

## CELEBRITIES

# Bill Cosby trial: How did a mistrial happen? And what comes next?

Maria Puente

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Brendan McDermid | Reuters

Actor and comedian Bill Cosby arrives with his wife Camille for the sixth day of his sexual assault trial at the Montgomery County Courthouse in Norristown, Pennsylvania, U.S. June 12, 2017.

The outcome of the Bill Cosby sexual assault trial is that there isn't one: On Saturday morning, Judge Steven O'Neill [declared a mistrial](#) after the jury failed to reach a unanimous verdict on any of three counts of aggravated indecent assault of accuser Andrea Constand, following 52 hours of deliberation over five days.

Cosby was *not* found guilty and was *not* acquitted. A jury of seven men and five women could not reach a unanimous verdict — required by law — for either, thus resulting in a hung jury, thus resulting in the declaration of a mistrial.

Why did a mistrial happen? The bottom-line: Montgomery County District Attorney Kevin Steele failed to prove the state's case against Cosby beyond a reasonable doubt to at least one member of the jury. Here are several theories of what led to a mistrial:

Cases are difficult to prove when significant time has elapsed

The encounter between Bill Cosby and accuser Andrea Constand happened in January 2004. She did not report it until a year later. Steele did not file charges until December 2015 (after a previous DA declined for lack of evidence due to the time lapse), and the trial took place in June 2017.

Getting a conviction this long after the alleged assault is anything but a slam dunk, lawyers say.

"Prosecuting a case this old is inherently risky as jurors need to have a comfort level that justice is reasonably speedy and has not been delayed for improper reasons," says Dennis McAndrews , a former Pennsylvania prosecutor who has been following the case.

Prosecuting sex crimes a decade or more after an incident is almost always difficult, "because memories fade over time, potential forensic evidence is often unavailable, and juries may wonder why they should convict if the alleged assault happened so long ago," adds Dan Schorr, managing director of Kroll Associates, a former New York sex-crimes prosecutor who also teaches a class on sex crimes at Fordham University's law school.

Judge O'Neill did not allow a dozen other accusers to testify

The defendant doesn't have to testify, and Cosby did not, preferring not to open himself up to cross-examination about the five-dozen other women who have accused him of drugging and/or raping them in episodes around the country dating back decades (and thus too old to prosecute).

But Steele could not persuade O'Neill to allow a dozen other accusers to testify that Cosby drugged and sexually assaulted them, too, to demonstrate a pattern of "prior bad acts." Instead, Steele was allowed to call just one other accuser, Kelly Johnson , to testify that Cosby drugged and assaulted her in a Los Angeles hotel in 1996.

"The testimony of Johnson helped corroborate Constand's account by supporting the argument that Cosby did have a pattern of drugging women in order to sexually assault them," Schorr says.

But it wasn't enough. Gloria Allred, the women's rights attorney who represents 33 Cosby accusers, told the media outside the courthouse after the mistrial, that she hoped next time more accusers will be allowed to testify.

"The court only allowed one such prior bad act witnesses," she said. "If the court allows more accusers to testify next time it might make a difference. In other words, it's too early to celebrate, Mr. Cosby."

O'Neill allowed Steele to introduce as evidence Cosby's own words about his encounter with Constand, in a 2005 police interview and in a deposition he gave for her 2005 civil lawsuit against him. The latter contained damaging admissions that he acquired drugs to give to women he sought for sex.

"Cases such as this one are difficult to prosecute when there is a delay in reporting and no (forensic) evidence," says New York criminal defense attorney Stuart Slotnick who's been following the case for more than two years. "Here, however, the prosecution had Cosby's explanation and deposition, which is not the case in most trials."

Constand's credibility was questioned

In a she-said-he-said case with no forensic evidence, it all comes down to one question: Did the jury believe Constand's testimony — and Constand herself — was credible?

Jurors have to weigh the testimony of the accused and the accuser, looking for inconsistencies in past statements versus those made in the present, says trial attorney Priya Sopori of [Greenberg Glusker](#) in Los Angeles.

