

Circuit Court for Charles County
Case No. C-08-CR-20-000410

UNREPORTED*
IN THE APPELLATE COURT
OF MARYLAND

No. 133

September Term, 2022

TIMOTHY JOEL ALLEN

v.

STATE OF MARYLAND

Nazarian,
Reed,
Getty, Joseph M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Getty, J.

Filed: January 19, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

This case concerns the circuit court finding manifest necessity to declare a mistrial in a criminal trial for rape and assault. During cross-examination of the alleged sexual assault victim, counsel for the Appellant, Timothy Allen, asked a question about the alleged victim’s prior sexual conduct. Allen’s attorney claimed this was relevant because the DNA evidence in the case was based on a Y-STR profile, which did not specifically identify Allen but also did not exclude him.¹ The State argued the question violated the Rape Shield Statute, and the court subsequently granted a mistrial. Allen then filed a motion to dismiss the case claiming he could not be retried due to his right against being placed in double jeopardy. That motion was denied, resulting in this appeal.

Allen frames this appeal around the denial of his motion to dismiss on double jeopardy grounds. However, the issues we must consider are more nuanced. Before we can reach the issue of double jeopardy, we must first determine whether there was manifest necessity for the trial court to declare a mistrial. As will be discussed in further detail below, if there was manifest necessity to declare a mistrial, Allen can be retried without infringing on his double jeopardy rights. However, if there was no manifest necessity, double jeopardy attaches, and Allen could not face trial again. We begin with a brief recitation of the facts and the questions presented.

¹ Y-STR testing is unique because it “specifically targets male contributors of DNA,” by examining “‘the DNA [that] is present on the Y chromosome,’ which only biological males possess.” *Curtis v. State*, 259 Md. App. 283, 298 n.1 (2023). While it is “a useful technique in isolating a DNA profile and comparing it with that of a known male suspect,” it cannot identify a specific suspect because “Y-STR testing cannot differentiate between males in the same paternal line, thus meaning that ‘grandfathers, father, son, all of those individuals would share the same Y-STR profile.’” *Id.*

Ms. M² went out for dinner and drinks with her friends in La Plata, Maryland in March 2020. She returned to her friend’s house where Allen was staying. As will be discussed in more detail below, she alleged that she fell asleep on the couch and woke up when Allen was sexually assaulting her. Shortly thereafter, her friend drove her to the hospital where Ms. M spoke with police and had a sexual assault examination. The hospital also collected a Y-STR DNA sample. This type of DNA sample only tests for the presence of a Y-chromosome and does not specifically identify an individual within the paternal line. Police then located Allen and brought him to the police station for questioning. Allen was subsequently indicted for second-degree rape and second-degree assault.

Allen appeared in the Circuit Court for Charles County for a jury trial in October 2021. The State called Ms. M to the stand as its first witness. During defense counsel’s cross-examination of Ms. M, she was asked about a prior instance of sexual conduct with a man not involved in the proceedings.³ The State objected to the question and moved for a mistrial, arguing “the State cannot un-ring that bell.” After hearing from both sides, the judge found there was manifest necessity and granted the State’s motion for a mistrial based on Section 3-319 of the Criminal Law Article, Maryland Code (2002, 2021 Repl. Vol.).

Following the mistrial, Allen filed a Motion to Dismiss on Double Jeopardy Grounds, claiming the court erroneously granted a mistrial because no manifest necessity

² This opinion will identify the alleged victim only with the first initial of her last name.

³ Since this man is not otherwise involved in this case, we will refer to him as “Mr. B.”

existed. Therefore, Allen argues that the case must be dismissed to avoid placing Allen in double jeopardy in violation of the Fifth and Fourteenth Amendments to the United States Constitution and applicable Maryland common law. The parties appeared for a hearing on the motion to dismiss. After arguments from both parties, the judge denied the motion to dismiss.

Allen timely filed this appeal and presents the following questions for our review, which we have rephrased:⁴

1. Was there manifest necessity for the trial court to declare a mistrial?
2. If there was no manifest necessity to declare a mistrial, did the circuit court err in denying the Appellant's motion to dismiss on double jeopardy grounds?

