrial or take other remedial action after Quayle struggled to leave the courtroom, and collapsed outside the courtroom

Issue preserved by hearings on the issue, Thomas's motion for a mistrial, and the court's ruling. T-III* 434-48, 503-09.

*Citations to the record are as follows:
"NOA" designates the notice of appeal;
"App." designates the Appendix to this brief;
"T-I" through "T-IV" designate the four volumes of trial transcript.

STATEMENT OF THE CASE

A Hillsborough County (South) grand jury indicted Raymond Paul Thomas with one count of attempted murder. T-I 8. The indictment alleged that he repeatedly stabbed his ex-girlfriend, Rebecca McKinnon (now Quayle), on March 24, 2002. T-I 8.

Thomas had previously stood trial and been convicted, but this Court reversed because the trial court erred in declining to instruct on lesser-included offenses. State v. Thomas, 154 N.H. 189 (2006). After this trial, the jury again convicted him of attempted murder. T-IV 634. The court (Lynn, J.) sentenced Thomas to serve 30 years to life in prison. NOA 2.

STATEMENT OF FACTS

Rebecca Quayle (formerly McKenzie) and Raymond Thomas met when they were patients at St. Joseph's Hospital in Nashua in January of 2002. T-II 284. Quayle had been admitted for depression, and Thomas was detoxing from alcohol. T-II 283-84. They were discharged on the same day, and Thomas moved into Quayle's apartment at 22A Kinsey Street. T-II 285.

Thomas intended to stay sober, but he immediately began to drink heavily. T-II 286-87. Quayle never saw him drink any beverage that did not contain alcohol. T-II 287. On March 23, 2002, they planned to go to a local social club to drink, but Quayle could not find her identification. T-II 291. Thomas left without Quayle, which angered her. T-II 291-92.

Quayle soon found her identification and called her best friend, Cheryl Ann Voight. T-II 292. They made plans to go to the Nan King Restaurant in Hudson. T-II 293. Voight's brother David picked Quayle up and they met Cheryl at the restaurant. T-II 294-95. There, Quayle consumed two "scorpion bowls" and became intoxicated. T-II 295. She went to a Motel 6 with David and spent the night with him. T-II 295-96.

The next morning, David dropped Quayle off at her apartment at around 6:00 a.m. T-II 296. Thomas was sitting on the couch drinking. T-II 296. According to Quayle, Thomas looked worse than she had ever seen him. T-II 296, 348. It appeared to her

that he had been up drinking all night. T-II 296. Thomas accused Quayle of cheating on him, which she denied. T-II 297-98. Quayle claimed that she had spent the night at Voight's house. T-II 298. She had plans to spend the day with her young son, Steven, so she left the apartment with her mother and returned with Steven at around 10:00 a.m. T-II 299-300.

When Quayle returned she and Thomas continued arguing. T-II 300. Thomas hit Quayle in the face. T-II 309. Quayle called Voight and said that she had to leave. T-II 309. Voight knew that Quayle had no access to a car so she went to Quayle's apartment to help her. T-I 173. Thomas told Quayle she was not going to leave. T-II 310. He threatened her with a knife and said, "I want you to die. You're going to fucking die, bitch." T-II 311. Thomas stabbed Quayle. T-II 311, 313.

Voight arrived and found the apartment door locked. T-I 173. She knocked on the door and tried to call Quayle by phone but got no response. T-I 174. While walking away, Voight heard a faint voice say "Help me." T-I 174. She put her fist through a glass pane, unlocked the front door, and punched through another pane to unlock a second door leading to the apartment. T-I 174-75.

When Voight entered she saw Thomas on top of Quayle. T-I 175. Voight grabbed Thomas's shoulder to pull him away, and he pulled the knife out of Quayle. T-I 176. Thomas slashed

Voight's arm and chased her into the kitchen. T-I 176-77. He told Voight that Voight had caused him to stab Quayle. T-I 177.

During the ensuing struggle with Voight, Thomas slashed her two more times and stabbed her in the back. T-I 178. When Voight pulled out the knife, the blade detached from the handle. T-I 179. As Thomas seemed to be getting another knife, Voight threw the kitchen table at him and ran for help. T-I 179. Outside, Voight flagged down an officer and the Nashua Police headed to Quayle's apartment. T-I 180.