"They faced weighty questions of credibility, consent, drugs and sexuality," says Sopori. "They (asked) themselves if the evidence showed beyond a reasonable doubt that Ms. Constand was coerced into taking drugs or if she willingly took drugs with an informed understanding of their effect and a willingness to engage in sexual conduct with Mr. Cosby."

The declaration of a mistrial means "at least one juror had a reasonable doubt about Constand's credibility because of some inconsistencies in her account," Schorr said. "Even though it is very common for victims of sexual assault to delay reporting of the attack and have some inconsistencies in how they relate the events because of trauma, fear, embarrassment and other issues, juries sometimes hold such inconsistencies against" an accuser.

"It's almost inevitably due to the inconsistencies in the victim's statement about times and places, as well as the 12-year delay in bringing the case, all of which can raise reasonable doubt in the minds of the jury," McAndrews says.

The defense did not put on an extensive case; did that matter?

No matter how many times a judge reminds a jury that under American law [a defendant does not have to testify](#) and does not have to put up a defense (because the burden of proof is all on the prosecution), it's hard for laypeople — i.e. jurors — to not think... hmmm... when it happens.

It happened in Cosby's trial. His team called one witness when it came time to present his defense on Monday, and he finished answering a few questions in a little more than five minutes.

"The defense rests," lead defense attorney Brian McMonagle said. And that was it. The trial was over in the courtroom in six days.

Lawyers say such a move is not that unusual. "It is far more often that defendants do *not* put on an extensive case than they do," says Slotnick. "Often the reason is that the defense does not believe the prosecution met their very high burden of proving guilt beyond a reasonable doubt."

McAndrew wasn't surprised at the move either, since virtually all of the evidence the Cosby team needed to address came in through the prosecution's case, such as the deposition and police interview. "Some of the Commonwealth's witnesses were also effectively cross-examined, and therefore that left relatively little for the defense to introduce in their case-in-chief," McAndrews says.

Make no mistake, Cosby got a "great defense" by McMonagle and Angela Agrusa, says Jill Stanley, a trial attorney in Washington and a former federal prosecutor and criminal defense attorney who covers celebrity legal news on her website, [Proof With Jill Stanley](#). She attended the trial.

"They fought hard on every witness, every document, every report, on Cosby's words — his defense was vigorous," Stanley says "Five minutes and one witness does not mean he was not fully represented. Their case started the minute the jury sat down in the box, in the way they carried themselves, in their aggressive and powerful opening statements. They left no stone unturned."

What happens now?

Steele told the judge he intends to retry the case. He elaborated later at a press conference, saying Constand "deserves a verdict" on the charges. He said he was disappointed about the mistrial but insisted he has no doubts about the state's case and that the trial had meaning for victims of sexual assault everywhere.

"Our plan is to move this case forward as soon as possible," Steele said, adding that another year added to the age of the case would not be a burden. "One of the challenges that we face in this type of case is the time period that has gone. But it doesn't affect the evidence. And I hope, if you sat through the court proceedings, you saw how powerful that evidence is."

Slotnick suggested some of Steele's statements at the press conference could be problematic. "The prosecutor's press conference was inappropriate as he disparaged the defense," Slotnick said. "A prosecutor should not make public statements that could potentially influence a future jury pool."

But it's not over for Cosby, Slotnick said. "Without a doubt, a mistrial is a good development for Cosby, but he still has to face another trial," Slotnick said. "It is not time for Cosby to pop the champagne, but a mistrial makes the prosecutor's case harder to prosecute."

Meanwhile, everyone, public included, will want to know what happened with the jury and how the vote turned out. The jury may now discuss their deliberations publicly but they don't have to do so.

"It may change the approach of the prosecution or the defense if it is revealed that the vote was 11 to 1 in either direction," Slotnick says. "A fairly even split between the jurors means that there were significant doubts" about the prosecution's case.

"If it's 11-1 in favor of guilty, the prosecution retries the case under the assumption there is one unusual holdout juror that for whatever reason never budged," says Alan Tuerkheimer, a Chicago-based jury consultant who followed the case. "Did they miss something in jury selection that should have tipped them off?"

Criminal defense attorney Lisa Houlié, a former prosecutor in Los Angeles County, says she would want to know the vote count but "more importantly, the issue in dispute before deciding whether to retry someone."