Circuit Court for Prince George's County
Case No. CT160444X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1408

September Term, 2017

NICHOLAS ALLEN PERKINS

v.

STATE OF MARYLAND

Meredith,
Leahy,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: March 26, 2019

Nicholas Perkins, appellant, was indicted in the Circuit Court for Prince George's County on several charges. At trial, the prosecutor for the State delivered an opening statement in which she asserted that a witness would testify about an incriminating admission allegedly made by Perkins prior to trial that had not been disclosed during discovery. The next day, Perkins requested a mistrial, which the court granted. Perkins thereafter filed a motion to dismiss the indictment, arguing that any retrial on the charges was barred by double jeopardy. Following a hearing, the court denied Perkins's motion, and Perkins appealed. Perkins presents the following question for our review:

> Did the circuit court err in denying appellant's motion to dismiss based on double jeopardy?

For the reasons that follow, we answer Perkins's question in the negative and affirm the judgment of the circuit court, and remand the case for further proceedings.

BACKGROUND

Perkins was indicted on multiple charges after it was alleged that he had sexually assaulted his girlfriend's two-year-old daughter, A.F., while the child was in his care.

During pre-trial investigation, the investigating police officers had taken written statements from A.F.'s mother [Brianna B.], A.F.'s grandmother [Lakeisha P.], and two of A.F.'s maternal aunts [Kristina J. and Michelle J.]. The statements of Brianna, Lakeisha, and Kristina were taken immediately after the incident occurred; those three statements were in the prosecutor's file and were provided in response to Perkins's discovery requests. The statement of Michelle, who was a teenage minor, had been taken at a later date; it was not provided to Perkins prior to trial. According to the prosecutor,

she did not receive a copy of Michelle's statement until the morning of the second day of trial, at which point the statement was belatedly provided to defense counsel.

On the first day of trial, the prosecutor delivered an opening statement in which she provided the jury a synopsis of the State's case:

> [In 2013, A.F.] was born to her mother, Brianna [B.] . . . . And during the tender years of her life, her mother, Brianna, began dating the defendant Nicholas Perkins. Nicholas and Brianna shared common ground. They both attended high school together, each of them, a parent of a child from a previous relationship. Brianna [B.] had a two-year-old, [A.F.]. And Nicholas Perkins, the defendant, had his own [three-year-old] son from a previous relationship[.]
>
> So, Brianna trusted the defendant. They were in a romantic relationship together. After all, he was a father to a child as well. So, when he moved into her apartment . . . she felt comfortable with him being around [A.F.] leaving her in his care and his custody.
>
> So, on March 14, 2016, to her, it was just another ordinary day. By 2:30 p.m., she left the house saying goodbye to the defendant and her daughter, [A.F.], and his son, . . . leaving them at home, so that she could run errands with her mother and her sisters, taking her sister to the doctor that afternoon, stopping off at the pharmacy to pick up medication. Never in a million years did she think that she was going to receive a phone call that would be life changing.
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> As she sat in the parking lot of Target around 5:00, she received that phone call. It was the defendant, and he was in a panic. He kept repeating [A.F.] is bleeding. The blood won't stop. She gets everybody together in the car. She rushes home back to the apartment . . . . She busts through the door, and she finds the defendant in the bathroom with [A.F.] in the tub wearing nothing but a wet t-shirt and no underwear. She sees that the defendant is washing her private area. Panic for her sets in, too.
>
> The baby is taken out of the tub, dried off. As she puts [A.F.] on her back and spreads her legs, that's when her sister, Kristina [J.] calls 911. Kristina [J.] does what Nicholas Perkins didn't do. She called for medical attention.

> We are going to play that 911 call for you. You are going to hear her ask for an ambulance and listen to Brianna [B.] tell you what she saw.
>
> (Audio playing and ends.)
>
> The testimony from [A.F.'s] grandmother, from [A.F.'s] mother, and from her aunt, are going to show that their concern for [A.F.] was singular, her well-being. But their testimony is also going to reveal during this trial that when Nicholas Perkins was also in the house, when he was in the living room, while this 911 call was made, that he was concerned, too. But listen to what they tell you that he said, pacing back and forth in the living room, ["]I really fucked up. I fucked up bad. This is so bad.["]
>
> When the grandmother tells him, calm down, it will be okay, he says, ["]no, it won't.["]

At the conclusion of the State's opening statement, Perkins moved for a mistrial because of the prosecutor's reference to certain experts. That motion was denied. Defense counsel advised the court that he wished to reserve his opening statement. The court dismissed the jury for the evening, and recessed for the day.

