Circuit Court for Baltimore City
Case No. 118092006

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2260

September Term, 2019

ANTWON JOHNSON

v.

STATE OF MARYLAND

Friedman,
Wells,
Zic,

JJ.

Opinion by Wells, J.

Filed: March 19, 2021

Appellant, Antwon Johnson, was indicted by the Grand Jury for Baltimore City for the first-degree murder of Anthony Joyner and related crimes. The matter proceeded to a jury trial in the Circuit Court for Baltimore City. The day before trial, a State's witness failed to appear pursuant to a summons, and the court issued a body attachment. Thereafter, a jury was empaneled, and, during the next few days, evidence was presented. While that trial was in progress, the recalcitrant witness was apprehended, and the court ordered that she be held without bond until the State could obtain her testimony. Because of "human error" by employees of the Baltimore Central Booking Intake Center, the detention facility did not honor the court's order and instead released the witness from custody. Several days later, after the State had presented testimony of nine other witnesses and nearly two dozen pieces of evidence had been admitted, the missing witness still had not been located. At the State's request, the court declared a mistrial over defense objection.

Thereafter, Mr. Johnson filed a motion to dismiss on the ground of double jeopardy, but the court denied the motion. Another jury trial was held. The jury found Mr. Johnson guilty of murder in the second degree; use of a firearm in the commission of a crime of violence; wearing, carrying, and transporting a handgun on or about the person; and possession of a regulated firearm by a prohibited person. The court imposed consecutive sentences of thirty years' imprisonment for second-degree murder; five years' imprisonment for possession of a regulated firearm by a prohibited person; and twenty years' imprisonment, the first five without the possibility of parole, for use of a firearm in the commission of a crime of violence.

This appeal ensued, raising a single question for our review:

> Did the lower court err by ruling that there was manifest necessity to grant the prosecutor's request for a mistrial and by denying Appellant's motion to dismiss for a double jeopardy violation?

Because we conclude that the circuit court did not so err, we affirm the judgments.

BACKGROUND

On the evening of December 15, 2013, Anthony Joyner died of multiple gunshot wounds on a street near the Douglas Homes housing project in east Baltimore. Based upon ballistics evidence recovered from the scene, at least three different firearms were used, though no weapon was ever found. Police officers who canvassed the surrounding homes shortly thereafter were unable to find any eyewitnesses to the shooting.

During the succeeding weeks, police identified Markita Mayo and Sonya Ellis as potential witnesses to the shooting. Ms. Ellis gave a statement, inculpating Mr. Johnson, but Ms. Mayo claimed, at that time, that she did not know who had shot Mr. Joyner.

In May 2015, Ms. Mayo, while incarcerated in Baltimore County in an unrelated case, offered to give a more definitive statement to Baltimore City homicide detectives regarding the instant case. At that time, Ms. Mayo gave a recorded statement, claiming that both appellant and his brother had shot Joyner and that appellant's motive was a debt of $60 that he owed to Mr. Joyner.

In April 2018, an indictment was returned, in the Circuit Court for Baltimore City, charging Mr. Johnson with murder in the first degree; use of a firearm in the commission of a felony or crime of violence; wearing, carrying, and transporting a handgun on the person; conspiracy to murder; and possession of a regulated firearm after having been convicted previously of a disqualifying offense. At the same time, a similar indictment

was returned against Anthony Johnson, Mr. Johnson's brother. The two brothers were scheduled to be jointly tried in February 2019.

On February 5, 2019, the cases were called, and a jury was selected and sworn. Although both Ms. Mayo and Ms. Ellis were subpoenaed and ordered to appear in court the day prior to the scheduled beginning of trial, neither witness appeared at that time, and the court issued body attachments for both witnesses. The body attachments were served on both Ms. Mayo and Ms. Ellis, and Ms. Ellis thereafter appeared and testified at trial. On February 7, 2019, Ms. Mayo was brought before the court, which held an ex parte hearing[1] to determine the conditions of her custody until her testimony could be procured the following week, and it ordered that she be held without bond. Over the weekend, however, Ms. Mayo was mistakenly released from custody, and the State was unable to locate her.[2]

Ultimately, the State called all its other witnesses and presented all evidence except that admissible through Ms. Mayo's testimony. The State then made a proffer of Ms. Mayo's expected testimony and, asserting that she was "the most important witness in this case, by far," moved for a mistrial, claiming manifest necessity. The court heard argument

[1] The defendants did not have standing to challenge the conditions of Ms. Mayo's confinement, and their presence at that hearing was not required. Nor, for that matter, is this issue before us in this appeal.

