UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2798

September Term, 2014

SCOTT PATRICK ADAMS

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Nazarian,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: November 10, 2015

Scott Patrick Adams, appellant, charged with theft, elected to be tried by a jury in the Circuit Court for St. Mary's County. During the testimony of the State's first witness, the trial court declared a mistrial. Prior to the second trial, appellant filed a motion to dismiss on double jeopardy grounds, which the court denied.

Appellant noted this interlocutory appeal, and presents a single question for our review, which we rephrase[1]:

> Did the trial court err by denying appellant's motion to dismiss the charge on double jeopardy grounds?

For the following reasons, we shall affirm the judgment of the circuit court.

BACKGROUND

Appellant was charged with the theft of property of Edmund Broderick. During the jury selection process, among the questions put to the panel of prospective jurors was:

> The alleged victim in this case is Edmund Broderick. Is there any prospective juror who is related by blood or marriage to Mr. Broderick or his family from any business or social relationship, or in any capacity whatsoever?

None of the prospective jurors answered in the affirmative. Ultimately, a jury was empaneled and appellant's trial commenced.

During his opening statement, appellant argued that Edmund Broderick was not the owner of the allegedly stolen property, but instead his parents, Joan and John Broderick, were

[1]Appellant phrased the question as: "Did the trial court err by denying Appellant's motion to dismiss when there was no manifest necessity for declaring a mistrial?"

the owners.[2] This assertion was confirmed by the State's first witness, Edmund Broderick, who conceded that his parents owned the property in question. The State then moved to amend the charging document to reflect that Joan and John Broderick were the alleged victims. The trial court granted the motion. The court granted a recess and gave appellant the option of a continuance in light of the amendment and any prejudice that this may have caused him. After consulting with counsel, appellant elected to proceed.

Before the jury was returned to the courtroom and the trial was resumed, the trial court observed that the names John and Joan Broderick had not been presented to the venire during jury selection. The following colloquy ensued:

> THE COURT: All right. Here is the issue that the Court is having, and it came in as the jury was coming in; is that Question 6 of the voir dire questions indicates the alleged victim in the case is Edmund Broderick. The question was asked if any prospective juror who is related by blood or marriage to him knows him or his family.
>
> Now, the question in the Court's mind is that we have now changed this into his father and his stepmother's name. We did not use either one of those names during the voir dire questions.
>
> And the problem that I am having – and understand Madam State's Attorney's position is that by saying that they're related by blood or marriage, or that are family of Mr. Broderick, that that resolves the issue. I do not believe that that is specific enough in order for the voir dire question to survive.

[2]It should be noted that John Broderick was deceased at the time of the trial and that, according to Appellant, Joan Broderick was the sole owner of the property; however, this distinction has no bearing on the question before this Court.

Both of you, of course, were satisfied with the questions at the end of the voir dire, but the Court's problem is how do we rectify the fact that one, more, or none of these individuals may know the victim in this case – alleged victims in this case – but because we have changed the – and by consent, whether or not it would have been by consent or not is moot at this point. It is by consent. That it doesn't change the character of the questions asked.

Your position is that by asking the question as "or family member," that's certainly fine. Is that correct?

[PROSECUTOR]: I'm not positive.

THE COURT: I don't believe it is, either.

[DEFENSE COUNSEL]: I don't believe it is.

THE COURT: My feeling is quite honestly at this point that to protect the rights of your client, is that a mistrial would probably be the appropriate avenue to take.

I do not want to take that particular avenue. But I can't see any way to resolve the issue, the fact that the victims in this case, the alleged victims in this case, were not specifically spelled out to the jury.

I understand the position of Madam State's Attorney, because your belief is because they are family members of the alleged victim that was brought up in voir dire, that would be sufficient. But frankly, I don't know if that is; and as you both say, you are not sure either.

And I guess in some ways it might be a godsend for you, because it will give you an opportunity to look at your strategy and whether or not to try to work out something with Madam State's Attorney.

But I have not declared a mistrial. I am welcome to any input that the two of you want to make. I am not sure how we can fix this problem today.

[DEFENSE COUNSEL]: Well, **I certainly agree that it is a problem**. That question is not sufficient given the change. How it can be fixed –

THE COURT: I know both of your minds are running about a mile a minute, trying to figure it out. But I just don't see how it can be fixed.