At the start of trial the following day, defense counsel moved for a mistrial based on the State's comments during opening argument, in which the prosecutor informed the jury that, on the day of the alleged assault, Perkins had allegedly stated: "I really fucked up. I fucked up bad. This is so bad" (hereinafter referred to as "the Statement"). Defense counsel argued that the Statement had not been disclosed by the State at any time prior to trial. Defense counsel indicated he had sent an e-mail to the prosecutor the previous evening, raising this discovery issue, and had been provided Michelle's written statement --- which contained the "I fxd up I fxd up [sic]" reference --- for the first time on the morning of that second day of trial. The prosecutor conceded that the Statement

had not been disclosed prior to trial, but explained that she had only just learned about the Statement being in a written statement given by Michelle. The prosecutor explained that she had spoken with A.F.'s grandmother just three days prior to the start of trial, and that it was during that conversation that the Statement attributed to Perkins came to her attention. The court granted defense counsel's motion for a mistrial.

Perkins thereafter filed a motion to dismiss the indictment, arguing that retrial was barred by the constitution and Maryland common law protection against double jeopardy. Perkins asserted that the prosecutor had intended to goad him into requesting a mistrial by quoting the inflammatory Statement that had not been provided during discovery.

The State opposed the motion to dismiss, and the prosecutor provided an explanation for her erroneous belief that she had disclosed the Statement during discovery. The prosecutor asserted in her opposition:

> 1. On March 14, 2016, Brianna [B.] received a phone call from her boyfriend, the defendant, who frantically stated that Ms. [B.'s] two year old daughter was bleeding uncontrollably.
>
> 2. Ms. [B.], who was running errands with her mother, Lakeisha [P.], and her two sisters, Kristina and Michelle [J.], rushed home to find the defendant washing the baby's genitals in the bathtub.
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> 3. While Ms. [B.] attended to her baby, family members observed the defendant in a state of "hysteria." Lakeisha [P.] and Kristina [J.] described the defendant to police as "pacing back and forth," "balled up," and repeatedly saying **"this is so bad . . . this is not ok." These descriptions were provided to police in written and video-recorded statements**.
>
> 4. In turn, **investigators provided the statements of Ms. [P.] and Ms. [Kristina J.] to the State**. In a series of discovery packets, **the State**

provided the defendant with nearly 700 documents and several disks. Specifically:

- **On May 13, 2016, the written statements of Brian[n]a [B.] (baby's mother), Lakeisha [P.] (baby's grandmother) and Kristina [J.] (baby's aunt) were provided to the defense in a discovery packet which included 129 pages.**
- On May 18, 2016, further discovery, in the form of 6 DVDs (all photos, witness interviews and defendant's interviews), was provided to the defendant.
- On July 19, 2016, and August 8, 2016, the State provided continuing discovery consisting of medical records and DNA *Cole* evidence, respectively.

5. **On Friday, May 12, 2017, (three days before the trial commenced) the State met with the child's grandmother, Ms. [P.] who described the defendant's behavior during his "hysteria" and stated that the defendant remarked, "I fucked up."**

6. On Monday, May 15, 2017, the trial in this case commenced with opening statement by the State. The State referred to the defendant's hysterical behavior when he realized the damage he had caused to the victim's genitals and the State repeated his words, "I fucked up."

7. The night of the first day of trial, at 9:30 pm, the State received an email from defense counsel requesting to know what evidence in the discovery contained the defendant's statement, "I fucked up."

8. The next morning, on May 1, 2017, the State reviewed counsel's email and referred back to Ms. [P.'s] written statement, honestly believing (although erroneously) that her written statement described the defendant's outburst. When the State realized that Ms. [P.'s] nine page written statement was void of the defendant's remark, it conferred with the lead detective to gain clarity.

9. The lead detective confirmed that witnesses informed him, during the investigation, that the defendant did indeed say, "I fucked up" but he could not remember off-hand which witness statement contained the information. The detective scoured his own case materials and located a statement written by Michelle [J.].

10. **For the first time, on the morning of May 16, 2017, before the Court took the bench, the State received Michelle [J.'s] statement which specified that the defendant kept repeating, "I f'ed up." According to the detective, he thought he had provided it to the State at the same time as the other evidence but must have been mistaken.**

11. According to the detective, on March 15, 2016, the day of the incident, the victim's mother left her in the care of the defendant in order to run errands with her mother (Ms. [P.]) and two sisters (Kristina and Michelle [J.].) Due to the severity of the injuries, the victim was admitted to the hospital and several family members stayed overnight. It was not until the next day, on March 16, 2016, that investigators were able to interview family members at the police station where they obtained written and tape-recorded statements from Ms. [P]. and Ms. Kristina [J.].

