Circuit Court for Frederick County
Case No. 10-K-15-057375

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1101

September Term, 2017

MILTON A. ORELLANA

v.

STATE OF MARYLAND

Graeff,
Nazarian,
Fader,

JJ.

Opinion by Graeff, J.

Filed: May 9, 2018

Milton A. Orellana, appellant, was charged with first degree murder and first degree rape in the Circuit Court for Frederick County. At trial, following defense counsel's opening statement, the court granted the State's motion for a mistrial on the ground that defense counsel referred to the victim's prior sexual conduct in violation of Maryland's rape shield law.[1] Appellant subsequently filed a motion to dismiss the indictment, asserting that double jeopardy barred his retrial because the mistrial was granted without manifest necessity. The circuit court denied the motion to dismiss.

Appellant filed this interlocutory appeal from the order denying the motion to dismiss, in which he presents the following question:

> Is retrial of [appellant] barred by double jeopardy because the trial court improperly granted a mistrial without manifest necessity?

For the reasons set forth below, we answer appellant's question in the negative, and therefore, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

At trial, during opening statement, the prosecutor stated that the victim's son found his mother's naked body on the living room floor of her apartment, with her legs spread apart, her throat cut, and her wrists bound with a phone charging cord. Appellant's sperm was found inside of the victim and on the carpet near her body.

Defense counsel told the jury in opening statement that what happened to the victim was "awful," but appellant "didn't do it." Counsel stated:

[1] Md. Code (2012 Repl. Vol.) § 3-319 of the Criminal Law Article ("CR").

> [The victim's] son [ ] and his wife took out two life insurance policies on his mom. That's because they always knew or thought that because of her lifestyle she was going to die an early death. Yes, they did love her. Of course they loved her, and her grandchildren loved her too. Of course they loved her, but you will hear evidence, you will hear testimony that she abused drugs, all kinds of drugs.
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> She had a back injury, and so she lived on disability, but in addition to the Percocets that she bought and sold, she was involved with the criminal milieu. She was involved with a lot of drug dealers and very bad criminals, very bad people. She abused heroin, cocaine, alcohol -- I don't know about marijuana -- and pills, and she used these illegal substances with very dangerous people. She had a lot of men and women in and out of her life to support the drug habit.
>
> You will hear evidence that she turned tricks, she prostituted herself to get money for drugs, and that her, she had a lot of different types of clients but most of her johns -- that is, her customers, her clients -- were Hispanics. She had, she would bring them to her house, probably to avoid detection by the police, and so there were a lot of strangers in and out of her house regularly over the years, and there were drug -- there were men that were angry with her for drug exchanges, not happy over, okay, I gave you the pills, now where's my money? So you're going to hear testimony about people wanting her dead, people threatening to kill her, people threatening to have other people kill her.
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> [Appellant] had sex with [the victim], as did a lot of people. … There was no evidence of rape at all. [Appellant's] DNA, his sperm was in her vagina. Yes, he did have sex with her, but he did not rape her. He did not kill her.

Trial recessed at the conclusion of defense counsel's opening statement.

The next morning, the prosecutor moved for a mistrial, arguing that defense counsel's opening statement violated Md. Code (2012 Repl. Vol.) § 3-319 of the Criminal Law Article ("CR"), Maryland's Rape Shield Statute. Defense counsel argued that § 3-319 was not applicable because appellant had also been charged with murder, and evidence

that the victim engaged in prostitution was relevant to the defense to the murder charge, which was that someone else committed the murder.

The circuit court granted the State's motion for a mistrial, stating:

> The problem in this case is – the Defense may be right that some of this evidence would be admissible … although it, I agree, it's tied in with the defense of someone else might have done it, it directly goes into the requirements of [§] 3-319, and there was not the pretrial hearing to determine what, if any, of that evidence would be admissible before the jury. And I have to agree with the State, we cannot unring that bell at this point…. So I do find, based on those circumstances, there is manifest necessity to declare a mistrial in this case.

Defense counsel requested that the court reconsider its ruling, suggesting that the court hold a closed hearing, and if the court found the evidence admissible, there would be no need for a mistrial. The court declined, stating that, "while it's possible I could find some of that [evidence] admissible … I don't think [it] would necessarily be.… I just think under all the circumstances that [ ] there's the necessity to go ahead and declare a mistrial." Trial was rescheduled to July 17, 2017.

Prior to the second trial, appellant filed a motion to dismiss the indictment on double jeopardy grounds. At the hearing on the motion, defense counsel asserted that there was no manifest necessity for a mistrial because the evidence referred to in opening statement did not violate § 3-319, and therefore, appellant's retrial was barred by the prohibition against double jeopardy. As stated, the court denied the motion to dismiss.