[2] The apparent reason for the mix-up was that Ms. Mayo also was facing charges in an unrelated case and had failed to appear, several times, in that case. The charge in that case was a misdemeanor, and bond for the failure to appear had been set at $3,500. Apparently, an employee at the Baltimore Central Booking Intake Facility released her after she was able to post bond.

of the parties and considered two other alternatives to a mistrial—admitting Ms. Mayo's May 2015 statement and granting a two-week continuance in the hope that Ms. Mayo could be located—but found that neither alternative was feasible. [It therefore granted the State's motion and declared a mistrial. Both defendants filed motions to dismiss, which were heard one week later by another judge but denied.

A second trial was held in October 2019. By then, Ms. Mayo had been located, and she appeared and testified in the State's case. Neither she nor Ms. Ellis was a willing witness, and the State was forced to rely upon Maryland Rule 5-802.1 to introduce their prior inconsistent statements as substantive evidence.

The jury acquitted Antwon Johnson of first-degree murder and conspiracy to murder, but found him guilty of second-degree murder, use of a firearm in the commission of a felony or crime of violence, possession of a regulated firearm after having been convicted previously of a disqualifying offense, and wearing, carrying, and transporting a handgun on the person. The jury acquitted Anthony Johnson of all charges. After the court-imposed sentences totaling fifty-five years this timely appeal followed.

DISCUSSION

The Double Jeopardy Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, *Benton v. Maryland*, 395 U.S. 784, 794 (1969), provides that "no person shall be . . . subject for the same offence to be twice put in jeopardy

of life or limb."[3] U.S. Const. amend. V. The Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal[;]" it "protects against a second prosecution for the same offense after conviction[;]" and it further "protects against multiple punishments for the same offense." *United States v. Wilson*, 420 U.S. 332, 343 (1975) (citation and quotation omitted).

"Ordinarily," a defendant may not claim double jeopardy "unless there has been a trial that has proceeded to verdict, but there are exceptions to this rule." *Nicholson v. State*, 157 Md. App. 304, 310 (2004). One of those exceptions, pertinent to the instant case, applies when, during trial, a court declares a mistrial over defense objection. "Because jeopardy attaches before the judgment becomes final, the constitutional protection also embraces the defendant's 'valued right to have his trial completed by a particular tribunal.'" *Arizona v. Washington*, 434 U.S. 497, 503 (1978) (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)).

There is an important distinction, however, between a case that has not proceeded to a verdict and one that has. Retrial "is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused," *id.* at 505, whereas it is flatly prohibited in the latter case. *Nicholson*, 157 Md.

[3] Although the Constitution of Maryland lacks an express provision prohibiting double jeopardy, "Maryland common law provides well-established protections for individuals against being twice put in jeopardy." *State v. Long*, 405 Md. 527, 536 (2008) (citing *Taylor v. State*, 381 Md. 602, 610 (2004)). Appellant does not contend that Maryland common law provides greater protection than the Fifth Amendment and relies exclusively upon decisions interpreting the Fifth Amendment.

App. at 310. "Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused," the "valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury." *Washington*, 434 U.S. 505 (footnote omitted). Nonetheless, "in view of the importance of the right, and the fact that it is frustrated by any mistrial," the prosecution bears a "heavy" burden if it seeks a retrial following the declaration of a mistrial over defense objection. *Id.* Once jeopardy has attached,[4] if a trial court declares a mistrial over defense objection, retrial generally is barred unless there was a "manifest necessity" for declaring the mistrial. *Id.*

The "manifest necessity" standard should not be applied "mechanically" but, rather, must be applied in the context of "the particular problem confronting the trial judge." *Id.* at 506. "Whether manifest necessity to declare a mistrial and, thus, whether the prohibition of the double jeopardy clause is triggered depend upon the unique facts and circumstances of each case." *Mansfield v. State*, 422 Md. 269, 287 (2011) (citations omitted).