For the following reasons, we conclude that the Circuit Court for Charles County did not abuse its discretion in determining there was manifest necessity to declare a mistrial. Therefore, the circuit court did not err in denying Allen's motion to dismiss on double jeopardy grounds.

FACTS & PROCEDURAL HISTORY

On March 4, 2020, the State charged Allen with second-degree assault and second-degree rape. Prior to trial, Allen filed a motion in limine to exclude Y-STR DNA evidence and expert testimony on the topic. He argued the DNA evidence was irrelevant since it

⁴ The Appellant states his question presented as:

1. Did the lower court err in denying Appellant's motion to dismiss on double jeopardy grounds when manifest necessity did not exist for the granting of a mistrial which ended Appellant's first trial?

was only a reading of the Y-chromosome and therefore a partial DNA profile. Allen claimed the evidence showed that he could not be excluded from the profile but that it did not specifically identify him. The court denied the motion.

Allen was tried by a jury in the Circuit Court for Charles County on October 4 and 5, 2021. During opening statements, counsel for Allen argued that he was innocent, that he did not have intercourse with the victim, and that the DNA found was not his. Before the State called the victim as its first witness, the State asked to approach the bench where the following conversation took place:

[STATE]: I just wanted to make . . . a Motion In Limine regarding the Rape Shield Law CR 3-319 I'm not sure what, if anything, the Defense, because they didn't file anything, but I just, I always do it in every case.

* * *

THE COURT: Okay.

[DEFENSE]: Well I think there may be an opportunity at some point during my cross of [Ms. M], depending on what comes out, to have that hearing outside the presence of the jury regarding an exception to the Rape Shield Law.

* * *

THE COURT: So right now I'll reserve on your Motion In Limine in reference to the rape shield . . . until the appropriate time when you cross.

The victim then took the stand and testified about the events leading up to the alleged rape. She went out with her friends for dinner and drinks, got “pretty drunk,” and was eventually driven back to her friend’s house where Allen was staying. When she

arrived, the front door was locked, so she went around to the back of the house and Allen unlocked the side door so that she could enter the house. Allen was the only one awake at the time, so she sat on the couch, ate tacos, and “just hung out.” She testified that she eventually fell asleep on the couch and woke up with her pants pulled down to her knees and Allen on top of her with his penis partially inside of her. She said she “kicked him off” and ran to her friend’s room “hysterical.”

She ultimately went to a hospital where she had a sexual assault examination, met with a SANE nurse, and spoke to a police officer. The nurse asked a variety of questions about the events leading up to, during, and after the alleged rape.

During cross-examination of Ms. M, Allen’s attorney recounted these questions to Ms. M as well as her answers to them, and then asked:

[DEFENSE]: And the nurse asked you when the last time you had consensual intercourse was, right?

[MS. M]: Yes.

[DEFENSE]: And you said, “Four weeks ago,” right?

[MS. M]: Yes.

[DEFENSE]: Okay. In the two weeks before this incident, you didn’t have sex with [Mr. B]?

The State objected immediately, and the court excused the jury for a recess.

After a brief recess, the State’s Attorney noted “[the prior question] is why I brought up the motion in limine regarding the rape shield prior to Ms. [M] testifying. Ultimately, I can’t . . . un-ring this bell.” The State said Allen’s attorney should have “brought this up

prior to asking the question,” but the judge could not “rule on anything because nothing was brought up at the bench conference” that would require a closed hearing. The State then requested a mistrial.

