Circuit Court for Wicomico County
Case No. C-22-CR-17-000081

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1338

September Term, 2017

CHRIS ANTHONY WALDEN

v.

STATE OF MARYLAND

Wright,
Berger,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: July 24, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Chris Anthony Walden, appellant, was convicted by a jury sitting in the Circuit Court for Wicomico County of false imprisonment and three counts of reckless endangerment.[1] Appellant raises two questions on appeal, which we have slightly rephrased:

I. Did the trial court err when it denied appellant's motion to dismiss in which he claimed the State engaged in vindictive prosecution by filing additional charges against him following a mistrial?

II. Did the trial court abuse its discretion when it declined to give a missing evidence jury instruction because the State allegedly did not produce key pieces of evidence at trial?

For the following reasons, we shall affirm the judgments.

FACTS

The State's theory of prosecution was that during the mid-morning of July 27, 2016, appellant threatened three people who lived in a mobile home at 6112 Ruth Street in Salisbury. Testifying for the State were two of the victims, Bimini Howard and her adult daughter, Stephanie Kominos; a neighbor; and a responding Wicomico County police officer.[2] The theory of defense was that appellant did not threaten or harm anyone. The defense presented no witnesses. Viewing the evidence in the light most favorable to the prosecution, the following was established.

---

[1] Appellant was sentenced to a total of 15 years of imprisonment – consecutive sentences of five years for false imprisonment, and four, three, and three years for each of his three reckless endangerment convictions.

[2] Gregory Warren, the third victim, died of cancer in January 2017, a few weeks before appellant's first trial.

On July 27, 2016, Howard and Kominos were renting a room from Gregory Warren, a friend of Howard's for almost 20 years, in Warren's double-wide trailer. Howard and Kominos had been living with Warren for a few weeks, during which time Howard had borrowed money from appellant, Warren's friend. Mid-morning on July 27, appellant went to Warren's trailer and, in the presence of Warren, Howard, and Kominos, he demanded that Howard pay him the money she owed him. When Howard told appellant that she did not have the money, appellant pulled out a knife with a four-inch blade.

According to Howard and Kominos, appellant placed the knife to Warren's throat, placed the knife against the body of Warren's small dog, and then placed the knife against Howard's neck. Each time appellant did so, he threatened those present that he would harm them if he did not get his money. Appellant also placed Kominos's hand on the arm of the couch and made a motion to stab it, but she quickly withdrew her hand and he missed, stabbing the couch where her hand had been. Appellant also lit a sheet that was laying on the back of the couch on which Howard was sitting. The fire burned through the sheet and left a burn mark on the couch before Howard was able to put it out.

After the above tirade, appellant gathered Warren's, Howard's, and Kominos's cell phones and Howard's laptop and said he was taking them until he received his money. When Kominos protested, he put her in a headlock until she passed out. When she regained consciousness, she ran out the back door. Appellant dropped the electronics and chased after her. Appellant returned to Warren's trailer and said not to call the police or someone would kill them. He then left. Kominos returned to the trailer, and they locked the front

door. A few minutes later, appellant kicked in the door, took Howard's laptop, and left. The police were called.

A next-door neighbor testified that on July 27, 2016, Warren came to his mobile home, upset and crying, and said that someone was trying to rob him. When the neighbor looked outside, he saw appellant get into a car and drive away.

Deputy Benjamin Parsons with the Wicomico County Sheriff's Office responded to the scene where he observed a bruise above Kominos's eye and a two-inch linear mark across Howard's neck. He observed damage to the door jamb on Warren's front door, and a burned blanket on the back of the couch, which also had a burn mark. The deputy did not recall seeing or smelling any smoke.

DISCUSSION

I.