This appeal followed.

DISCUSSION

Appellant contends that a retrial is barred by double jeopardy because there was no manifest necessity to grant a mistrial. In support, he argues: (1) § 3-319 applies only to prosecutions for sexual offenses and not to evidence "necessary for a defense of a separate, joined crime," in this case, murder; (2) application of § 3-319 "was unconstitutional as applied here" because it prevented appellant from defending himself against the murder charge; and (3) the circuit court abused its discretion in granting a mistrial without pursuing the "reasonable alternative to a mistrial – conducting a rape shield hearing at trial."

"The Double Jeopardy Clause of the United States Constitution, as well as Maryland common law, protects a defendant from being subject twice to criminal proceedings for the same offense." *State v. Fennell*, 431 Md. 500, 505 (2013). "'In a jury trial, the Double Jeopardy Clause generally bars the retrial of a criminal defendant for the same offense once a jury has been empaneled and sworn.'" *State v. Baker*, 453 Md. 32, 47 (2017) (quoting *Simmons v. State*, 436 Md. 202, 213 (2013)).

When a mistrial is granted over the objection of the defendant, however, "'double jeopardy principles will not bar a retrial if there exists "manifest necessity" for the mistrial.'" *Id.* (quoting *Simmons*, 436 Md. at 213).[2] "If, however, the mistrial was not manifestly necessary, then the trial judge abused her [or his] discretion in declaring the mistrial, and retrial is barred by double jeopardy principles." *Id.* There is "manifest

[2] Where a mistrial is granted with the consent of, or at the request of the defendant, the double jeopardy analysis is different. *See Hubbard v. State*, 395 Md. 73, 89 n. 6 (2006).

necessity" for a mistrial 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 (quoting *Hubbard v. State*, 395 Md. 73, 92 (2006)).

The determination whether "manifest necessity exists for the purposes of double jeopardy in the case of a mistrial depends on the unique facts and circumstances of the case," and "that determination is left to the sound discretion of the trial judge." *Simmons*, 436 Md. at 214. A trial judge's determination is entitled to "'special respect'" where, as here, the basis for the mistrial is improper remarks made by defense counsel in opening statement. *Simmons*, 436 Md. at 217 (quoting *Arizona v. Washington*, 434 U.S. 497, 510 (1978)). That is because "'[a]n improper opening statement unquestionably tends to frustrate the public interest in having a just judgment reached by an impartial tribunal,'" and that interest "'would be impaired if [the trial judge] were deterred from [declaring a mistrial] by a concern that any time a reviewing court disagreed with his [or her] assessment of the trial situation a retrial would automatically be barred.'" *Id*. at 218 (quoting *Arizona*, 434 U.S. at 512-13).

With these principles in mind, we address the issues presented on appeal.

I.

The Rape Shield Statute

CR § 3-319, Maryland's rape shield statute, provides that evidence "relating to a victim's reputation for chastity or abstinence and opinion evidence relating to a victim's

chastity or abstinence may not be admitted in a prosecution for" specified sexual offenses, including rape.[3] The statute provides exceptions to this general rule, as follows:

> (b) *Specific instance evidence admissibility requirements*. - 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:
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> (1) the evidence is relevant;
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> (2) the evidence is material to a fact in issue in the case;
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> (3) the inflammatory or prejudicial nature of the evidence does not outweigh its probative value; and
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> (4) the evidence:
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> (i) is of the victim's past sexual conduct with the defendant;
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> (ii) is of a specific instance of sexual activity showing the source or origin of semen, pregnancy, disease, or trauma;
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> (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.
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> (c) *Closed hearing*. – (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.

Appellant asserts that the plain language of the statute "limits its application to prosecutions for sexual offenses," and the circuit court erred in determining that § 3-319 applied in this case because it "was not simply a rape case; it was a murder-rape case." He argues that, because the statute does not address what happens when a non-sexual offense, such as murder, is joined for trial, the statute is not triggered at all in such circumstances.

[3] As the Court of Appeals has noted, although commonly referred to as "rape shield" laws, statutes such as Maryland's CR § 3-319 generally apply to a wider variety of sexual crimes. *White v. State*, 324 Md. 626, 633, n.1 (1991).

Appellant further contends that the legislative intent in enacting § 3-319 was not only to protect victims, but also to protect a defendant's constitutional rights, and therefore, it would be "inconsistent with the legislative intent to extend the statute" to non-sexual offenses.