In response, counsel for Allen argued that the question was not calling into question Ms. M’s chastity or abstinence. Rather, it was evidence “of a specific instance of sexual activity, showing the source or origin of semen, disease, trauma, or pregnancy,” and therefore was a “clear exception” under Md. Code, Crim. Law § 3-319. This was especially significant, the defense argued, because the DNA showed the “frequency of that Y-STR profile is one in 1,348 people.” Therefore, even though the DNA does not specifically identify Allen, he cannot be excluded from the DNA profile and the State wants the jury to use this information to infer he is a match. Additionally, Allen’s attorney went on to argue why the question about prior sexual acts was relevant:

And when the State makes it an issue, saying part of [the] reason that they did the testing the way they did is that [Ms. M] told the nurse that she hadn’t had sex in four weeks. And so we have evidence that she . . . had sex with other individuals in the two week period before this incident happened. And why that is relevant . . . is that we know from speaking with the DNA expert, that a DNA profile can . . . be detected by the DNA analyst up to . . . at least fifteen days before the testing.

* * *

This is a specific instance [that] would show that the source of the DNA could be from other individuals, Your Honor.

The State disagreed and argued that a closed hearing was required under the statute before the question could be asked and reiterated that there was “no way to un-ring this

bell.” The judge then granted the State’s motion for a mistrial, stating her reasoning as follows:

According to [Md. Code, Crim. Law § 3-319(c)(1)], “Evidence described in Subsection [a] or [b] of this section may not be referred to in a statement to a jury, or introduced in a trial, unless the Court has first held a closed hearing,” which it did not, “and determined that the evidence is admissible.”

“The Court may reconsider a ruling excluding the evidence and hold an additional closed hearing if new information is discovered during the course of the trial that may make the evidence admissible.”

But the Court is not reconsidering it. As the State indicated, the jury heard the question asked by the Defense, and at this point it is manifest necessity that the Court grant the State’s motion for a mistrial.

Allen later filed a Motion to Dismiss on Double Jeopardy Grounds. The State filed an opposition, and the Court held a hearing on the motion in March 2022. In his brief and at oral argument Allen argued that jeopardy had attached in the proceedings, the defense did not consent to a mistrial, and there was no manifest necessity for the court to declare a mistrial in this case. Therefore, retrial would violate his right against double jeopardy.

Allen’s attorney stated that the defense’s lack of consent to the mistrial was important because retrial is then barred unless there is a showing of manifest necessity. Additionally, counsel argued the record did not demonstrate that a mistrial was justified in this case. In order for manifest necessity to exist, counsel said, there has to be a high degree of necessity for the mistrial, the trial court has to engage in exploring reasonable alternatives to a mistrial, and no reasonable alternatives were available. Counsel then argued that manifest necessity did not exist for three reasons: (1) the State waived their

objection; (2) inadmissible evidence was not actually presented to the jury; and (3) the court had to go through the process of considering reasonable alternatives.

Counsel first argued that the State “waived their objection by consenting to addressing the issue of admissibility during cross-examination” when the parties had a bench conference. Next, counsel argued that the evidence was admissible under two different theories. First, counsel said that “no evidence at all” was presented to the jury as counsel only asked the question and “questions of the attorneys obviously are not evidence.” The question, standing alone without an answer, did not violate § 3-319, counsel said. However, even if it did violate part of § 3-319, it was also admissible under the portion of § 3-319 that allows evidence relating to a specific instance of a victim’s prior sexual conduct when the evidence is relevant and material to a fact in the case and its probative value outweighs the prejudicial nature of the evidence. Second, counsel continued, it was also admissible because it was offered for impeachment “after the State put [the DNA] at issue.”

Finally, the court did not consider any reasonable alternatives, counsel said, even though reasonable alternatives did exist. Counsel argued that “an easy fix” would have been for the court to hold a hearing on the admissibility of the evidence or give the jury a curative instruction.

In response, the State argued that in addition to the three factors necessary for the declaration of a mistrial, a mistrial is dependent on the unique facts and circumstances of each case. In this case, the State said, a mistrial was necessary because defense counsel

violated the Rape Shield Statute when she asked the question about Ms. M’s prior sexual acts. The defense never filed a motion or indicated that it “intended to admit a specific instance of the victim’s prior sexual conduct” and the State “was not aware of the two-week prior instance.” Additionally, Mr. B’s name was not mentioned during voir dire, and no juror was ever asked about him. The State concluded that the court properly granted a mistrial because the law requires a closed hearing to determine the admissibility of the evidence and the defense never provided the court an opportunity to have such a hearing. A hearing could not be held after the question was asked because “[the question had] already been heard by the jury and obviously we can’t unring that bell . . . [t]he jury’s attention was now focused on that name and a prior sexual conduct of Ms. [M].”

