UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0233

September Term, 2015

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MICHAEL STEWART

v.

STATE OF MARYLAND

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Eyler, Deborah S.,
Meredith,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

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Opinion by Thieme, J.

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Filed: August 16, 2016

Appellant, Michael Stewart, is charged with the September 16, 2012 murder of Brittany McKinley, and attempted murder of Meromia Callahan. His trial on these and related charges began on September 14, 2014 in the Circuit Court for Prince George's County. A mistrial was declared on the third day of trial after a police detective described a photo of appellant that was shown to a witness for identification as "a jail picture." Appellant then moved to "dismiss the indictment for a violation of the double jeopardy protections of the State in the federal constitution." The trial court denied the motion. Appellant appeals, presenting the following question for our review, which we have slightly edited:[1]

> Did the trial court err in failing to dismiss the indictment based on double jeopardy grounds?

For the reasons discussed below we assign no error and affirm.

## BACKGROUND

Brittany McKinley and Meromia Callahan were exotic dancers at Irving's Nightclub in Capitol Heights. Appellant frequented the club regularly and was in a relationship with McKinley. McKinley, Callahan, and appellant were at the club in the early morning hours of September 16, 2012. While there, appellant got into a verbal argument with Callahan and another dancer named Michele Stringfield. During this argument Joshua Hicks, a security guard at the club, heard appellant saying that McKinley and Stringfield had

[1]Appellant phrased the question presented as follows:

> Did the trial court err in failing to dismiss the indictment on double jeopardy grounds where the State intentionally caused a mistrial by eliciting testimony from an officer that the defendant had been previously incarcerated?

poisoned him. Hicks eventually escorted appellant out of the club. Appellant then returned to the club, at which time Hicks enlisted the assistance of Officer Lewis,[2] who was working secondary employment at the club. Officer Lewis, and off-duty Officer Bryan Stevens of the Seat Pleasant Police Department, entered the club and encountered appellant arguing with a group of women. Officer Stevens observed a group of men pulling appellant away from the women. Appellant was "very upset" and was "huffing and puffing," with his fist "clinched up." Officers Lewis and Stevens then escorted appellant out of the club. Officer Stevens observed appellant walk down the street and away from the club. Later, Hicks alerted Officers Stevens and Lewis that appellant had returned and was trying to get into the club again. The two officers then approached appellant who was trying to get into the back fenced in area of the club and told him to leave.[3]

At around 6 a.m. on September 16, 2012, Melvin Twine and Shareana King were in their beds in their respective homes on Heath Street in Capitol Heights. Twine, who lived four houses down from McKinley, reported that he heard two or three gunshots followed by a female voice screaming "oh, no, oh, no." King, who lived in the same home as McKinley, was awoken by a gunshot followed by what she recognized as McKinley's voice yelling "please don't kill me." She then heard a second shot, after which she heard McKinley crying and sounding scared say, "I'll do anything you want me to do. I'll stop dancing." King then heard another female voice, which she did not recognize say, "please

[2] Officer Lewis's full name does not appear in the record.

[3] It is unclear from the trial transcripts if appellant was removed from the property two or three times.

don't kill her. She said she will do anything you want her to do, just don't kill her." King then heard a third gunshot and nothing further.

Shortly after 6 a.m. on September 16, 2012, Callahan called 911 to report that she and McKinley had been shot while seated in Callahan's vehicle. During the 911 call, Callahan identified appellant as the shooter.[4] Police officers and fire department personnel met Callahan in the parking lot of a business located on Central Avenue. Callahan, who was suffering from a gunshot wound to the arm, was crawling over McKinley's lifeless body which was lying on the passenger side of the vehicle. McKinley, who suffered a gunshot wound to the right side of her neck, was pronounced dead at the scene.

Sergeant William Silvers, Jr., of the Prince George's County Police Department testified that he was one of the first officers on scene and made contact with Callahan. A "panicked and shocked" Callahan made a number of statements to Sergeant Silvers at the scene, most of which were not admitted at trial after the court found they were not excited utterances. Sergeant Silvers was permitted to testify that based upon those statements, he established appellant as a possible suspect and used his mobile computer to access several computer databases and obtain a photograph of appellant. Whereupon the following exchange occurred:

> [THE STATE]: Okay. And the picture that you gave to – or that you showed, that came up on your Toughbook, did you also have a name with that?

[4] We have been unable to review the actual contents of the 911 call, which was admitted into evidence and published to the jury, as it was not transmitted with the record. Callahan's identification in the 911 call, of appellant as the shooter, was referenced several times on the record and in the State's opening.

SILVERS: Yes.

[STATE]: Okay. What was the name?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[DEFENSE COUNSEL]: Hearsay. Objection. Hearsay.

THE COURT: Overruled.

SILVERS: It was Michael Stewart.

[STATE]: Okay. Do you remember what the actual photo looked like that you pulled up?

SILVERS: It was a jail picture.

[DEFENSE COUNSEL]: Move to strike, Your Honor.

THE COURT: Strike. It's stricken.
Jurors, you cannot consider that.
Strike the question as well as the answer.

The State concluded their direct examination of Sergeant Silvers after this exchange and counsel for appellant eventually moved for a mistrial based upon Sergeant Silver's response that the photograph was a "jail picture."

The court indicated that it would deny the motion and issue a curative instruction, stating:

> Ultimately, I'm going to ask the jurors whether or not any of them cannot erase that testimony from their mind. The Court's concern is that just by mentioning it once again, we put it back there. The Court is going to remind the jurors that during their selection and at the beginning of this trial, I indicated to them that the mere fact that someone is arrested means absolutely nothing.