A few general principles may be derived from the case law and were summarized by the Court of Appeals:

> [T]here exists "manifest necessity" for a mistrial only if 1) there was a "high degree" of necessity for the mistrial; 2) the trial court engaged "in

[4] In a jury trial, jeopardy attaches when the jury is empaneled and sworn. *Hubbard v. State*, 395 Md. 73, 90 (2006) (citations omitted). In the instant case, there is no dispute that jeopardy had attached prior to the time the court granted the State's motion for mistrial.

> 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.

State v. Baker, 453 Md. 32, 49 (2017).

There is "tension" between a trial court's "great discretion" to declare a mistrial and a defendant's constitutional right "to have his trial completed by the particular tribunal summoned to sit in judgment of him." *McCorkle v. State*, 95 Md. App. 31, 60 (1993). The scope of a trial court's discretion may be viewed along a "sliding scale."[5] *Id.*

At one extreme is a case in which "a prosecutor proceeds to trial aware that key witnesses are not available to give testimony and a mistrial is later granted for that reason." *Washington*, 434 U.S. at 508 n.24 (citing *Downum v. United States*, 372 U.S. 734 (1963)). In such a case, "a second prosecution is barred," *id.*, that is, "the trial court has *no* discretion to grant a mistrial." *McCorkle*, 95 Md. App. at 61.

In a second category is a case in which "the prosecutor has proceeded to trial unaware" that critical evidence is unavailable; if the trial court later declares a mistrial for that reason, we review its decision under the "strictest scrutiny." *Id.* (quoting *Washington*, 434 U.S. at 508). That is, in such a case, the trial court "is vested with *limited* discretion to grant a mistrial." *Id.*

[5] Similarly, in *Baker*, 453 Md. at 54-55, the Court of Appeals described a "spectrum of circumstances precipitating the declaration of a mistrial," with a case in which a mistrial is declared to give a prosecutor "an unfair advantage" at one end and a hung jury at the other.

Finally, at the opposite extreme is a case in which the trial court has declared a mistrial "premised upon" its "belief that the jury is unable to reach a verdict, long considered the classic basis for a proper mistrial." *Washington*, 434 U.S. at 509 (citing *Downum*, 372 U.S. at 735-36). "[W]ithout exception, the courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial," and a trial judge's decision to declare a mistrial upon finding that a jury is deadlocked is "accorded great deference by a reviewing court." *Id.* at 509-10 (footnote omitted).

The circuit court found (and we have no reason to question its finding) that Ms. Mayo was an essential witness, indeed the only witness to identify Anthony Johnson as one of the shooters.[6] Moreover, she was the only witness to testify as to a motive for the killing. And furthermore, the only other witness to the shooting, Ms. Ellis, was hardly a reliable witness, given that she struggled with a drug addiction and testified that she was under the influence of heroin at the time of the killing. We conclude that the first prong of *Baker*, that there was a "high degree" of necessity for the mistrial was satisfied. 432 Md. at 49.

There is no doubt that the circuit court carefully considered alternatives to a mistrial but determined that none of them was feasible. One of those alternatives, admitting Ms. Mayo's May 2015 statement, would have required the defendants to waive their

[6] It is irrelevant to our analysis that Anthony Johnson subsequently was acquitted of all charges. Obviously, the circuit court could not have known that at the time of its ruling.

confrontation rights, which they were unwilling to do. The other alternative was a two-week continuance, in the hope that Ms. Mayo might appear in her district court case and then could be served with a body attachment and compelled to testify. As all parties and the court agreed, that alternative would have greatly inconvenienced the jury and offered no assurance of success, given that Ms. Mayo previously had failed to appear in that case three times. We conclude that the second prong of *Baker*, that the trial court engaged "in the process of exploring reasonable alternatives" to a mistrial and determined that none was available, 432 Md. at 49, was satisfied.

Finally, we address the third prong of *Baker*, whether no reasonable alternative to a mistrial was, in fact, available. *Id.* According to Mr. Johnson, there *was* a reasonable alternative that the circuit court failed to consider—requiring the State to proceed without the missing witness. He analogizes this case to such cases as *Downum* and *In re Mark R.*, 294 Md. 244 (1982).