Following oral argument, the court denied the motion to dismiss from the bench. The Appellant timely appealed.

STANDARD OF REVIEW

We review the trial judge’s decision to grant a mistrial under an abuse of discretion standard. *State v. Baker*, 453 Md. 32, 46 (2017). The trial judge is observing the trial in real time and is in the unique position of gauging jurors’ reactions. *Simmons v. State*, 436 Md. 202, 212 (2013) (citations omitted). Therefore, “[i]t is well-settled that a decision to grant a mistrial lies within the sound discretion of the trial judge and that the trial judge’s determination will not be disturbed on appeal unless there is abuse of discretion.” *Id.* (quoting *Carter v. State*, 366 Md. 574, 589 (2001)).

To determine if evidence is admissible under Maryland Code, Criminal Law Section 3-319, four conditions must be met: (1) the evidence must be relevant; (2) the evidence must be material to a fact at issue in the case; (3) the prejudicial nature of the evidence must not outweigh its probative value; and (4) the evidence must be in one of the four statutorily defined categories. Md. Code, Crim. Law § 3-319; *Smith v. State*, 71 Md. App. 165, 182 (1987) (citing *Joyce v. State*, 59 Md. App. 237, 246 (1984)). When evaluating these conditions, “decisions on the relevance or inflammatory nature of the evidence rest in the sound discretion of the trial court and will not be reversed on appeal absent a showing that such discretion was clearly erroneous.” *Smith*, 71 Md. App. at 182.

THE PARTIES’ CONTENTIONS

On appeal, Allen argues that he met all the requirements outlined in the Rape Shield Statute in order to trigger the exception and allow in evidence of prior sexual conduct. He states that he established the evidence’s relevancy, its materiality, its scientific connection, and that its probative value outweighed its prejudice.

Additionally, he claims that his failure to seek a ruling on the admissibility of prior sexual conduct before posing the question was “not fatal” for three reasons. First, he relies on our decisions in *Smith* and *Bell*, claiming that neither case mentions that the defendant “obtained permission from the trial court prior to posing their Rape Shield questions.” Second, he argues that both parties agreed to waive the provision in Section 3-319 that requires the determination to be made before trial and agreed the issues could be addressed at the time of cross-examination. Finally, even though counsel asked the question before

obtaining permission, the court still had the opportunity to address whether it fell under an exception. Also, the court could have considered reasonable alternatives to a mistrial such as addressing the question of admissibility midtrial or issuing a curative instruction.

The State argues there was manifest necessity to declare a mistrial, and the motion to dismiss based on double jeopardy was correctly denied. Granting a mistrial was proper because the defense violated the Rape Shield Law by referencing a specific instance of Ms. M's prior sexual conduct in front of the jury. The defense, the State continued, did not make "a sufficient proffer in a closed hearing regarding the alleged specific instance of the victim's prior sexual conduct before [defense counsel] referenced the alleged evidence in front of the jury." Since the defense did not alert the court that a closed hearing was necessary before posing the question, the court did not have an opportunity to rule on its admissibility. This is in direct conflict with the statute, which requires a closed hearing to determine the admissibility of evidence under the Rape Shield Statute. The State also dismissed Allen's argument during the motions hearing that no evidence was presented to the jury. The State argues that the Rape Shield Statute "says the evidence 'may not be referred to' unless the court has a closed hearing to determine if it falls within an exception."

