

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1443

September Term, 2014

KENNETH HART

v.

STATE OF MARYLAND

Wright,
Friedman,
Thieme, Raymond G.
(Retired, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: August 12, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

FACTUAL BACKGROUND

Appellant Kenneth Hart was indicted on December 19, 2013, on numerous drug possession charges. The case proceeded to a jury trial on May 19, 2014. On May 20, 2014, the court submitted the following four counts to the jury: (1) possession with intent to distribute heroin; (2) possession of heroin; (3) possession of cocaine; and (4) possession of PCP.

While the jury was deliberating, Hart complained of chest pains and was taken to the hospital. As a result, he was not in the courtroom when the jury sent out a note, informing the trial court that it was deadlocked and could not reach a verdict with respect to the possession with intent to distribute heroin count (“Count 1”). In response to the note and after consultation with the lawyers, the trial court determined that the jury was deadlocked with respect to Count 1 and, therefore, declared a mistrial as to that count. The trial court received the jury’s verdict of guilty on Counts 2-4.

Post-trial, Hart filed two relevant motions. First, he moved for a new trial on Counts 2-4 (the possession counts) because the verdict in those counts was taken in his absence, while he was seeking medical treatment. That motion was granted and is of no further concern to us. Hart’s second motion was to dismiss Count 1 based on double jeopardy. The trial court denied this motion to dismiss and Hart has brought this interlocutory appeal to forestall retrial on that count.¹

¹ In his brief, Hart states that he is also appealing from the denial of his motion to dismiss the charge of possession of cocaine (Count 3). At the conclusion (continued...)

DISCUSSION

Hart’s theory of the case is that the trial judge was premature in declaring the jury hung on Count 1, that it should have sent the jury back for further deliberation, and that, as a result, there was no manifest necessity for declaring a mistrial. In the absence of manifest necessity, Hart urges, retrial is barred by double jeopardy.² The State, naturally, disagrees, arguing that the trial court did not abuse its discretion in determining that the jury was hung, that as a result of that determination, a mistrial was manifestly necessary, and that, as a result, retrial is not barred by double jeopardy. As interesting as these questions are, however, we cannot reach them because our analysis stops at the threshold. In our view,

(...continued) of the State’s case, the trial court granted Hart’s motion for acquittal as to the charge of possession with intent to distribute cocaine, but allowed the lesser included offense of possession of cocaine to proceed to the jury. Following the partial verdict, mistrial, and Hart’s subsequent request for a new trial, Hart also moved to dismiss the possession of cocaine charge on the grounds that the court had no authority to instruct the jury on the lesser-included offense after acquitting him of the charge of possession with intent to distribute. Other than a brief reference in his statement of facts, Hart presents no argument as to why we should reverse the trial court’s denial of his motion to dismiss the possession of cocaine charge. Accordingly, we will not address it in this opinion. *See* Md. Rule 8-504 (stating that the appellate court may dismiss an appeal if it lacks argument in support of an issue).

² The Double Jeopardy Clause of the Fifth Amendment “protects individuals from being tried for the same offense more than once.” *Simmons v. State*, 436 Md. 202, 213 (2013). While the Maryland Declaration of Rights does not include a prohibition against double jeopardy, it is prohibited under the common law. *Giddins v. State*, 163 Md. App. 322, 330 n.1 (2005). Under the Constitution and Maryland common law, where jeopardy has attached, and a mistrial is granted over the objection of the defendant, “double jeopardy principles will not bar retrial if there exists ‘manifest necessity’ for the mistrial.” *Simmons*, 436 Md. at 213.

the threshold inquiry is whether Hart had a right to be present at the declaration of the mistrial.

We hold that Hart had a right to be present when the trial court declared a mistrial on Count 1, and that the declaration of a mistrial in his absence was in error. Because the entry of a mistrial in Hart's absence was erroneous in the first place, there could be no manifest necessity for declaration of the mistrial. As a result, retrial on that charge is barred by double jeopardy.

The right to be present “is a common law right preserved by both the Sixth Amendment of the United State Constitution and Article 5 of the Maryland Declaration of Rights; it is also stated with particularity in Maryland Rule 4-231(b).” *Lewis v. State*, 91 Md. App. 763, 769 (1992). Rule 4-231(b) embodies the constitutional right of a defendant to be present at every stage of his trial:

(a) When Presence Required. A defendant shall be present at all times when required by the court. ...

(b) Right to Be Present--Exceptions. A defendant is entitled to be physically present in person at a preliminary hearing and every stage of the trial, except (1) at a conference or argument on a question of law; (2) when a nolle prosequi or stet is entered pursuant to Rules 4-247 and 4-248.

* * *

(c) Waiver of Right to Be Present. The right to be present under section (b) of this Rule is waived by a defendant:

(1) who is voluntarily absent after the proceeding has commenced, whether or not informed by the court of the right to remain; or

(2) who engages in conduct that justifies exclusion from the courtroom; or

(3) who, personally or through counsel, agrees to or acquiesces in being absent.

Accordingly, unless one of the exceptions listed in Md. Rule 4-231(b) applies, or a defendant has waived the right to be present through any action listed in 4-321(c), the trial court is not permitted to continue the trial, or any portion thereof, in the defendant's absence.