In *Downum*, the defendant faced six charges stemming from theft of checks from the mail and forging and uttering of those checks. A witness, Rutledge, "the payee on the checks involved in" two counts of the indictment, had not been subpoenaed and did not appear on the morning of trial. 372 U.S. at 735. Although the prosecutor was aware of Rutledge's absence, he did not request a continuance, and a jury was selected and sworn. *Id.* That afternoon, when the court reconvened, the prosecutor moved for a mistrial, and the trial court granted that motion. *Id.* Two days later, a second trial was held, and Downum moved to dismiss on the ground of double jeopardy. The trial court denied his motion, the

second jury found him guilty, and he appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed. *Id.*

Reversing, the Supreme Court noted that the "jury first selected to try [Downum] and sworn was discharged because a prosecution witness had not been served with a summons and because no other arrangements had been made to assure his presence." *Id.* at 737. Moreover, that witness "was essential only for two of the six counts" charged, and therefore it would have been feasible to proceed on the remaining four counts of the indictment, as Downum had urged the trial court. *Id.* at 735, 737.

In *Mark R.*, a magistrate, presiding over a delinquency adjudication, declared a mistrial because the prosecution's chief witness, whose first language was not English, could not be understood during cross-examination. 294 Md. at 245-46. The child then moved to dismiss on the ground of double jeopardy, but the juvenile court denied his motion. *Id.* at 247-48. In a subsequent hearing (in which the State had arranged for a Korean interpreter to be present), the juvenile was found involved in theft. *Id.* at 247-48. He appealed to this Court, and we affirmed in an unreported opinion. *Id.* at 248.

The Court of Appeals reversed. It held that jeopardy had attached at the commencement of the first hearing, and it further concluded that there had been no manifest necessity for a mistrial. The Court reasoned that the mistrial had been "entirely due to a deficiency in the prosecution's evidence" and that, furthermore, a brief continuance to procure an interpreter would have been a feasible alternative to a mistrial. *Id.* at 264.

The instant case is distinguishable from both *Downum* and *Mark R.* In *Downum*, the Supreme Court observed that the absent witness "had not been served with a summons,"

and "no other arrangements had been made to assure his presence." 372 U.S. at 737. Here, the absent witness, Ms. Mayo, had been served with a summons, and, although she ignored the summons and failed to appear (a fact of which the prosecutor was aware prior to the swearing of the jury), the State took additional "arrangements" to "assure [her] presence"—the issuance of a body attachment. She was thereafter seized and brought before the court, which ordered that she be held until her testimony could be procured. At that point, any "deficiency in the prosecution's evidence" had been cured, *In re Mark R.*, 294 Md. at 264, and her subsequent release from the Baltimore Central Booking Intake Facility occurred through no fault of either the prosecutor or the circuit court.

The closest case (of which we are aware) to the instant case on its facts is *McCorkle v. State*, *supra*, 95 Md. App. at 31. In that case, a key witness, who had been expected to appear and testify, ultimately did not. Although the witness had been present the first two days of trial, on the third day, when he was scheduled to testify, he was absent. 95 Md. App. at 35, 38 n.3. When trial reconvened the following Tuesday, the fourth day of trial, and the witness still failed to appear, claiming that he was ill, the trial judge and opposing counsel conducted a telephone conference call with him to ascertain his condition and subsequent availability. *Id.* at 36-37. The prosecution called all its remaining witnesses, and the defense also was required to call several witnesses out of order. *Id.* at 34-35, 38. Finally, because the witness lived in northern Virginia, the State sought the cooperation of Virginia authorities to locate and compel the witness to testify but were unable to find him. *Id.* at 38. Only after these extraordinary measures had been taken did the court declare a

mistrial, and, on appeal, we held that there had been manifest necessity to do so. *Id.* at 39, 61-62.

Similarly, in the instant case, Ms. Mayo, although not present at the time the jury was empaneled, subsequently was within the jurisdiction of the court after she had been served with a body attachment and brought before the court. Furthermore, both in *McCorkle* and in the instant case, all other witnesses and evidence were presented to the court to provide time to locate the absent witnesses. Finally, both in *McCorkle* and in the instant case, the trial courts and prosecutors took extraordinary measures to procure the presence of the missing witnesses but to no avail. This case does not present what the dissent in *Downum* termed "excusable oversight." *Downum*, 372 U.S. at 742 (Clark, J., dissenting). Under the exceptional circumstances present here, there was, as the circuit court concluded, manifest necessity to declare a mistrial.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS ASSESSED TO APPELLANT.