The State contends that, "[t]o the extent that [appellant] is arguing that the inclusion of a charge for a non-sexual offense renders the rape shield statute inapplicable in a prosecution to which it would otherwise apply, that interpretation would be 'absurd, illogical [and] incompatible with common sense.'" (quoting *State v. Johnson*, 415 Md. 413, 422 (2010)). It asserts that one of the purposes of the statute would be frustrated if it were interpreted "in such a way that the victim in a rape prosecution who has also been subjected to a non-sexual offense," such as robbery, burglary, kidnapping, or murder, "would be less entitled to the privacy protections afforded by the rape shield statute because he or she was not *only* raped."

To resolve the issue raised by appellant, we apply principles of statutory construction, which the Court of Appeals has summarized as follows:

> The cardinal rule of statutory construction is to ascertain and give effect to the intent of the General Assembly. We begin with the plain meaning of the statute. If the statutory language is unambiguous and consistent with the purpose of the statute, our review ceases and we apply the normal and plain meaning of the statute. When, however, the language is ambiguous because it gives rise to more than one reasonable interpretation, we must look to other indicia to ascertain the intent of the General Assembly, including the relevant statute's legislative history, the context of the statute within the broader legislative scheme, and the relative rationality of competing constructions.

Twigg v. State, 447 Md. 1, 24 (2016) (citations and internal quotation marks omitted). "'[I]n seeking to ascertain legislative intent, [the Court] may consider the consequences resulting from one meaning rather than another, and adopt that construction which avoids an illogical or unreasonable result, or one which is inconsistent with common sense.'" *Smith v. State*, 425 Md. 292, 300 (2012) (quoting *Ridge Heating, Air Conditioning & Plumbing, Inc. v. Brennen*, 366 Md. 336, 342 (2001)). "'[W]e do not construe a statute with "forced or subtle interpretations" that limit or extend its application.'" *State v. Bey*, 452 Md. 255, 265 (2017) (quoting *Johnson*, 415 Md. at 421). Nor do we "'supply missing language … by judicially creating a statutory provision that the legislature would probably have added if it had given any thought to the problem it had not addressed.'" *Maryland State Police v. McLean*, 197 Md. App. 430, 441 (2011) (quoting *Fisher v. State*, 367 Md. 218, 292 (2001)).

Subsection (a)(1) of § 3-319 provides that "[e]vidence relating to a victim's reputation for chastity or abstinence . . . may not be admitted in a prosecution for: (1) a crime specified under this subtitle."[4] Appellant was charged with first-degree rape pursuant to CR § 3-303. Accordingly, it is clear from the plain language of the statute that § 3-319 governed the admissibility of such evidence at appellant's trial.

We do not agree with appellant that the provisions of § 3-319 were rendered inapplicable because he also was on trial for murder, and the statute does not explicitly

[4] Title 3, Subtitle 3 of the Criminal Law Article, entitled "Sexual Crimes," includes rape, attempted rape, sodomy, incest and other sexual offenses.

address what happens when sexual offenses and non-sexual offenses are joined for trial. Had the legislature intended the statute to be totally inapplicable in any case where a defendant is also on trial for a non-sexual offense, it could have included such an exception, along with the other exceptions listed in the statute. *Cf. Alexis v. State*, 437 Md. 457, 490 (2014) ("If the Legislature intended that the anti-merger provision be limited narrowly to the underlying crime, the Legislature would have stated so."); *Maryland State Police*, 197 Md. App. at 440 (if it was the intent of the legislature to exempt certain individuals from the provisions of a statute governing possession of firearms, "it is reasonable to presume that the legislature would have used operative language to express that intent.")

Moreover, appellant's interpretation of § 3-319 would be illogical and contrary to the intent of the General Assembly. As the Court of Appeals explained in *White v. State*, 324 Md. 626, 633-34 (1991), the rape shield statute is designed to "protect rape victims from unscrupulous defense attorneys who try to shift the focus away from their clients and onto the victims," and to "encourage more victims to report the crimes and help bring rapists to justice." It would be illogical and contrary to the legislative intent to hold that these considerations become moot when a defendant, who is on trial for rape and/or another sexual offense to which § 3-319 applies, is also on trial for a non-sexual crime involving the same victim.[5] Accordingly, we reject appellant's argument that the rape shield statute

[5] We disagree with appellant's argument that, because the victim was deceased at the time of trial, "the policies of protecting rape victims were less significant," and "aspects of the victim's sexual history warranted fewer protections." *See e.g. People v. Sandifer*, 65 N.E.3d 969, 977 (Ill. 2016) (Illinois rape shield statute applied even when the victim of

does not apply to a prosecution of a sexual offense when it is joined with a non-sexual offense, such as murder.[6]

II.