In response to Allen's argument that the court did not explore alternatives to a mistrial, the State notes that the defense did not suggest any alternatives when the court was considering the State's motion for a mistrial. Additionally, even if a curative instruction was suggested, it was "not clear" that such an instruction could "unring the

bell’ and remove the prejudice.” The State distinguishes this case from *Smith*, where the State claims there was an opportunity for a closed hearing before referencing the victim’s prior sexual conduct. *Bell* is also distinguishable according to the State because it was not a jury trial. Finally, the State claims that Allen’s “proffer about the evidence was not sufficient to show he was entitled to an exception” under the Rape Shield Statute. This is because it was unsubstantiated, as no pre-trial filings were provided, or any evidence disclosed.

DISCUSSION

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, which applies to the States through the Fourteenth Amendment, *Benton v. Maryland*, 395 U.S. 784, 796 (1969), states that “. . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.” U.S. Const. amend. V; *Simmons*, 436 Md. at 213. While Maryland does not have a double jeopardy clause in its constitution, “it is well established that Maryland common law double jeopardy principles also protect an accused against twice being put in jeopardy for the same offense.” *Simmons*, 436 Md. at 213 (cleaned up).

In a jury trial, jeopardy attaches when the jury has been empaneled and sworn. *Hubbard v. State*, 395 Md. 73, 90 (2006) (citing *Illinois v. Somerville*, 410 U.S. 458, 467 (1973)). Once jeopardy has attached, the Double Jeopardy Clause “unequivocally bars the retrial of a defendant after a final judgment of acquittal.” *Id.* at 89 (citing *Arizona v. Washington*, 434 U.S. 497 (1978)). However, retrial may be permitted “when a criminal

proceeding is concluded after jeopardy attaches but without resolving the merits of the case.” *Id.* The Supreme Court of the United States further explained this principle in *Arizona v. Washington*:

Unlike the situation in which the trial has ended in an acquittal or conviction, retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused. Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury. Yet in view of the importance of the right, and the fact that it is frustrated by any mistrial, the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate “manifest necessity” for any mistrial declared over the objection of the defendant.

434 U.S. at 505.

Therefore, in order to determine if the judge improperly denied Allen’s motion to dismiss on double jeopardy grounds, we must first decide whether there was manifest necessity for the trial court to declare a mistrial based on defense counsel’s question about Ms. M’s prior sexual conduct. If there was manifest necessity, “the defendant may be retried without implicating the Double Jeopardy Clause; if there were no manifest necessity for the mistrial determination over objection, the defendant could not be retried.” *Hubbard*, 395 Md. at 89.

1. The Rape Shield Statute

Maryland’s Rape Shield Statute, codified at Section 3-319 of the Criminal Law Article, provides rules for when certain types of evidence about a victim’s prior sexual

conduct may be admissible in criminal prosecutions for sex crimes. *Westley v. State*, 251 Md. App. 365, 385 (2021). *Westley v. State* provides a thorough review of the legislative history of Maryland’s Rape Shield Statute and the intent of the General Assembly. This history

reflects that the General Assembly intended to protect victims of sexual offenses from the introduction of humiliating evidence about their past, except in the rare circumstances when such evidence was necessary to a defendant’s legitimate defense, for the purposes of: (1) encouraging victims of sex crimes to report them; (2) avoiding further trauma to victims who do report such crimes; and (3) avoiding confusing juries and diverting their attention from the defendant’s guilt or innocence with the introduction of evidence of limited or no probative value, but which is highly prejudicial or inflammatory.

Id. at 394.

Subsection (a) of the statute prohibits the admission of “[e]vidence relating to a victim’s reputation for chastity or abstinence and opinion evidence relating to a victim’s chastity or abstinence.” Md. Code, Crim. Law § 3-319(a). Subsection (b) provides that:

Evidence of a specific instance of a victim’s prior sexual conduct may be admitted in a prosecution described in subsection (a) of this section only if the judge finds that:

- (1) the evidence is relevant;
- (2) the evidence is material to a fact in issue in the case;
- (3) the inflammatory or prejudicial nature of the evidence does not outweigh its probative value; and
- (4) the evidence:
 - (i) is of the victim’s past sexual conduct with the defendant;

(ii) is of a specific instance of sexual activity showing the source or origin of semen, pregnancy, disease or trauma;

(iii) supports a claim that the victim has an ulterior motive to accuse the defendant of the crime; or

(iv) is offered for impeachment after the prosecutor has put the victim's prior sexual conduct in issue.