> I will remind them that a photograph in the possession of law enforcement as a result of an arrest means absolutely nothing. I'll indicate that in response to the question from the State, Officer Silvers testified as to the source of the photo of Mr. Stewart. I sustained objection and ordered that the jury was to disregard that. I will ask if there are any of you who would feel as though you would not be able to erase that testimony from your memory.
>
> I'm going to have to do it that way. But the Court is unable to find manifest necessity. I don't know what they're going to say.

After counsel for appellant argued that Sergeant Silvers had intentionally "intended to poison the jury," the court reiterated that it was denying the motion, but added that it "question[ed] the officer's offering of the statement." The State, which had initially objected to the mistrial, addressed the court as follows:

> Your Honor, the State would concur with the mistrial, with the defense's argument. We would concur. The State has reservations about Your Honor's statements that you have – you have – this Court has reservations on Officer Silvers' intentions.
>
> Further, I'm not – the State has also reservations with the procedure, the cautionary advisement, procedure on the cautionary advisement to the jury.

The court then declared a mistrial. Before the next scheduled trial date, counsel for appellant moved to dismiss the indictment "for a violation of the double jeopardy protections of the State in the federal constitution." The court denied the motion and appellant filed this timely appeal.

## DISCUSSION

The Double Jeopardy Clause contained in the Fifth Amendment to the United States Constitution, is made applicable to the states through the Fourteenth Amendment, and provides that, "... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." *Simmons v. State*, 436 Md. 202, 213 (2013). Once a jury has

been "empaneled and sworn," the "Double Jeopardy Clause generally bars the retrial of a criminal defendant for the same offense." *Id.* Retrial, however, "is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused." *Arizona v. Washington*, 434 U.S. 497, 505 (1978). "Ordinarily, a defense request for a mistrial is treated as a waiver of any double jeopardy claim." *West v. State*, 52 Md. App. 624, 631 (1982).

There is, however, a narrow exception to this rule. A defendant who has requested a mistrial may "raise the bar of double jeopardy to a second trial," where the State acted with the intent "to 'goad' the defendant into moving for a mistrial." *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982). "Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, therefore, 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.

In *Giddins v. State* we explained the intent requirement of this limited exception as follows:

> [A]s an exemption from waiver by a defendant who asks for a mistrial, prosecutorial overreaching is a necessary condition, but it is by no means a sufficient condition. Although it is necessary, as a threshold matter, that the prosecutor do something both erroneous enough and prejudicial enough to justify the declaration of a mistrial, the very happening of the mistrial is ordinarily a sufficient sanction for such prosecutorial error. The barring of a retrial adds an entirely new dimension to the sanction, one that is available only in the rarest of circumstances.
>
> What is critically necessary for the imposition of that additional sanction is not error and prejudice, but a particular intent or purpose.

163 Md. App. 322, 338 (2005).

Intentional goading is "the act of deliberately 'sabotaging a trial that is going badly.'" *Id.* at 340 (quoting *Fields v. State*, 96 Md. App. 722, 746 (1993)). That the State's misconduct is "grossly negligent or intentionally perpetrated tactically to gain a trial advantage is of no consequence to the question of retrial." *Bell v. State*, 41 Md. App. 89, 101 (1979). The State must have intended to compel the defendant to request a mistrial. *Id.*

Appellant argues that the "State asked Silvers a question which could only have elicited inadmissible, and severely prejudicial, testimony." The State indicated during the motion to dismiss that while questioning Sergeant Silvers they had not intended to cause a mistrial. When they asked him to describe the photo, they expected him to "describe the person in the photo" and "[n]ot where the photo came from." The court denied the motion to dismiss the indictment on double jeopardy grounds and stated:

> The question that was asked could have been answered in another manner. And I cannot lay at the foot of the Office of the State's Attorney any intention to solicit a response that would cause a mistrial.
>
> The Court also considers the fact that the motion for a mistrial was resisted. And perhaps upon further reflection realizing what was said was probably going to result in a reversal if it was appealed or something like that, notwithstanding the desire to go forward.
>
> The Court does not deem the State's decision to consent to a mistrial as being done for the purpose of achieving a tactical advantage. And the Court does not deem the question of the officer to be for the purpose of intentionally baiting the Court into a mistrial or to deny the Defendant of his right to a fair trial. The motion to dismiss is denied.

In *Oregon v. Kennedy*, the trial court made a finding of fact that the prosecutor had not intended to cause a mistrial. 456 U.S. at 679. That finding was accepted by the appellate court and ultimately became the predicate for the Supreme Court's holding.

> Since the Oregon trial court found, and the Oregon Court of Appeals accepted, 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 of the Fifth and Fourteenth Amendments to the United States Constitution.

*Id.*

Appellant contends that the State, believing that their case was going poorly, "intentionally" provoked a mistrial. The State counters that their case was not floundering as they "had introduced ample evidence corroborating the eye-witness's 911 call identifying [appellant] as the shooter, and had not yet introduced the eye-witness, who was expected to testify to the shooting and Stewart's relationship with the victim."

At the time the mistrial was declared, the State had presented a strong case, and there appears to be no evidence in the record why it would want the trial halted. *See Bell v. State*, 286 Md.at 206. The State had presented the 911 call from Callahan, the sole surviving witness to the shooting, which identified appellant as the shooter. Several witnesses had testified that appellant had been kicked out of the night club several times that day after arguing with a group of women, including Callahan. Further, Shareana King testified that she heard the shooting and McKinley's words to the shooter just prior to being shot in the neck. One could infer from King's testimony that McKinley knew the shooter and that the shooting had something to do with her work at the strip club.

We do not find any evidence suggesting the State had a reason to abort the trial. We accept the trial court's finding that the prosecution did not intend to goad appellant into requesting a mistrial. Appellant's request for a mistrial, therefore, foreclosed any subsequent double jeopardy claim.

**JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.**