Circuit Court for Baltimore City
103216074

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2474

September Term, 2015

CLAYTON D. COLKLEY

v.

STATE OF MARYLAND

Berger,
Reed,
Shaw Geter,

JJ.

Opinion by Reed, J.

Filed: January 19, 2018

On two separate occasions, a jury in the Circuit Court for Baltimore City convicted Clayton D. Colkley, appellant, of second degree murder, attempted first degree murder, conspiracy to commit murder, and related weapons offenses.[1] Both convictions were reversed and remanded on appeal.[2] At appellant's third trial, the Honorable Edward R. K. Hargadon declared a mistrial at the request of the defense. Appellant then filed a motion to dismiss on grounds of double jeopardy. Following a hearing on December 3, 2015, the court denied the motion. Appellant filed a timely appeal and presents two questions for our review, which have been reduced to one and rephrased:[3]

1. Did the trial court err in denying Mr. Colkley's motion to dismiss on double jeopardy grounds?

For the following reasons, we answer this question in the negative and shall affirm the judgment of the circuit court.

[1] Both trials were joint trials where Darnell Fields was co-defendant. The first trial resulted in a sentence of life plus fifty years. The jury acquitted appellant on charges of one count of use of a handgun at the second trial, and he was sentenced to life plus fifty-five years.
[2] *Fields v. State*, 172 Md. App. 496, 916 A.2d 357 (2007); *Fields v. State*, 432 Md. 650, 69 A.3d 1104 (2013).
[3] The appellant provided the following questions *verbatim*:

1. Did the trial court err in denying Appellant's motion to dismiss where the Assistant State's Attorney, a prosecutor with nearly three decades of experience, intentionally elicited testimony from the lead detective that Appellant's former co-defendant had been "convicted . . . of something related to this case"?

2. Did the trial court err in permitting the same Assistant State's Attorney to provide testimony and closing argument at the hearing on Appellant's motion to dismiss?

FACTUAL AND PROCEDURAL BACKGROUND

As stated above, appellant was twice convicted by a jury in the Circuit Court for Baltimore City. The convictions were reversed and remanded for new trials by this Court and the Court of Appeals.[4] Two months before the third trial, Mr. Colkley's former co-defendant, Mr. Fields, entered a guilty plea. Mr. Colkley proceeded to trial on September 21, 2015.

The State called Sargent Kerry Snead as its first witness. During direct examination, the following exchange ensued:

> [Prosecutor]: Ultimately, did you charge Mr. Fields?
>
> [Defense Counsel]: Objection.
>
> THE COURT: Counsel, approach.
>
> (Whereupon, counsel approached the bench and the following ensued:)
>
> [Defense Counsel]: Mr. Fields is not on trial.
>
> THE COURT: Overruled.
>
> (Whereupon, counsel returned to trial tables and the following ensued:)
>
> THE COURT: Detective, you may answer the question.
>
> The Witness: Yes.

[4] This Court found that the trial court erred when it denied the defendants the right to be present for and respond to jury questions. The Court of Appeals held that the trial court committed reversible error when it denied the defendants access to the complete internal affairs files of testifying detectives Darrell Massey and Sargent Kerry Snead.

> [Prosecutor]: And was he convicted?
>
> The Witness: Yeah.
>
> [Prosecutor]: Of something related to this case. Was he convicted of something related to this case?
>
> The Witness: Yes, he was.
>
> [Prosecutor]: And Mr. Boyd, what if anything happened to Mr. Boyd between your conversation with Mr. Boyd and now?
>
> [Defense Counsel]: Objection. May we approach?
>
> THE COURT: Yeah.
>
> (Whereupon, counsel approached the bench and the following ensued:)
>
> [Defense Counsel]: First, the last question, the one that deals with Mr. Fields, I'm moving for a mistrial. There's nothing about anything Mr. Fields, whether he was convicted or not, has anything to do with how this jury decides whether or not Mr. Colkley (unintelligible) and did the things that he's charged with. It's prejudicial and it's outside the scope of what the jury should hear.
>
> [Prosecutor]: He's charged with conspiracy and I didn't ask him what particularly he was convicted of, just the fact that he was convicted. That explains why he is not sitting at the table.