I also think in the long run it may be appropriate for another reason, and that is to allow you time to change your trial strategy without making a decision in five minutes of whether or not to ask for a continuance or not. Do you agree with that?

[DEFENSE COUNSEL]: That's fair.

THE COURT: All right. You want to be heard? You know I will listen to you. I always do.

[PROSECUTOR]: I know you will. I know you will.

THE COURT: You also know I only want this to be a fair trial for you and for the defense.

[PROSECUTOR]: I know. I know. And probably to avoid comebacks, that is the best decision. There's no reason to have this many issues and then have there be a comeback. It just would – and at this point, we're not going to get through the first witness.

THE COURT: That's fine. You are scheduled for two days; and if you needed a third day – I have never been one to rush your cases. Mr. Sullivan doesn't know me very well, but you do; and you have never been rushed in any trial or motion you have ever had.

[PROSECUTOR]: But there would be a break in the witness. I don't believe we could finish him today, which is not ideal for either side, either, so – I should think that it is the fairest solution and the wisest solution –

THE COURT: Do you agree?

[PROSECUTOR]: – as little as I like it.

THE COURT: Well, I know you don't. Do you think any of us actually like this?

[PROSECUTOR]: No.

THE COURT: I have to report this to the administrative judge, who will want to know what I did that could have kept it from happening.

[DEFENSE COUNSEL]: Of course, **I am not happy, either, with a mistrial. I certainly agree with the problem. I certainly agree that I can't think of an adequate solution at this point**.

THE COURT: Okay. What I will do, then, is we will go ahead and **I will call this a joint motion between the Defense, the State, and the Court**, that the fairest in this point is because of the change in the charging document, that it is less prejudicial to the defendant, and that the State's position because of the voir dire questions. All right?

[PROSECUTOR]: May I ask what we need to do to get this reset for trial?

THE COURT: Oh, you are not going anywhere when this is over with. You are going to go downstairs with my young lady who is going to get a date for you certain, and we will do it as quickly as we can do it.

[PROSECUTOR]: Thank you.

THE COURT: You know, and then quite honestly, you may, based on the change in the ownership of the properties – allegation – there may be something else the two of you may want to talk about to each other. May be different at this point. Okay? All right. Go ahead. Bring the jury in. I will tell you. I will put it on the record.

(Emphasis added).

After the jury was excused, the trial court engaged in the following colloquy with appellant:

THE COURT: Mr. Adams, go ahead and sit down. You weren't up here when I was discussing this matter with your attorney. Once the amendment to the charging document took place, the individuals whose names are now as the victims in this case were not specifically discussed in the voir dire questions. Do you remember those questions we started off with today?

[APPELLANT]: Yes, sir.

THE COURT: In order to make sure that you and the State both have a fair trial, I am going to consider this essentially a mistrial from all three of us – the Court, the Defense, and the State – in order to make sure that there are no issues concerning any type of conflict with the jury as to the addition of those names, and also to give you an opportunity, because of the change of those names in the charging document, to adequately be prepared. Understand?

[APPELLANT]: Yes, sir.

THE COURT: Now, your attorney is probably going to want to speak to you for a few moments. Once he is done, though, don't hold him up too much. I want he and the State to go down with my law clerk, and we are going to get a date certain in the next couple of weeks, or whenever I have two days available, in order to do your case. Understand?

[APPELLANT]: Yes, sir.

THE COURT: I know it's a disappointment, but do you understand it's important that your trial be fair and that your attorney be able to adequately defend you? It's also important for the State to be able to adequately present their case. Do you understand?

[DEFENDANT]: Yes, sir.

THE COURT: And we don't want to have a situation where there is a disposition in this case that the parties, or at least one of the parties, is ending up asking the Court of Appeals or Court of Special Appeals to review because they felt that it has inappropriately gone forward. Do you understand?

[DEFENDANT]: Yes, sir.

Upon consultation with the State and appellant's counsel, the trial court set a new trial date. Shortly thereafter, appellant filed a motion to dismiss, alleging that the Double Jeopardy Clause prohibited a second trial. The trial court denied the motion and ruled that,

although defendant should have been consulted prior to the declaration of the mistrial, there were no reasonable alternatives to the declaration of the mistrial.