The State originally charged appellant in a 16-count criminal information. On the second day of trial, the court declared a mistrial. The record contains no information about who requested the mistrial or the circumstances surrounding its declaration. Less than a week later, a grand jury issued a 43-count indictment stemming from the same incident.[3]

Prior to trial, appellant filed a motion to dismiss the additional charges, arguing that by increasing the number of charges against him following the mistrial the State violated

[3] The grand jury added charges for false imprisonment; armed robbery; attempted armed robbery; robbery; attempted robbery charges; theft of property valued at less than $100; attempted theft of property valued at less than $100; malicious destruction of property valued at less than $1,000; second-degree malicious burning; third-degree burglary; and fourth-degree burglary. The State dropped charges of home invasion and carrying a concealed weapon.

his right to due process. A hearing was held, at which the State prosecutor explained its decision. The State asserted that charging appellant with additional counts post mistrial was not done to punish appellant, but that evidence elicited at appellant's first trial "changed the State's perspective of the way that these events occurred and clarified for the State the actual crimes that did occur." The lower court denied appellant's motion to dismiss. As stated above, a jury subsequently convicted appellant of four counts. The false imprisonment count against Warren was the lone conviction that was not contained in the initial charges.

Appellant argues on appeal that we should vacate his conviction for false imprisonment because the lower court erred when it denied his motion to dismiss. Specifically, appellant argues, as he did below, that the State violated his due process rights when it filed additional charges against him following his mistrial because in doing so the State engaged in vindictive prosecution. The State disagrees, arguing that appellant has failed to demonstrate that the additional charges were motivated by prosecutorial vindictiveness. We agree with the State.

State prosecutors have wide discretion in determining whether to prosecute a person and what charges to bring. *Evans v. State*, 396 Md. 256, 298 (2006), *cert. denied*, 552 U.S. 835 (2007) (citations omitted). Ordinarily, the courts are reluctant to interfere with that discretion. *McNeil v. State*, 112 Md. App. 434, 463 (1996) (citation omitted). A prosecutor commits a due process violation, however, when he files new charges against a defendant to retaliate against the defendant for exercising his rights. *Burton v. Mumford*, 219 Md. App. 673, 702 (2014) (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)

(recognizing that vindictiveness by a prosecutor is a Fourteenth Amendment due process violation) and *United States v. Goodwin*, 457 U.S. 368, 372 (1982) (recognizing that vindictiveness by a prosecutor is a Fifth Amendment due process violation)), *cert. denied*, 441 U.S. 218 (2015). *See also Goodwin*, 457 U.S. at 372 (stating that "while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right.") (footnote omitted). To show a violation of his due process rights, a defendant bears the burden of showing either: (1) actual vindictiveness through objective and direct evidence, or (2) circumstantial evidence that warrants a presumption of vindictiveness. *Burton*, 219 Md. App. at 706 (citation omitted). The burden then shifts to the State to provide an objective, non-vindictive reason for its actions. *Id.* at 703.

Neither the United States Supreme Court nor the Maryland appellate courts have ruled on the question of vindictiveness in the context of a mistrial. Courts that have done so have held that the reason for the mistrial is critical to a determination of prosecutorial vindictiveness. *See United States v. Perry*, 335 F.3d 316, 324 (4th Cir. 2003), *cert. denied*, 540 U.S. 1185 (2004). Where a mistrial is declared for neutral reasons (like a deadlocked jury) and the government does not oppose the motion, courts have held that a presumption of vindictiveness is not warranted because there is no reason why the prosecutor would consider the defendant responsible for the mistrial. *See Perry*, 335 F.3d at 324; *United States v. Contreras*, 108 F.3d 1255, 1263 (10th Cir.), *cert. denied*, 522 U.S. 839 (1997); *United States v. Marrapese*, 826 F.2d 145, 149 (1st Cir.), *cert. denied*, 484 U.S. 944 (1987); *United States v. Kahn*, 787 F.2d 28, 32-33 (2d Cir. 1986); *United States v. Mays*, 738 F.2d

1188, 1190 (11th Cir. 1984); *United States v. Ruppel*, 724 F.2d 507, 508 (5th Cir. 1984); *Griffin v. State*, 464 S.E.2d 371, 376 (Ga. 1995), *cert. denied*, 519 U.S. 834 (1996); *Sisson v. State*, 985 N.E.2d 1, 11 (Ind. Ct. App. 2012).