Michelle [J.], however, being 16 years old at the time was unavailable for an interview by police on March 16, 2016. After speaking with Ms. [P.] and understanding that Michelle was also a witness in the case, police went to the home of Michelle [J.] at a later date and obtained her written statement. Contained in Michelle [J.'s] written statement was a description of the defendant's remark, "I f'd up."

12. **When the State received Michelle [J.'s] five page written statement for the first time on May 16, 2017, it immediately made a copy for defense counsel and provided it the same morning.**

13. The defendant moved the Court for a mistrial on the grounds that he had just received Michelle [J.'s] written statement.

14. The State admitted that it too had just received Michelle [J.'s] written statement and that it was provided to the defense as soon as it was received from the detective. Further, the State explained that its reference to the defendant's exclamation was based on its mistaken belief that [it was] Ms. [P.'s] written statement [that] was consistent with what [Lakeisha had] described to the State in her pre-trial meeting. . . .[1]

[1] During the hearing on the motion to dismiss, the prosecutor offered this clarification of what Lakeisha had said during her trial prep session on May 12, 2017:

[STATE]: Your Honor, just so you know when I -- I think it's important because you're about to read those statements. When we subsequently

continued…

> The State acknowledged that the defense was receiving Michelle [J.'s] statement as a late disclosure and admitted that it would be unfair to call her as a witness where neither party was aware of her statement thus far and she was not under subpoena given that the State had no knowledge of her potential testimony.

continued…

> asked the grandmother, Ms. [Lakeisha] did you actually hear him say I effed up? . . . [S]he said no, my daughter told me that. That's why it wasn't in her statement. I just wanted to let you know that.
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> * * *
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> THE COURT: And when did you learn that part? So your last statement, the part you just said . . . you had subsequently learned from the grandmother that she heard it from her daughter. When did you learn that?
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> [STATE]: After Your Honor declared the mistrial and we asked where's Michelle.
>
> * * *
>
> THE COURT: And Lakeisha [P.] is the one who told you that she heard it from her daughter.
>
> [STATE]: Right.
>
> THE COURT: Which one, Michelle?
>
> [STATE]: Michelle.
>
> THE COURT: Right. But I guess my question is when did you find out from the grandmother that the statement that she said about him saying that she learned from her daughter?
>
> [STATE]: May 16th after Your Honor declared the mistrial.
>
> THE COURT: After the hearing?
>
> [STATE]: Yes, ...

* * *

> [H]ere, there is no fact in the record or asserted by the defendant in his motion, to suggest that the State's case was going so poorly that the State would have benefitted from sabotaging its own case. Nor is there any indication that the State's case was a probable loser. In fact, at the time the defendant requested the mistrial, the trial had just commenced – the defendant had preserved his opening statement, not one single witness had taken the stand, and not one piece of physical or scientific evidence had been presented to the jury. Indeed, the State, in its opposition to the mistrial, proposed remedies in lieu of mistrial that the Court rejected which included proceeding with the trial without Michelle [J.] and a curative instruction.
>
> * * *
>
> There is no evidence in the record that the State's case was going so poorly that it deliberately sabotaged the trial to "goad" the defendant into requesting a mistrial. It is the defendant who must demonstrate that such prosecutorial purpose was divined. Having failed to present any such evidence, the defendant's motion to dismiss indictment should be denied.

(Emphasis added.)

The court held a hearing on the motion to dismiss. At that hearing, Perkins argued that retrial was barred by double jeopardy. In support, Perkins posited that the prosecutor, after learning about the Statement just prior to trial, wanted to use the Statement at trial but knew that she would not be able to because of the late disclosure. Perkins further posited that, upon learning about the Statement, the prosecutor made the conscious decision to use the Statement during opening statement rather than simply disclose the Statement to the defense. Perkins alleged that the purpose of the prosecutor's use of the undisclosed comment was to "goad" the defense into moving for a mistrial so that the State could then use the Statement at a subsequent trial. Perkins

argued that, as a result of the prosecutor's deception, a retrial should be barred on double jeopardy grounds.

In response, the prosecutor explained, as she had in her opposition quoted above, that, when she first received the case file from the detective investigating the case, the file indicated that there were three witnesses present when Brianna B. came home and discovered the injuries to A.F.: Brianna B.; Brianna B.'s mother, Lakeisha P.; and, Brianna B.'s sister, Kristina J. Those individuals, according to the prosecutor, were later contacted by the police at the hospital where A.F. had been taken following the discovery of her injuries. Each of those individuals subsequently gave a statement regarding, among other things, Perkins's behavior at the time the injuries were discovered, and, according to the prosecutor, those statements were included in the case file and disclosed to the defense in a timely fashion. In one of those statements, which was provided by Lakeisha P., it was reported that, shortly after the injuries to A.F. had been discovered, Perkins was "pacing back and forth" and kept repeating "this is bad, this is so bad."