Md. Code, Crim. Law § 3-319(b). Finally, subsection (c) requires a closed hearing and states:

(1) Evidence described in subsection (a) or (b) of this section *may not be referred to in a statement to a jury* or introduced in a trial *unless the court has first held a closed hearing* and determined that the evidence is admissible.

(2) The court may reconsider a ruling excluding the evidence and hold an additional closed hearing if new information is discovered during the course of the trial that may make the evidence admissible.

Md. Code, CL, § 3-319(c) (emphasis added).

Allen argues that he met all of the requirements outlined in Section 3-319(b), and therefore, the evidence of Ms. M's prior sexual conduct should have been admitted. He claims he established relevancy by "proffering that scientifically, male sperm can survive in a vagina up to two weeks," and therefore, the DNA recovered could have been placed there by another individual. Additionally, at trial Allen's counsel argued that had Ms. M told police she last had sexual intercourse two weeks ago instead of four weeks, "the DNA testing and evaluation of the recovered genetic material would have been different." This was critical, Allen said, as the jury would be alerted to the possibility the DNA belonged to another man.

Allen also claims he “established with the requisite specificity a scientific basis that [Ms. M’s] prior sexual intercourse” with another person could be the source of the recovered DNA. He concluded that these proffers “clearly established the probative value of testimony that Ms. M had sexual intercourse [with another man] in the two weeks before the alleged rape.” Finally, any prejudice that could be attributed to the question posed to Ms. M was “severely undercut” because it was asked “directly after Ms. M[] testified without objection that she had had sexual intercourse with another man four weeks prior to the alleged rape.” Allen asserts this “clearly minimized” any prejudice towards Ms. M.

Even though the evidence may have been admissible under Section 3-319(b), the party seeking admission, in this case Allen, still needs to comply with the rest of the statute, namely, subsection (c). Section 3-319(c) clearly states that evidence described in subsection (b) may not be referenced to the jury “*unless the court has first held a closed hearing and determined that the evidence is admissible.*” Md. Code, Crim. Law § 3-319(c)(1) (emphasis added).

Allen contends he does not need to comply with the rules as they are laid out in the statute. He bases this assertion on his interpretation of *Smith* and *Bell*, claiming neither case mentions “the fact that neither Smith nor Bell obtained permission from the trial court prior to posing their Rape Shield questions.”

In *Smith*, the defendant was indicted on twenty-four counts, including rape, kidnapping, and other related sexual offenses, and had a jury trial in the Circuit Court for Prince George’s County. *Smith*, 71 Md. App. at 168. During the jury trial, defense counsel

tried to call the victim as a witness when presenting its case. *Id.* at 169. The State objected and moved to “preclude the defense from calling the victim” based on the Maryland Rape Shield Statute. *Id.* The court granted the motion and the defense subsequently rested, presenting no evidence to the jury. *Id.* The defendant was ultimately found guilty of rape, among other counts, and sentenced to two consecutive life terms. *Id.* Defendant appealed, arguing the court incorrectly interpreted the Rape Shield Statute when it granted the State’s motion to preclude the victim from testifying about her prior sexual conduct. *Id.* at 181. The defendant contended that “[t]his action by the trial court [in precluding the testimony] was prejudicial error of constitutional magnitude depriving the appellant of his right to due process of law under the 14th Amendment to the United States Constitution.” *Id.*

This court disagreed, noting that based on a pre-trial motion, the trial court ruled that defense counsel could not discuss the victim’s previous sexual conduct. *Id.* at 182. Additionally, the court said the defense did not lay a proper foundation, which could have been done by “proffering that the victim had sexual intercourse at a reasonably specific time before the incident with a person other than the defendant and that, scientifically, prior sexual contact could have accounted for the physician’s finding male fluids in her vagina.” *Id.* at 189. The defendant must produce specific scientific evidence and establish a proper medical foundation to show the probative value of the testimony. *Id.* at 187–89.