Here, appellant has failed to show that he was punished for the exercise of a protected right. Appellant has failed to meet his burden of showing either actual vindictiveness or circumstantial evidence of vindictiveness because he failed to present any evidence about the basis for the mistrial. He never provided a transcript of the second day of the first trial when the mistrial was declared nor did he make any proffer as to when or why the mistrial was declared. "A claim of vindictive prosecution based solely on the timing of the filing of the charges, without some evidence of actual bad faith, does not rise beyond the level of mere conjecture." *Robinson v. State*, 209 Md. App. 174, 190 (2012) (holding that there was no evidence of prosecutorial vindictiveness based solely on the fact that the charges against the defendant were initially nol prossed but then refiled after the defendant filed a civil suit against the officers), *overruled on other grounds by Dzikowski v. State*, 436 Md. 430 (2013). Accordingly, we shall affirm the trial court's ruling.

II.

Citing *Cost v. State*, 417 Md. 360 (2010), appellant argues that the trial court abused its discretion in declining to give a missing evidence jury instruction based on the State's failure to produce crime scene photographs of the burn mark on the couch and the burned blanket itself. Appellant argues this evidence was "highly relevant" to his defense. The

State responds that the trial court did not abuse its discretion because the evidence was not central to appellant's case.

Prior to instructing the jury, defense counsel requested a missing evidence instruction. Defense counsel argued that the police had taken photographs of the damage to the couch but had not brought them to court and had not seized the blanket from the house. After hearing the parties' argument, the court declined to give the instruction, stating:

> As to the photographs, the only thing I recall in terms of testimony is that he took photographs, and he does not have them – did not have them -- this is Deputy Parsons. Took photographs and did not have the photographs with him. I didn't hear any evidence – maybe I missed it, but I didn't hear any evidence to suggest that he failed to preserve [the photographs]. That the photographs aren't back at headquarters. That he was asked to bring them. And so I don't think as to the photographs that that is a necessary – that there has been a failure to produce evidence or preserve evidence that would warrant the instruction.
>
> With respect to the failing to preserve and retain the sheet, of course, the sheet would be evidence that the sheet had burned. . . . But count 43 is malicious destruction of the sofa. And so whether he had seized the sheet or not would not, it seems to me, be proof of malicious destruction or lack of malicious destruction of the sofa. So I don't think the evidence warrants giving that instruction.

Defense counsel renewed her objection after the jury instructions were given, thereby preserving this argument for our review. *See* Md. Rule 4-325(e); *Taylor v. State*, 236 Md. App. 397, 411 (2018).

Md. Rule 4-325(c) provides: "The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." Maryland courts have consistently interpreted the Rule to require a trial court to

make three determinations when a party requests a particular jury instruction: (1) whether the requested instruction is a correct statement of the law; (2) whether it is applicable under the facts and circumstances of the case; and (3) whether it is not fairly covered in the instructions actually given. *Dickey v. State*, 404 Md. 187, 197-98 (2008).

Trial courts have broad discretion in determining whether to give instructions requested by the parties. *Roach v. State*, 358 Md. 418, 428-29 (2000) (citation omitted). Generally, a trial court "need not instruct, even when requested or when facts might support the inference, on the presence or absence of most evidentiary inferences, including 'missing evidence' inferences." *Patterson v. State*, 356 Md. 677, 694 (1999). The Court of Appeals has explained why such an instruction is generally not required:

> An evidentiary inference, such as a missing evidence or missing witness inference . . . is not based on a legal standard but on the individual facts from which inferences can be drawn and, in many instances, several inferences may be made from the same set of facts. A determination as to the presence of such inferences does not normally support a jury instruction. While supported instructions in respect to matters of law are required upon request, instructions as to evidentiary inferences normally are not.

Id. at 685. A trial court, however, may abuse its discretion where the missing evidence is central to the defense's case; is the type of evidence usually collected by the State; or was in the State's custody when destroyed. *Grymes v. State*, 202 Md. App. 70, 111 (2011) (quotation marks and citations omitted). Nonetheless, a trial court is not required to give a missing evidence instruction where a defendant alleges non-production of evidence that the State might have produced. *Cost*, 417 Md. at 382.