The prosecutor further explained that, unbeknownst to her, a fourth individual, Michelle J., who was Brianna B.'s other sister, had also been present at Brianna B.'s home at the time the injuries were discovered; however, that individual was not at the hospital when the police made contact with the other three witnesses. The police did eventually make contact with Michelle J. "a week or two after the incident," and, during that interview, Michelle J. provided a written statement. In that statement, Michelle J.

told the police that "she too had observed the hysteria, and that she specifically heard Mr. Perkins say I effed up."

Although Michelle J.'s statement, which included the aforementioned Statement by Perkins, was ultimately added to the detective's own case file, it was not, according to the prosecutor, part of any discovery provided to the State by investigators. The prosecutor explained that, although she did learn about Perkins's alleged "effed up" Statement prior to trial, she did so during trial preparation with Lakeisha P. just three days before trial. During that conversation, Lakeisha P. made a reference to the fact that Perkins had made the Statement, but, according to the prosecutor, she never mentioned Michelle J. or the fact that Michelle J. had been the one who allegedly heard Perkins make the Statement. The prosecutor explained that, because the other three witnesses had provided similar information regarding Perkins's behavior at the time A.F.'s injuries were discovered, the prosecutor mistakenly, but honestly, thought the Statement had been part of the three statements that had been disclosed to the defense. When defense counsel raised the issue during the evening recess after the prosecutor mentioned the Statement in her opening remarks, the prosecutor reviewed her case file and spoke with the detective, at which time it was discovered that Michelle's written statement, which included the Statement, had not been provided to the State by the detective. Upon learning that new information, the prosecutor realized her mistake, provided Michelle's statement to the defense, and offered not to introduce the Statement or Michelle J.'s testimony into evidence. The prosecutor later inquired of the grandmother why she had referred to the

Statement on the Friday before trial began, and the grandmother explained that, although she had not personally heard Perkins make the Statement, she had heard of it from Michelle.

At the end of the hearing, the circuit court denied Perkins's motion to dismiss, explaining:

> [The prosecutor's] representation was that when the mother – grandmother made those statements to her, she at that time had already had in her possession and had provided a nine-page statement to the defense. And while she didn't go back and look at it again in detail, she was under the opinion that included in this detailed narrative were those words I effed up, I effed up. So when she said them, she thought they were part of the statement she'd already given to the defense.
>
> Upon reflection, when she went back and which I have now in front of me, the statement goes on and talks about [Perkins's] demeanor and his behavior, and him saying – he's pacing back and forth and kept repeating this is bad, this is so bad, but doesn't have those exact words. And thus, it's her representation as to how she ended up making that argument to the jury with the belief that it was part of that statement.
>
> I don't find that representation not to be true. I find that just – that representation by counsel to be consistent with logic and reason and the format of the case as thus. The question before the Court is whether or not it's been demonstrated that she – the State made these arguments with the intent to goad, as to use the words of some of these cases, the defense into having to seek this unfavorable mistrial, I mean, this mistrial they didn't want. I will note that the State objected venomously [sic] and wanted other options, but the question still remains not only what was the motivation behind it, because that's one point, but the question also is was it something she was aware of, was it something she knew or should have known?
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> * * *
>
> **I am finding** by review of this file, review of the cases, review of the exhibits presented in trial **that [the defense] failed to demonstrate that this – State acted with the deliberate intent to provoke a mistrial. [The defense] failed to demonstrate that it was a result of [the State]**

> **seeking to [goad] the Defendant [into] request[ing] a mistrial.** The mere fact that the State made an error, which resulted in a mistrial, does not necessarily rise to the level of deliberate or intentional acts, foul play, and I find that they haven't demonstrated that.
>
> And as such, the defense request for a dismissal based on double jeopardy is denied.

(Emphasis added.)

This interlocutory appeal followed.