While Allen claims *Smith* supports his position, it is clearly distinguishable from his case. In *Smith*, the trial court had the opportunity to address the evidence’s admissibility before trial when it ruled on various motions. Moreover, the court granted the State’s

motion to preclude the victim’s testimony about her prior sexual conduct. Here, Allen’s counsel did not mention the evidence in any pre-trial motion or even at the bench conference at the beginning of the trial. In fact, the State claims it had never even heard the name of the other man Ms. M allegedly had sexual relations with. Additionally, Allen states that Smith did not obtain permission from the trial court “prior to posing [his] Rape Shield questions,” and he was therefore not required to do so. However, unlike the facts of this case, counsel never asked a question in *Smith*, but only attempted to call the victim as a witness. *Id.* at 169. The court in *Smith* then granted the State’s motion to prevent the defense from calling the victim before she could testify. *Id.* This is markedly different from this case where Allen’s attorney asked Ms. M about her prior sexual conduct before the court could decide whether or not to admit the testimony.

Allen also relies on our decision in *Bell v. State* to argue that a ruling on the admissibility of Ms. M’s prior sexual conduct before posing the question was not required. However, as the State indicates, that case is clearly distinguishable as it was not a jury trial, so no question or evidence was presented to the jury. 118 Md. App. 64, 69 (1997). Additionally, the *Bell* court noted that the defendant did not lay a scientific foundation that could have accounted for the indication of sperm in the medical report. *Id.* at 91.

Neither opinion explicitly mentions a closed hearing during the trial, but that does not mean the cases support Allen’s assertion that a party does not need to comply with the procedure stated in the Rape Shield Statute. Additionally, the trial court in *Smith* held a

hearing on the admissibility of the evidence before the trial began, which further weakens Allen’s argument.

Allen next argues that both parties and the court agreed to waive the provision of Section 3-319 that requires a pre-trial closed hearing, and to make the admissibility determination during cross-examination. However, there was no opportunity to do this as defense counsel referred to the evidence in front of the jury before a hearing could be conducted. Even though the court reserved on when to hold the closed hearing, the hearing was not waived. *See Shand v. State*, 341 Md. 661, 663 (1996) (A closed hearing cannot be waived as it is mandatory).

For these reasons, we find that the court needed to hold a closed hearing to determine the admissibility of the evidence before defense counsel questioned Ms. M about her prior sexual conduct. We next turn to whether posing the question in front of the jury before the court had the opportunity to hold a closed hearing created manifest necessity to declare a mistrial.

2. *Manifest Necessity*

Generally, the Double Jeopardy Clause disallows a defendant from being tried twice for the same offense. U.S. Const. amend. V. However, when a mistrial is granted over the defendant’s objection and is based on manifest necessity, retrial is allowed. *Hubbard*, 395 Md. at 89. If the mistrial was not manifestly necessary, “then the trial [court] abused [its] discretion in declaring the mistrial, and retrial is barred by double jeopardy principles.” *Baker*, 453 Md. at 47 (citing *Hubbard*, 395 Md. at 89).

Whether manifest necessity exists, depends on the “unique facts and circumstances of each case. While it is in the sound discretion of the trial judge to declare a mistrial, he or she may do so only if a ‘high degree’ of necessity demands that he or she do so.” *Id.* at 48 (quoting *Mansfield v. State*, 422 Md. 269, 287 (2011)). Manifest necessity for a mistrial exists only if “(1) there was a ‘high degree’ of necessity for the mistrial; 2) the trial court engaged ‘in the process of exploring reasonable alternatives’ to a mistrial and determined that none was available; and 3) no reasonable alternative to a mistrial was, in fact, available.” *Id.* at 49.