In *Cost*, the Court of Appeals carved out a narrow exception to the general rule stated in *Patterson*. *See Jarrett v. State*, 220 Md. App. 571, 593 (2014) (stating that *Cost*

is the only case in which the Court of Appeals has found that a trial court has abused its discretion by failing to give a missing evidence instruction). In *Cost,* the defendant was charged with crimes arising from the stabbing of a fellow inmate, Brown, in his prison cell. *Cost*, 417 Md. at 363. Photographs were taken of the cell after the attack showing a red substance on the floor and on towels and bedding in the cell. *Id*. at 366-67. The towels and bedding were collected and, for a time, held as evidence but later were destroyed, and the cell floor was washed before the substance could be examined. *Id*. At trial, the State argued that the substance in the photographs was blood; Cost argued that Brown had not been attacked and Brown had spread "melted red Jell-O" around his cell to look like blood. *Id*. at 366 n.1, 380. Cost was able to shed doubt on Brown's claims of assault by attacking Brown's medical records, but Cost was unable to prove the red substance was anything other than blood because the scene was cleaned before testing could be conducted. Cost asked for a "missing evidence" instruction, which was denied. *Id*. at 380.

The Court of Appeals held that the trial court abused its discretion when it declined to give a missing evidence instruction. *Id.* at 382. Emphasizing that the case was "not typical" and had "unusual facts," the Court of Appeals explained:

> [T]he crime scene, allegedly containing blood-stained linens and clothing, and dried blood on the floor, certainly would contain highly relevant evidence with respect to the crime for which Cost is charged, which normally would be collected and analyzed. Indeed, Brown's cell was sealed off from use, with the alleged crime scene left intact, pending IIU's investigation. Moreover, the missing items were actually held as evidence, completely within State custody. In fact, it appears from the record that at least some of these items were eventually submitted for laboratory examination, but were rejected because they were not submitted quickly enough, and because chain of custody was not properly preserved.

> The evidence destroyed while in State custody was highly relevant to Cost's case. A factual issue at trial was whether Brown was, indeed, stabbed, and whether the alleged stabbing caused significant bleeding, as Brown insisted. While Cost was able to shed doubt on Brown's claim through Brown's medical records, he was prevented from supporting his case with laboratory analysis of Brown's clothing, towel, sheets, and the red substance on the floor of Brown's cell. Such evidence might well have created reasonable doubt as to Cost's guilt. This missing evidence could not be considered cumulative, or tangential—it goes to the heart of the case. We are persuaded that under these circumstances a "missing evidence" instruction, which would permit but not demand that the jury draw an inference that the missing evidence would be unfavorable to the State, should have been given.

Id. at 380-81.

We are not persuaded that the trial court below abused its discretion in declining to give a missing evidence instruction, for the exceptional circumstances in *Cost* are not present here. The photographs of the couch, which were taken but not presented at trial were not so critical that their absence undermined the defense's theory of the case, because the theory of defense was not that the couch did not have a burn mark, but that there was no proof that appellant was the one who caused the damage. In closing, defense counsel argued:

> Now, unfortunately, we don't know what that [couch] looked like because whatever pictures existed, we don't have before you today. It could have been a small burn mark that's been there quite a long time. It could be a lot of things but we don't know because we can't see it and no one collected it and no one brought it to you here today.
>
> * * *
>
> You also have no smoke in the air, which I think lends more to the idea that the burn hole the deputy saw was already there.

Additionally, there was no evidence that *the State* destroyed any evidence or allowed the destruction of evidence in its possession, for the photographs of the couch were in the

State's possession and could have been presented by the defense via subpoena. As to the blanket, we note that it was not the type of evidence usually collected by the State, *i.e.*, there were no charges brought against appellant that related to the blanket, and so it likewise was not critical to the defense's case, which again, was not that it too was not damaged but that appellant did not cause the damage. Accordingly, under the circumstances presented, we are persuaded that the trial court acted within its discretion when it declined to propound a missing evidence instruction.

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.