DISCUSSION

The general rule is that, "where the defendant moves for a mistrial, . . . the Double Jeopardy Clause is no bar to retrial." *Oregon v. Kennedy*, 456 U.S. 667, 673 (1982). But that general rule is subject to an exception for "prosecutorial or judicial overreaching," *i.e.*, instances in which the trial judge or prosecutor engaged in some impropriety that necessitated the declaration of a mistrial at the behest of the defendant. *Giddins v. State*, 163 Md. App. 322, 336 (2005). The reasons behind this narrow exception were explained in detail by the Supreme Court in *Kennedy*:

> Since one of the principal threads making up the protection embodied in the Double Jeopardy Clause is the right of the defendant to have his trial completed before the first jury empaneled to try him, it may be wondered as a matter of original inquiry why the defendant's election to terminate the first trial by his own motion should not be deemed a renunciation of that right for all purposes. We have recognized, however, that there would be great difficulty in applying such a rule where the prosecutor's actions giving rise to the motion for mistrial were done in order to goad the [defendant] into requesting a mistrial. In such a case, the defendant's valued right to complete his trial before the first jury would be a hollow shell if the inevitable motion for mistrial were held to prevent a later invocation of the bar of double jeopardy in all circumstances.

456 U.S. at 673 (internal citations, quotations, and footnote omitted).

The Supreme Court cautioned, however, that when a mistrial is requested by a defendant because of some "overreaching" on the part of the prosecutor, the defendant is not automatically entitled to the protections of double jeopardy (such that a retrial is barred). *Id.* at 679. Rather, prosecutorial conduct sufficient to justify a mistrial on a defendant's motion "does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause." *Id.* at 675-76. The Supreme Court explained:

> Where prosecutorial error even of a degree sufficient to warrant a mistrial has occurred, "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error." [*United States v. Dinitz*, 424 U.S. 600, 609 (1976).] **Only where the governmental conduct in question is intended to "goad" the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.**

Id. at 676 (emphasis added).

In *Fields v. State*, 96 Md. App. 722 (1993), this Court expounded upon the meaning of "intentional goading" within the context of double jeopardy analysis:

> Even at the extreme end of the reprehensibility spectrum, however, where the prosecutor has committed the deliberate foul, there is still this pivotal distinction between (1) seeking to win the game unfairly and (2), knowing the game is going awry, deliberately causing it to be cancelled and rescheduled. If the prosecutor wins the game unfairly, we make him replay it. When the prosecutor deliberately causes the game to be cancelled unfairly, we do not permit him to reschedule it.
>
> **This is what "prosecutorial or judicial overreaching" means. It is the deliberate commission of error for the specific purpose of sabotaging a trial that is going badly for the State so that the State may have another opportunity to do better.** It interferes with a defendant's right to keep his tribunal, once empaneled, together to the sweet or bitter

> end by goading him or provoking him into asking for the declaration of mistrial in the expectation that his agreement to the mistrial will then estop any future double jeopardy claim.

Id. at 746 (emphasis added).

Whether a prosecutor has engaged in "intentional goading" is a question of fact for the trial court. *See, e.g., Kennedy, supra*, 456 U.S. at 675 ("[A] standard that examines the intent of the prosecutor . . . merely calls for the court to make a finding of fact."); *United States v. Johnson*, 55 F.3d 976, 978 (4th Cir. 1995) ("We have recognized that a 'court's finding concerning the prosecutor's intent is, of course, a factual one which we must accept unless it is clearly erroneous.' [*United States v.*] *Borromeo,* 954 F.2d [245] at 247 [4th Cir. (1992)]."); *Giddins, supra*, 163 Md. App. at 356 ("The intent of the prosecutor in asking a question or in making an argument is a fact, which, like any other fact, may be established by relevant evidence."). "Further, the defendant bears the burden of proving that the prosecution acted with specific intent to provoke a mistrial." *United States v. Smith,* 441 F.3d 254, 265 (4th Cir. 2006). *See also Bell v. State,* 286 Md. 193, 207 (1979) ("We cannot say that the trial court was clearly wrong in concluding that the prosecutor did not want or deliberately seek a mistrial.").

In view of these precedents, we hold that the circuit court did not err in denying Perkins's motion to dismiss. The court found that the prosecutor, in referencing Perkins's Statement during her opening remarks, did not act with a deliberate intent to provoke a mistrial. The court based that finding on the prosecutor's representation --- made both in writing and in open court --- that she mistakenly, but honestly, confused

Perkins's Statement with other comments made by Lakeisha P. in her statement to the police, which *had* been disclosed to the defense. Based on the record before this Court, we cannot say that the court's finding in that regard was clearly erroneous. In short, because the mistrial was granted at the request of Perkins, and because the court's finding as to the prosecutor's intent was not clearly erroneous, a retrial is not barred by double jeopardy. *See Kennedy*, 456 U.S. at 679 ("Since the Oregon trial court found . . . that the prosecutorial conduct culminating in the termination of the first trial in this case was not so intended by the prosecutor, that is the end of the matter for purposes of the Double Jeopardy Clause[.]").

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. CASE REMANDED FOR FURTHER PROCEEDINGS. COSTS TO BE PAID BY APPELLANT.