Following a recess and conference in chambers, the State put on the record that it believed a mistrial was not necessary and that a curative instruction would suffice. The court disagreed and granted the defense's request for a mistrial, explaining that the "question and answer was too prejudicial."

Appellant then filed a motion to dismiss the charges on grounds of double jeopardy. At the hearing, defense counsel argued that the State intentionally provoked the request for a mistrial by eliciting testimony that Mr. Colkley's former co-defendant had been convicted of related charges. The prosecutor testified that he had not acted intentionally, and the court denied the motion. This interlocutory appeal followed.

DISCUSSION

A. Parties' Contentions

Appellant argues that the circuit court erred in denying his motion to dismiss. Specifically, appellant argues that permitting a retrial following the declaration of a mistrial in this case is barred by the principles of double jeopardy. Although a defense request for a mistrial is ordinarily treated as a waiver of any double jeopardy claim, appellant relies on a narrow exception to this rule which states that there is no waiver where the government acts intentionally to provoke mistrial requests. *See United States v. Dinitz*, 424 U.S. 600, 611 (1976).

It is appellant's position that defense counsel was goaded into moving for a mistrial. Appellant contends that the prosecutor intentionally elicited testimony he knew to be prohibited in order to provoke defense counsel into requesting a mistrial. Appellant rejects the State's position that the prosecutor was simply unaware of the law and asserts that an attorney with as much trial experience as the prosecutor is certainly aware of such well-settled law.

According to appellant, the State was motivated to sabotage the trial because its case was not going well, and a mistrial would give the State a new opportunity to try Mr. Colkley when it was better prepared. The appellant supports this claim with facts discussed below in our analysis. Citing *Oregon v. Kennedy*, appellant asserts that the prosecutor's intent should be inferred from "objective facts and circumstances" rather than testimony from the prosecutor as to his subjective intent. *Oregon v. Kennedy*, 456 U.S. 667, 675 (1982).

Appellant also argues that pursuant to Rule 3.7 (Md. Rule 19-303.7) of the Rules of Professional Conduct, the prosecutor should not have been permitted both to testify as a witness and provide closing argument as counsel at the hearing. Appellant maintains that the trial court either should not have permitted the prosecutor to testify or required the State's co-counsel to provide closing argument. Appellant concludes that the record supports a finding that the State acted intentionally and goaded defense into requesting a mistrial. For these reasons, appellant contends that a retrial is barred by double jeopardy.

The State argues that the record provides ample evidence to support the trial court's factual finding that the prosecutor did not intentionally provoke the defense into requesting a mistrial. The State points out that whether the prosecutor acted with the deliberate intent to provoke a mistrial is a question of fact for the circuit court to decide. *See Kennedy*, 456 U.S. at 675 (stating that divining the prosecutor's intent requires the trial court to make a finding of fact). As the trial court's factual findings are accepted unless clearly erroneous, the State asserts that the appellate court must accept the trial court's factual determinations unless they are "so contrary to unexplained, unimpeached, unambiguous and documentary

evidence as to be inherently incredible and unreliable." *Kusi v. State*, 438 Md. 362, 384 (2014) (quoting *Attorney Grievance Comm'n v. Maignan*, 390 Md. 287, 295 (2005)). The State concludes that because of the trial court's finding, it must be accepted on appeal that the prosecutor acted out of a mistaken belief, rather than a purposeful attempt to sabotage the trial.

The State also argues that appellant's objection to the prosecutor being permitted to make the closing argument after testifying was untimely and therefore not preserved for appellate review. According to the State, appellant did not interpose a timely objection before the prosecutor testified or argued during the motion to dismiss hearing.