Constitutional Right to Present a Defense

Appellant next contends that, even if the statute is construed to encompass joined offenses, it was unconstitutional as applied here because it prevented him from defending against the murder charge. Specifically, he asserts that "[t]he defense attempted to establish reasonable doubt and offer an alternative theory by discussing other people with motive and opportunity to kill" the victim. He argues that he "was not attempting to use

sexual assault was deceased because "[k]eeping irrelevant and prejudicial evidence from the jury is a valid purpose, regardless of whether the victim is deceased or living."), *appeal denied*, Nov 22, 2017; *Cooke v. State*, 97 A.3d 513, 544 (Del. 2014) ("There is no reason to believe that the General Assembly's concern that alleged rape victims should not be subjected to general character assassination extends only to living victims and not those who also paid the ultimate price of losing their life."), *cert. denied*, __ U.S.__, 135 S.Ct. 961 (2015); *State v. Clowney*, 690 A.2d 612, 619 ("[t]he statutory goals of protecting the privacy of the victim and seeking to avoid character assassination are no less consequential when the rape victim is killed"), *certification denied*, 697 A.2d 549 (N.J. 1997). *But see State v. Sexton*, 444 S.E.2d 879, 900 (N.C. 1994) (policies designed to protect rape victims in prosecutions for sexual assaults are "of less importance" where victim is deceased), *cert. denied*, 513 U.S. 1006 (1994). We conclude that the rape shield statute applies even when the victim of the sexual assault is deceased at the time of trial.

[6] We also note that appellant did not move to sever the offenses for trial under Md. Rule 4-253. *See e.g. Whitlock v. State*, 318 S.E.2d 63, 64 (Ga. 1984) ("As there was no motion to sever the offenses made in the trial court, appellant cannot complain that the trial court erred in applying the [rape shield statute] when he was tried for all three offenses [aggravated sodomy, robbery by intimidation, and rape].").

this evidence to tar [the victim's] character or to show that she had consensual sex with [appellant], but to show that she could easily have been murdered by someone else."

The State contends the appellant's constitutional challenge is "hypothetical and premature." We agree.

Appellant's trial ended shortly after it began, after defense counsel made repeated references to the victim's prior sexual conduct in opening statement, despite failing to request a hearing, as required by § 3-319(c), to determine what portion, if any, of the evidence was admissible. Although the court found manifest necessity to declare a mistrial under the circumstances, the circuit court made no ruling on the admissibility of evidence of the victim's prior sexual conduct. Accordingly, there is nothing for us to review at this point. *See State v. Baxter*, 329 Md. 290, 297 (1993) (where trial court had not ruled on proffer, appellate court's ruling that proffered testimony was inadmissible was premature.) On retrial, appellant may raise the constitutionality of the statute, if applicable, after the circuit court issues a ruling pursuant to § 3-319(c).

III.

Manifest Necessity

Appellant's final contention is that the circuit court abused its discretion in failing to pursue the reasonable alternative of conducting a hearing, to determine whether the evidence that defense counsel had referred to in opening statement was admissible, prior to granting a mistrial. Appellant asserts that, "if this evidence and defense counsel's

remarks were found admissible following a rape shield hearing, the court would have avoided the need for the extreme remedy of a mistrial."

The State contends that the "court properly exercised its discretion in finding that there was manifest necessity to declare a mistrial." It notes that defense counsel made repeated remarks regarding the victim's alleged prior sexual conduct in opening statement, without having first sought a determination as to whether such evidence was admissible, as required by the statute. It argues that it is not reasonable to require the trial court, in these circumstances, to "attempt to retroactively sort through which of defense counsel's various statements (if any) referenced evidence that could ultimately be admitted."

As discussed, *supra*, manifest necessity for a mistrial exists when there is a "high degree" of necessity for a mistrial, with no reasonable alternative. *Baker*, 435 Md. at 49. Here, defense counsel immediately focused the jury's attention on the victim's prior sexual conduct, without first seeking a ruling on admissibility of such evidence.[7] The court considered whether an after-the-fact hearing on admissibility would be a reasonable alternative to a mistrial, but determined that "under all the circumstances," there was manifest necessity to declare a mistrial.

Even if a hearing had been held and some of the evidence was deemed admissible, defense counsel's argument went farther than merely suggesting that someone else may

[7] Appellant asserts that he "was not attempting to use this evidence to tar [the victim's] character or to show that she had consensual sex with [appellant], but to show that she could easily have been murdered by someone else." In his statement to the jury, however, counsel stated that appellant "had sex with [the victim], as did a lot of people… [b]ut it was consensual sex."

have committed the murder, and as the circuit court noted, it could not "unring that bell." Viewing the trial court's grant of a mistrial with "special respect," as we must, we conclude, under the circumstances of this case, that the trial court did not abuse its discretion in determining that manifest necessity existed to declare a mistrial. Accordingly, the circuit court properly denied appellant's motion to dismiss the indictment on double jeopardy grounds.

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