When they arrived, Quayle was on the living room floor bleeding profusely and she appeared to be in critical condition. T-I 38, 71. Thomas, who had retreated to the bedroom, yelled out that he had a gun and would shoot. T-I 41-42, 71. Though Thomas told the officers that Quayle was hurt and needed an ambulance, he refused to surrender. T-I 42, 48, 72, 78. When the police entered the room, Thomas had his right hand behind his back and moved toward the officers. T-I 45, 74; T-III 466. One of them struck him and the police were able to effect his arrest. T-I 45-46, 75; T-III 466.

Quayle had contusions on her face, a broken nose, a long laceration on the right front of her neck and two stab wounds to the back. T-I 109-115. She had lost 30-40% of her blood volume. T-I 108.

Thomas was taken to the hospital where he was treated for a broken eye socket and a mild concussion. T-I 56, 64. He smelled of alcohol. T-I 51. Thomas was taken into custody at 2:39 p.m. and a blood draw at 5:05 p.m. revealed a blood alcohol content of .278. T-I 51, 67; T-III 514. A toxicologist estimated that it was probably closer to .290 at 2:00 p.m., and that at such a level a person would have experienced significant impairment, disinhibition, disorientation, and increased aggression. T-III 517, 525-29.

At the hospital, officers heard Thomas make several unsolicited statements, in the nature of rambling, blurting or yelling things out. T-I 84-85. Officer Kevin Girouard heard him say, "You fucking cunt, you deserved it." T-I 85. Detective Francis Sullivan noted a number of statements over the course of an hour, some of which seemed relevant to the incident (e.g., "I didn't cut her . . . You forgot that she cut me"), and others of which seemed to be about other events (e.g., "My son is dead"; "She had me arrested four or five times"; "I work for the City of Nashua"). T-III 441, 443-45.

The next day, Lt. George McCarthy interviewed Thomas. T-II 394. Thomas told McCarthy that he loved Quayle "[c]ompletely," App. at A8, but she went out with someone else, which made him feel "[p]lissed off." App. at A19-A20. According to Thomas,

during an argument, Quayle punched him in the right eye. App. at A16. He walked away and Quayle called someone. App. at A17.

Initially, Thomas denied stabbing Quayle or Voight. App. at A24-A26. After McCarthy confronted him with the evidence against him, Thomas told McCarthy that Quayle punched him and he "flipped out." App. at A28. He explained further that after Quayle hit him, he pushed her away, she came after him and he stabbed her. App. at A28, A50. Thomas admitted that he tried to fight off Voight by pushing her away, but denied hurting her with a knife. App. at A48. He told McCarthy that he felt bad about the incident because he loves Quayle. App. at A53.

Events During Trial

At the beginning of Det. Sullivan's testimony, the court called a recess in response to commotion just outside the courtroom. T-III 434. Quayle, as she left the courtroom, fell ill, collapsed, and said "Help me" in a voice that was loud enough for the judge to hear from the bench. T-III 435-36. The court and the prosecutor expressed the belief the jury's vantage point would not have allowed it to see what happened or who had collapsed. T-III 436-37. The court instructed the jury that someone had fallen ill in the hallway, the person has been taken to the hospital, and "it obviously has nothing to do with this case. . . ." T-III 437-38.

A few hours later, the defense sought to revisit the issue. At a break, a Nashua Telegraph reporter told counsel that as Quayle left the courtroom, she was unsteady on her feet and braced herself on benches for balance. T-III 503. According to the reporter, it took Quayle "a minute or so" to get out of the courtroom. T-III 503. The reporter explained that he was concerned enough that he thought of helping her, but he saw Voight go to Quayle's aid. T-III 503-04.

The court stated that it did not see Quayle leave the courtroom, T-III 505, but added that one of the court officers expressed concern that people in the courtroom may have heard emergency radio transmissions about the incident. T-III 506. After another recess, during which counsel consulted with the defendant, counsel moved for a mistrial. T-III 507. Thomas was concerned that the incident was prejudicial, and that any instruction would only exacerbate the prejudice. T-III 508. The court denied the motion. It ruled that even if the jury inferred that Quayle was the person who fainted and needed assistance, the jury would draw no inference adverse to Thomas. T-III 508-09.

SUMMARY OF THE ARGUMENT

The trial court erred when it refused to declare a mistrial or take other remedial measures after Quayle struggled to leave the courtroom, and then collapsed immediately outside the courtroom.