An appellate court reviewing whether there was manifest necessity for a mistrial “must be ‘persuaded by the record that the trial judge acted responsibly and deliberately, and accorded careful consideration to [the defendant’s] interest in having the trial concluded in a single proceeding.’” *Id.* (quoting *Washington*, 434 U.S. at 516).

In examining the record under the first and third *Baker* factors, we find no abuse of discretion in the court’s determination that a mistrial was necessary, and no reasonable alternatives were available.

The trial court analyzed the Rape Shield Statute, Section 3-319 of the Criminal Law Article, and determined that subsection (c) required a closed hearing to determine the admissibility of the evidence. The court noted that it did not hold such a hearing. Furthermore, the court declined to reconsider excluding the evidence as the jury had already heard defense counsel’s question. Therefore, the court found there was manifest necessity for a mistrial. Since Ms. M’s prior sexual conduct was referenced in defense

counsel’s question, it was not an abuse of discretion to determine no reasonable alternatives, such as a curative instruction as Allen urges, were available.

This is similar to our Supreme Court’s decision in *Simmons*, where defense counsel referenced a lie detector test during opening statements. 436 Md. at 208. While the court initially issued a curative instruction, the State later moved for a mistrial, arguing that the reference to the test “had prejudiced the jury, such prejudice could not be overcome, and the State was deprived of a fair trial.” *Id.* The court granted the mistrial after determining that the curative instruction was insufficient. *Id.* at 208–09. On appeal, *Simmons* argued that there was no manifest necessity for a mistrial because the curative instruction would have been sufficient. *Id.* at 210. In affirming there was manifest necessity to declare a mistrial, the Court noted that “the trial judge was correctly concerned about the prejudice that the State would suffer from the statement directly presented to and heard by the jury The trial judge concluded that there was no reasonable alternative to the declaration of a mistrial.” *Id.* at 216. The Court continued:

Although certainly there are alternative actions available in the trial court’s arsenal to counteract prejudice caused by an improper statement, such as curative instructions to the jury, the Supreme Court in *Arizona v. Washington* also cautioned that “[t]hose actions, however, will not necessarily remove the risk of bias that may be created by improper argument.” 434 U.S. at 513. The Supreme Court recognized that in cases of potential prejudice to the jury caused by one of the parties, “the extent of the possible bias cannot be measured,” and therefore, “[the Court] accord[s] the highest degree of respect to the trial judge’s evaluation of the likelihood that the impartiality of one or more of jurors may have been affected by the improper comment.” *Washington*, 434 U.S. at 511.

Id.

We next turn to the second *Baker* factor, whether the trial court explored reasonable alternatives to a mistrial. In its ruling, the court did mention that Section 3-319 allows for the court to reconsider “a ruling excluding the evidence and hold an additional closed hearing” and then went on to state that the “[c]ourt is not reconsidering it.” This shows that the court did consider the alternative of holding the closed hearing after defense counsel’s question was posed and rejected that alternative. We find that this was not an abuse of discretion.

Since we do not find that the trial court abused its discretion in determining there was manifest necessity for a mistrial, the Double Jeopardy Clause does not prohibit Allen from being retried. We therefore do not need to address Allen’s second question, as it is now moot. The second issue presented on appeal asked us to determine whether the circuit court erroneously denied Allen’s motion to dismiss on double jeopardy grounds. This question was premised on the notion that there was not manifest necessity for the trial court to declare a mistrial. This is because the issue of double jeopardy is only implicated if there was not manifest necessity for a mistrial. However, if there is manifest necessity for a mistrial, as we have found here, double jeopardy is not at issue, and we therefore do not need to address that question.

CONCLUSION

The Circuit Court for Charles County properly denied Allen’s motion to dismiss on double jeopardy grounds. The trial court did not abuse its discretion in determining there was manifest necessity to declare a mistrial. Therefore, Allen can be retried without

implicating his right against double jeopardy and we affirm the judgment of the circuit court.

**JUDGMENT OF THE CIRCUIT COURT
FOR CHARLES COUNTY AFFIRMED.
COSTS TO BE PAID BY APPELLANT.**