Alternatively, if the objection is preserved, the State asserts that the trial court did not violate Rule 3.7 of the Rules of Professional Conduct because the Rule applies only to trials. The State notes our decision in *Heard v. Foxshire Associates*, 145 Md. App. 695, 707 (2002), which it asserts distinguished between a trial and a hearing in the applicability of the Rules of Professional Conduct.

Further still, the State argues that even if this court finds that the trial court did err, any error was harmless beyond a reasonable doubt. Quoting the Court of Appeals, the State asserts that harmless error exists here because "a reviewing court, upon its own independent review of the record, [would be] able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict." *Dorsey v. State*, 276 Md. 638, 659 (1976). We agree.

B. Standard of Review

This Court "will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c). "A finding of a trial court is not clearly erroneous if there is competent or material evidence in the record to support the court's conclusion." *Lemley v. Lemley,* 109 Md.App. 620, 628, 675 A.2d 596 (1996).

Moreover, "[u]nder the clearly erroneous standard, this Court does not sit as a second trial court, reviewing all the facts to determine whether an appellant has proven his case." Nor is it our function to weigh conflicting evidence. Our task is limited to deciding whether the circuit court's factual findings were supported by "substantial evidence" in the record. And, to that end, we view all the evidence "in a light most favorable to the prevailing party." *Goss v. C.A.N. Wildlife Trust, Inc.*, 157 Md. App. 447, 455-56 (2004) (citations omitted).

C. Analysis

Double Jeopardy

The central issue here is whether retrial following the declaration of a mistrial at the request of a defendant is barred by double jeopardy. The Double Jeopardy Clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, provides, in pertinent part, that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V; *Simmons v. State*, 436 Md. 202, 213 (2013); *Benton v. Maryland*, 395 U.S. 784 (1969). Double jeopardy protects against: (1) second prosecutions for the same offense after acquittals and convictions, (2) multiple

punishments for the same offense, (3) retrials following certain mistrials, and (4) collateral estoppel. *See Giddins v. State*, 163 Md. App. 322, 325 (2005) (quoting *Fields v. State*, 96 Md. App. 722, 725 (1993)). The matter before us is the permissibility of retrial following mistrial.

"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." *Kennedy*, 456 U.S. at 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*, this Court held that granting the mistrial is "ordinarily a sufficient sanction for such prosecutorial error," and that subsequently barring a retrial is available "only in the rarest of circumstances." *Giddins v. State*, 163 Md. App. 322, 338 (2005). A particular purpose or intent, not just error or prejudice, on behalf of the State is critically necessary. *See id.*; *see also Loveless v. State*, 39 Md. App. 563, 566 (1978) ("The only time that retrial is barred under double jeopardy principles is when there has been such prosecutorial or judicial overreaching as to have amounted to a deliberate and intentional sabotaging of the earlier trial.").

We further explained that intentional goading is "the act of deliberately 'sabotaging a trial that is going badly.'" *Giddins*, 163 Md. App. at 340. Gross negligence or an intentional act to gain a trial advantage will not suffice to bar the retrial. *See Bell v. State*, 41 Md. App. 89, 101 (1979). The State must have intended to compel the defendant to request a mistrial, fearing that it would lose the case. *See Hagez v. State*, 131 Md. App. 402, 444 (2000) ("[I]t is evident that the prosecutor's improper conduct at trial was not prompted by a desire to 'sabotage a probable loser.'").

Appellant argues that the State knew its case was going poorly and intentionally provoked a mistrial. We disagree. Appellant relies mainly on two details from the record to support his position.[5] Appellant cites the prosecutor's "rambling" opening statement where he explained to the jury that his case would not make sense and confessed that he did not know which witnesses he would call, and the absence of the State's "star witness," Eric Horsey, as evidence of a failing case.