After it became clear that at least some jurors likely saw her leave the courtroom, and therefore inferred that it was she who needed emergency medical attention, the court had an obligation to ensure the event did not engender such sympathy for Quayle nor animus against Thomas as to have interfered with any juror's ability to fairly and impartially evaluate Thomas's defense. The court's failure to declare a mistrial, or take any remedial action under these circumstances, entitles Thomas to a new trial.

I. THE TRIAL COURT ERRED WHEN IT REFUSED TO DECLARE A MISTRIAL OR TAKE OTHER REMEDIAL ACTION AFTER QUAYLE STRUGGLED TO LEAVE THE COURTROOM, AND COLLAPSED OUTSIDE THE COURTROOM.

Immediately after she struggled to leave the courtroom, Rebecca Quayle collapsed and needed emergency medical assistance. T-III 434. Based on the observations of a Nashua Telegraph reporter who was covering the trial, it took Quayle about a minute to get out of the courtroom. T-III 503. Voight had to assist Quayle as she left, and after she collapsed, the court heard the cry, "Help me," from the bench. T-III 435-36, 503.

The court's initial response, which was to assure the jury that the events had nothing to do with the case, was premised on an understanding that no one would likely have known who had collapsed in need of medical attention. T-III 434-35. However, it later became clear to the court and the parties that Quayle's struggle to leave the courtroom was obvious. Observers in the courtroom thus would have connected the immediately subsequent call for help and the commotion in the hallway to Quayle, and assumed it was she who became ill. Accordingly, based on the information provided by the reporter, the court should have recognized that the jury observed aberrant or disruptive conduct, and either declared a mistrial or undertaken alternative remedial measures. Its failure to do so entitles Thomas to a new trial.

"The basis for granting a mistrial is the existence of circumstances which indicate that justice may not be done if the

trial continues to verdict." State v. Madore, 150 N.H. 221, 223 (2003). "The trial court is granted broad discretion to decide whether a mistrial or other remedial action is necessary because it is in the best position to measure prejudicial impact." Id.

This Court's jurisprudence on mistrials largely involves only claims arising from the admission of allegedly prejudicial evidence or the impact of a prosecutor's argument. Other courts have addressed the need for a mistrial or remedial action in circumstances where, as here, a witness has either fainted or displayed emotion in the jury's presence. See generally Annotation, *Emotional manifestations by victim or family of victim during criminal trial as ground for reversal, new trial, or mistrial*, 31 A.L.R.4th 229 (1984) (collecting cases). As one court has stated:

The fact that a victim suffers a fainting episode or some other outburst in the presence of the jury does not automatically require a mistrial; such relief is required only where the court determines that the incident prejudiced a substantial right of the defendant. . . . The prejudicial impact of the incident is to be determined after consideration of the following factors: (1) whether the incident was pronounced and persistent, creating a likelihood it would mislead and prejudice the jury, (2) the strength of the other evidence, and (3) curative action taken by the district court. . . . Ultimately, a motion for mistrial must be granted only where the court concludes the incident was of such magnitude that it precluded the jury's impartial consideration of the case, and where a

Motta v. Government of the Virgin Islands, 2004 WL 2848467 at *5 (D.V.I. 2004) (citations omitted).

In Motta, the victim collapsed as she prepared to leave the witness stand. Id. The judge immediately ushered the jury out of the courtroom for the lunch recess, and before the testimony resumed, informed the jury that the witness's medical condition and the stress attendant to testifying caused her to faint. Id. In addition, the court instructed the jury it could not weigh the incident in its deliberations. Id. Given the brevity of the incident and the curative measures taken, the defendant did not suffer such prejudice as to warrant a mistrial. Id.

Other courts have resolved the issue in similar fashion. In Walker v. State, 652 P.2d 88, 92 (Alaska 1982), the victim fainted in the courtroom aisle after she completed her testimony. The court excused the jury, and when the proceedings resumed, it admonished the jury to disregard the incident. Id. In addition, it instructed the jury at the end of the case that sympathy toward the victim could not influence its decision. Id. Likewise, in Commonwealth v. Simmons, 662 A.2d 621, 635 (Pa. 1995), no mistrial was necessary after a witness fainted because the incident was brief and the court quickly told the jury that the witness was fine. See also King v. State, 769 S.W.2d 407, 408 (Ark. 1989) (no mistrial needed where judge told jury to disregard the fact that the victim collapsed after she

testified); State v. Steckler, 526 So.2d 363, 365 (La. App. 1988) (no error where victim collapsed out of jury's line of sight); Miller v. State, 292 S.E.2d 102, 104 (Ga. App. 1982) (no error where victim fell to floor during testimony but was able to continue).