In this case, the question is whether the declaration of a mistrial was a part of the trial that was not exclusively legal in nature, at which Hard had a right to be present. With Hart unavailable, the trial court received the following note from the jury foreperson: "After thorough deliberation the jury is split on charge number one. No new information can help us reach consensus. What should we do?" In response to the note, the trial court engaged in a series of questions with the jury foreperson to determine the nature and extent of the jury's impasse in light of the circumstances of the case. In particular, the trial court inquired about the level of deadlock, the process that was occurring in the deliberation room, whether any additional information would help, and whether it would be helpful to dismiss the jury for the evening and recall them in the morning for further deliberations. The trial court also conferred with counsel to discuss possible alternatives to a mistrial in light of the foreperson's responses, and ultimately made a decision based on the specific factual circumstances of the case:

THE COURT: ... The foreperson came out. He indicated that ... they've taken breaks, they've gone over it, in response to my question, because the note wasn't clear where it says no new

information could help. And the response to my question was whether he was talking about information from us or information from the deliberations, and he said both.

So based on [the foreperson's] responses to my questions I'm not going to ask them to deliberate further.

Due to the factual nature of the inquiries surrounding the trial court's decision to declare a mistrial, we hold that Rule 4-231 required that Hart be present.³ As Hart was involuntarily absent due to a medical condition, none of the exceptions to the Rule apply. The declaration of a mistrial in Hart's absence, therefore, was in error under Rule 4-231.⁴

³ The State cites to a string of cases for the proposition that the declaration of a mistrial is not a stage of trial at which Hart had a right to be present under Md. Rule 4-231(b). All the cases cited to by the State, however, are factually distinguishable as they concerned stages of trial that only involved questions or arguments of law. *Brown v. State*, 272 Md. 450, 476-77 (1974) (no right to be present at an in chambers conference discussing a procedural rule regarding photographic evidence); *Martin v. State*, 228 Md. 311, 316-17 (1962) (no right to be present at a motion for a directed verdict because it was purely a legal discussion on the sufficiency of the evidence); *Brown v. State*, 225 Md. 349, 350-53 (1961) (no right to be present for legal arguments that took place in chambers about proposed jury instructions); *Sewell v. State*, 34 Md. App. 691, 698 (no right to be present at an in chambers conference on whether an informant's identity must be revealed when it was purely a discussion of law); *State v. Tumminello*, 16 Md. App. 421, 436-37 (1972) (no right to be present at bench conferences concerning the admissibility of evidence when "the essential questions considered in each instance were legal."). The State's reliance on the preceding cases is misplaced because the discussion surrounding the trial court's decision was not a purely legal conference or argument. We note, however, that had the inquiry been of a purely legal nature, the outcome of this case may well have been different.

⁴ The State has found only one case concerning a defendant's right to be present for the declaration of a mistrial. *Bishop v. State*, 335 S.E.2d 742 (Ga. Ct. App. 1985) (holding that a defendant's right to be present was not violated when the trial court declared a mistrial in his absence). The State's reliance on *Bishop*, however is misplaced. In *Bishop*, after an issue arose with one of the jurors, defense counsel, with defendant present, moved for a judgment of acquittal. *Id.* at 743. The trial court heard argument and then announced that it would reserve ruling to allow time for legal research. *Id.* Four days (continued...)

Although the violation of Rule 4-231(b) would be sufficient, our views are confirmed by the analogy to a defendant’s right to be present when a verdict is received. A defendant’s right to be present at a declaration of a mistrial is similar to the defendant’s right to be present for the receipt of the verdict because, as the cases hold, the mere face-to-face contact with the defendant may cause some jurors to change their position:

When a jury returns to the courtroom, faces the accused, and, typically, is subject to a poll of the verdict, the psychological influence of the eye-to-eye contact between juror and defendant may be significant enough to cause a juror to change his or her mind when outside the pressure of the jury room.

Kimes v. United States, 569 A.2d 104, 111 (D.C. 1989). The same rationale applies to a mistrial, when the jurors, upon seeing the defendant in court, might change their prior “unequivocal” stances that led to the deadlock in the first place. Thus, we conclude that, in this instance, Hart’s to be present was violated by the trial court’s order of a mistrial during his involuntary absence. Because of the importance the presence of the defendant may have in the minds of the jury, this error is not harmless.

Having determined that the trial court erred in declaring a mistrial during Hart’s involuntary absence from the courtroom, we must fashion a remedy for this violation. Generally, when a trial proceeds without the presence of the defendant in violation of Md.

(...continued) later, after the defendant had left, the judge ordered a mistrial. *Id.* The Georgia Court of Appeals determined that the declaration of a mistrial in the defendant’s absence was not improper in this instance because “everything that was going to happen had happened. The events upon which the court would rule were fixed.” *Id.* at 745. That, of course, is not the case here, as all relevant events surrounding the declaration of a mistrial including the judge’s questioning of the jury foreperson occurred outside of Hart’s presence.

Rule 4-231, the remedy is to allow for a retrial on any count that resulted in an adverse verdict. *Pinkney*, 350 Md. at 218. (When a trial court erroneously determined that the defendant was voluntarily absent, the remedy was to vacate any adverse verdict and grant the defendant a new trial). Here, however, that result would be the same as no remedy at all. A declaration of a mistrial is not an adverse verdict, and a retrial on Count 1 is exactly what Hart seeks to avoid. We hold that under the peculiar circumstances of this case the appropriate remedy is for us to recognize that there was no manifest necessity for the mistrial. Simply put, there could be no manifest necessity to proceed in an action that was prohibited in the first place. As such, retrial is barred by double jeopardy. *Simmons*, 436 Md. at 213-14.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court for Montgomery County denying Hart's Motion to Dismiss Count 1 is reversed.

**JUDGMENT OF THE CIRCUIT COURT
FOR MONTGOMERY COUNTY
REVERSED. COSTS TO BE PAID BY
MONTGOMERY COUNTY.**