STANDARD of REVIEW

The issue before us is whether the denial of appellant's motion to dismiss was a violation of his right against double jeopardy. For this reason, he asserts that we should apply a *de novo* standard of review. *See Giddins v. State*, 393 Md. 1, 15 (2006) ("Whether principles of double jeopardy bar the retrial of [the defendant] is a question of law, and therefore we review the legal conclusion of the trial court *de novo*."). Despite this language, the Court of Appeals has held numerous times that a trial court's decision to grant a mistrial should be reviewed for abuse of discretion. *See Simmons v. State*, 436 Md. 202, 211 (2013) ("[O]ur cases make clear that we apply the abuse of discretion standard of review in cases of mistrial."). Because the ultimate issue is whether there was a proper finding of manifest necessity by the trial court, we apply the abuse of discretion standard of review.

DISCUSSION

Appellant argues that there was no manifest necessity for the court's declaration of a mistrial. More specifically, he claims that the trial court ignored several reasonable alternatives, which obviated the manifest necessity doctrine and violated his double jeopardy protection. The State argues that appellant's assertion that there was no manifest necessity is moot because appellant did not properly object to the trial court's granting of the mistrial. The State adds that even if appellant did adequately object to the granting of the mistrial, the

trial court properly determined that there was manifest necessity. We agree with the State that the issue was waived by appellant's failure to object to the court's proposal of a mistrial.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides 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. Although the Double Jeopardy Clause generally forbids a retrial after a final verdict, it also forbids "the retrial of a criminal defendant for the same offense once a jury has been empaneled and sworn." *Simmons*, 436 Md. at 213.

However, "[u]nlike the situation in which the trial has ended in an acquittal or conviction, retrial 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). In the case of a mistrial, a retrial is permissible if, at the time the mistrial is declared, there exists "manifest necessity" for the mistrial. *Id*.

One key condition in the application of the manifest necessity doctrine is that the mistrial in question be granted at the behest of the trial court or the State. If, on the other hand, a mistrial is granted on a defendant's request or consent, the doctrine of manifest necessity is inapplicable and a retrial is generally permissible. *E.g. Harrod v. State*, 423 Md. 24, 35 (2011); *Ware v. State*, 360 Md. 650, 711 (2000). This is true "even if the defendant's motion is necessitated by prosecutorial or judicial error." *U.S. v. Jorn*, 400 U.S. 470, 485 (1971).

Ultimately it is the defendant's decision whether to proceed with the trial or seek a mistrial, and the doctrine of manifest necessity is usually applicable only when that decision has been taken out of the defendant's hands without his permission. *See Fields v. State*, 96 Md.App. 722, 736 (1993) ("When...a mistrial is requested, or even acquiesced in, by a defendant, the mistrial/retrial analysis is in a completely different posture. Manifest necessity is an irrelevancy.").

In the present case, appellant gave no adequate indication that he objected to the granting of the mistrial. *See e.g. Simmons*, 436 Md. at 213 ("When a mistrial is granted **over the objection of the defendant**, double jeopardy principles [apply.]") (emphasis added); *State v. Fennell*, 431 Md. 500, 515 (2013) ("If a **defendant objects to the declaration of a mistrial**, a mistrial must be manifestly necessary[.]") (emphasis added). Although appellant posits that his trial counsel expressed to the court that he was "not happy" with the mistrial, the same concern was echoed by both the State and the trial court. We cannot construe defense counsel's "not happy" comment as anything more than a general expression of frustration, much less as a formal objection to the mistrial, especially given that both the trial court and the State expressed the same frustration.

Furthermore, appellant agreed that there was no adequate solution other than to order a mistrial, and he gave no indication that he was opposed to the trial court's characterization of the motion for a mistrial as being "between the Defense, the State, and the Court." Moreover, not only did appellant fail to object to the mistrial, he essentially joined in the

motion, thus negating any double jeopardy implications. *See Harrod*, 423 Md. at 35 ("It is well-established in our jurisprudence that the grant of a mistrial upon a defendant's request or consent does not preclude a retrial."). Absent evidence of judicial overreaching or intentional prosecutorial misconduct, which we do not find on this record, appellant's acquiescence, taken with his failure to object, in the court's suggestion of a mistrial renders a retrial permissible. *See Ware*, 360 Md. at 711.

Because we hold that appellant waived his double jeopardy claim, we need not reach his manifest necessity argument.

JUDGMENT OF THE CIRCUIT COURT FOR ST. MARY'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.