Thus, the fact that a witness fainted in the courtroom does not necessarily compel the court to declare a mistrial. The less the jury is aware of the situation, or the more appropriately the court addresses it, the less likely it is that the proceedings have been irreparably tainted. Nonetheless, courts have recognized that prejudice may result, in the form of the jury feeling additional sympathy for the victim and hostility toward the defendant. This prejudice is exacerbated if the court failed to properly assess and address the situation.

Here, the court proceeded as if the jury had no idea whether the person who fell ill was connected to the case. Based on the initial assessment, there was no reason to think otherwise at that time. Accordingly, the court's instruction that what occurred had no connection to the case seemed appropriate.

However, based on the information subsequently provided by the reporter, the court had an obligation to take further remedial action. If the reporter saw Quayle's struggle, it is likely that at least some jurors saw it as well. Quayle's plight, even apart from her struggle and collapse at court, would

have engendered sympathy for her and hostility toward Thomas. The more prominent such feelings were, the more difficult it would have been to achieve a fair result based on an impartial analysis of the evidence. This Court has acknowledged that Thomas had a viable mental state defense to the attempted murder charge that was irreparably harmed by a trial judge's refusal to instruct the jury on a lesser offense. State v. Thomas, 154 N.H. 189, 193 (2006). A mental state defense to attempted murder is difficult under any circumstances. To preserve Thomas's right to an impartial and unbiased jury, the court, to avoid a mistrial, had to ensure that no juror was affected by Quayle's problems in a manner that would have impacted their ability to serve, and that no juror would have weighed the incident in its consideration of Thomas's defense.

Though defense counsel only asked for a mistrial, and specifically did not request a curative instruction, T-V 508, the court nonetheless had an obligation to ensure that the event would not affect the proceedings. Even where a mistrial is not warranted, the risk of prejudice must be identified and abated. If the court cannot declare a mistrial before it considers and exhausts lesser remedial measures designed to curb prejudice, State v. Gould, 144 N.H. 415, 418 (1999), it follows that the court must take those steps anytime a potentially prejudicial event occurs and before the court allows the proceedings to

event occurs and before the court allows the proceedings to continue. In other words, the defense's invocation of a specific remedy, i.e., a mistrial, did not relieve the court of an obligation to employ lesser measures. See State v. Ayer, 150 N.H. 14, 20-23 (2003) (holding defendant's specific request for mistrial with prejudice did not bar consideration of whether court should declare mistrial without prejudice).

Here, the court should have determined whether anyone saw Quayle struggle or knew it was she who needed aid, and addressed the influence of those observations or that knowledge. Absent these measures, there is no guarantee that the jury's rejection of Thomas's defense was not the product of its sympathy for Quayle. The court's failure to declare a mistrial or take adequate remedial action entitles Thomas to a new trial.

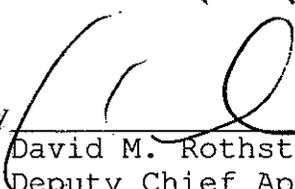
CONCLUSION

WHEREFORE, Mr. Thomas respectfully requests that this Honorable Court reverse his conviction and remand his case for a new trial.

Undersigned counsel requests five minutes of argument before a 3JX Panel of this Court.

Respectfully submitted,

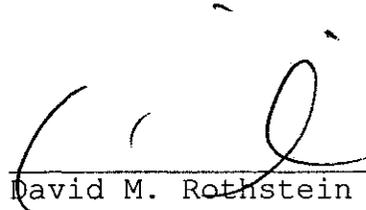
By


David M. Rothstein, NH Bar #5991
Deputy Chief Appellate Defender
NH Appellate Defender Program
2 White Street
Concord, NH 03301

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, this 9th day of December, 2009, to:

Criminal Bureau
Attorney General's Office
33 Capitol Street
Concord, NH 03301


David M. Rothstein

DATED: December 9, 2009