We cannot agree that the State's case was going poorly and it therefore decided to sabotage the trial. In fact, as we also noted in *Giddins*, the State's case was just beginning. *See Giddins*, 163 Md. App at 361 ("[T]he Court notes that the trial has just begun and it was not evident that the prosecutor's defeat was probable."). The mistrial was declared during direct examination of the State's first witness. Judge Hargadon, presiding over the trial and motion to dismiss, found no indication that the State had any intention of trying

[5] The other details appellant notes include: an article published in the Baltimore Sun after the jury was sworn in laying out allegations of misconduct by one of the main investigating officers; evidence left in the prosecutor's office that he wanted to introduce; the prosecutor complaining of a migraine; and potential impeachment evidence.

to "tank the case." He stated that at the time the mistrial was granted it was not clear to him that the State's case was going poorly. In *Kennedy*, Justice Stevens noted similarly in his concurring opinion that "[t]he isolated prosecutorial error occurred early in the trial, too early to determine whether the case was going badly for the prosecution." *Kennedy*, 456 U.S. at 692.

The record does not support appellant's argument that the State's case was a probable loser. Although it is true that Eric Horsey, whom the State intended to call as its first witness, was not present when the trial began, he arrived before the mistrial was granted. The State also had another witness, Jermaine Lee, who was prepared to identify Mr. Colkley as one of the shooters. Judge Hargadon stated in his ruling on the motion that there was nothing unusual about the prosecutor "scurrying" around trying to deal with evidence and witnesses.

The appellant reasons that eliciting inadmissible testimony of Mr. Fields' conviction could not have been an accident because case law on the subject is well-settled and the prosecutor had decades of trial experience. We cannot agree. There is nothing in the record to support a finding of intentional goading by the State. The State objected and suggested a curative jury instruction as an alternative to granting the mistrial. The Supreme Court and this Court have found it noteworthy when the prosecutor objects or suggests alternatives to a mistrial. *See Kennedy*, 456 U.S. at 680 ("Moreover, it is evident from a colloquy between counsel and the court, out of the presence of the jury, that the prosecutor not only resisted, but also was surprised by, the defendant's motion for a mistrial."); *Giddins*, 163 Md. App.

at 362 ("It is also worthy of note that when the trial judge granted the mistrial, the prosecutor objected and argued strenuously against granting of the motion.").

Furthermore, the prosecutor testified that he did not know the question was objectionable and in no way intended to provoke defense counsel into moving for a mistrial. While appellant would like us to conclude that the prosecutor's intent should be inferred only from "objective facts and circumstances," we have already held that testimony as to subjective intent is relevant:

> 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. All of the circumstances surrounding the asking of the question or the making of the argument are relevant evidence of prosecutorial purpose. Also obviously relevant is the testimony or statement by the prosecutor himself as to precisely what, if anything, his intent may have been. His testimony, of course, may be taken with a grain of salt, but its relevance, as evidence, is not to be doubted.

Giddins, 163 Md. App. at 356. In *Giddins*, appellant argued, as the appellant does here, that it was error for the trial judge to have considered and partially relied upon the prosecutor's testimony because his intent should have been inferred exclusively by objective facts and circumstances. *Id*. We rejected that argument completely as "a rule of law that we never remotely promulgated (and would, indeed, affirmatively reject)." *Id*.

The trial judge made his decision "based upon [his] memory . . . of what happened on that day of the trial," and found that there were no indications of goading. In *Kennedy*, the Supreme Court determined that where the trial court found, and the appellate court accepted, that the prosecutorial conduct which terminated the trial was not intended by the

prosecutor, it was "the end of the matter for purposes of the Double Jeopardy Clause." *Kennedy*, 456 U.S. at 679.

At the time the mistrial was declared, the State had only begun to present its case. Although the State was forced to call witnesses in a different order than planned because of a late witness, all of its evidence was available. There is no indication that the prosecutor acted intentionally in order to provoke a mistrial.

Rule 19-303.7 Attorney as Witness

Maryland Attorneys' Rules of Professional Conduct Rule 19-303.7 (MRPC 3.7) prevents an attorney from acting, "as an advocate at a trial in which the attorney is likely to be a *necessary* witness." (emphasis added) *Id.* Here, Assistant State's Attorney ("ASA") Volatile testified on behalf of the State and then argued in response to the appellant's motion to dismiss. ASA Volatile's testimony to his "subjective intent" was not "necessary," to the hearing of the appellant's motion to dismiss. As we previously ruled in *Giddins v. State*, 163 Md. App. 322, 356 (2005), while the testimony of a prosecutor is relevant, it should be taken with a grain of salt. That sentiment is true here. Merely because the testimony was relevant does not mean that ASA Volatile's testimony was necessary to the hearing. There was an abundance of evidence that Judge Hargadon could have considered that would make ASA Volatile's, possibly self-serving, comments unnecessary to consider. There were many pieces of evidence, discussed *supra*, that explain why the trial was not deliberately sabotaged. This includes, the opening statement of counsel, the timing of the mistrial requested, and the availability of witnesses.

The State correctly asserts that Rule 3.7 of the Rules of Professional Conduct only applies to trials. However, they misconstrue *Heard v. Foxshire Associates, LLC*, 145 Md. App. 695, 706 (2002). The case draws a distinction between counsel's conduct in trials before courts of record and hearings conducted by legislative or adjudicatory bodies. This is not a distinction that has any significance in the present case.

Next, we turn to the States argument that the issue was not properly preserved on the record for appeal. Following ASA Volatile's testimony, he intended to present a closing argument, to which appellant's counsel objected stating:

> [Appellant's Counsel]: I mean I guess it's just highly unusual that the person who gives the testimony makes the argument. I think I would feel more comfortable with [State's Co Counsel] making the argument. She's prepared enough to ask the questions. It just seems highly unusual to me to be a witness and litigate at the same time and I think it's strange posture –
>
> [The Court]: It's true.
>
> [Appellant's Counsel]: -- and the ethics is that you can't be a witness and a litigate in the same case. I just think it's odd.[6]

Although the appellant did not use the words "I object," the Court of Appeals has made it clear that it is not necessary for counsel to exclaim the exact words, "when the trial court makes an adverse ruling. Where the record demonstrates that counsel sufficiently indicated his [or her] disagreement with the [trial] court's view, we have refused to read Rule 4-323 (c) so narrowly." *Bundy v. State*, 334 Md. 131, 144 (1994) (internal quotation marks omitted). *See also* LYNN MCLAIN, 5 MARYLAND EVIDENCE, STATE AND FEDERAL, §103:8

[6] The record reflects that ASA Volatile made this statement; however, in both the appellants and the State's briefs, they attribute this statement to Appellants counsel.

n. 2 (2017)("the words 'I object' are not necessary; it is enough that counsel indicate the protest of a particular thing."). Thus, we find that the issue was properly preserved for review on appeal. Nevertheless, it would have been preferable for the appellant's counsel to "employ the time honored express of 'I object,' thus removing any question about preservation…" *Scott v. State*, 289 Md. 647, 654 (1981).

Finally, even if this court were to find error, it would have been harmless. "[A]n error will be deemed harmless only if a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt that the error in no way influenced the verdict." *Fuentes v. State*, 454 Md. 296, 280 (2017)(internal quotations marks omitted). It is our belief that Judge Hargadon was not influenced by ASA Volatile's testimony, such that it had an impact on the denial of the appellant's motion to dismiss. Had this been at a trial with a jury present, where the jury would have undoubtedly been prejudiced, the outcome would be different. Accordingly, we find that had this court found an error, it would have been a harmless error that did not influence the judge's decision.

CONCLUSION

We do not find any evidence supporting appellant's arguments. We accept the trial court's finding that the prosecution did not intend to goad appellant into requesting a mistrial. The trial court, therefore, did not err in denying appellant's motion to dismiss on double jeopardy grounds. Further, we find that the court did not err in allowing ASA Violate to present testimony and a closing argument.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.