Circuit Court for Prince George's County
Case No. CT150602X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 202

September Term, 2016

SAMUEL HENRY SLIGH

v.

STATE OF MARYLAND

Leahy,
Reed,
Shaw Geter,

JJ.

Opinion by Leahy, J.

Filed: March 5, 2018

On June 28, 2009, a Prince George's County police officer responded to an alleged sexual assault. The alleged victim, L.H.,[1] told investigators that while she was walking away from a hotel after spending an evening with friends, two strangers in an SUV offered her a ride, and L.H. agreed. According to L.H., at some point during the car ride the driver—later identified as Appellant Samuel Sligh—dropped off the other passenger at an apartment complex, and forced himself into the backseat where he forcibly raped her. After she was released from the car, L.H. called the police and later that morning, she was transported to the hospital where a rape kit was administered to take samples for DNA testing. The case then went cold for several years.

In 2014, after receiving a tip from the FBI about a possible DNA match in a federal investigation, the Prince George's County Police Department reopened the investigation of L.H.'s rape case and obtained a search warrant to acquire an oral swab from Appellant for DNA testing. An analysis of the oral swab revealed a match between Appellant and the male DNA present in the rape kit conducted in 2009. Appellant was charged with first- and second-degree rape.

Appellant's first trial in the Circuit Court for Prince George's County was quickly declared a mistrial. After the jury had been empaneled, defense counsel told the jury during opening arguments that it would hear testimony from three witnesses, previously undisclosed to the State, that supported its theory that the sex was consensual, and that L.H. had called the police because of Appellant's refusal to take her to buy PCP. The State

[1] To protect the privacy of the alleged sexual assault victim, we will use her initials.

objected to the introduction of testimony from the undisclosed witnesses, and the court, over Appellant's objection, declared a mistrial and set a date for a second trial. Appellant subsequently moved to dismiss the indictment on double jeopardy grounds, which was denied.

Appellant noted a timely interlocutory appeal of the trial court's denial of his motion to dismiss and raises the following question for our consideration:

> "Where reasonable alternatives to a mistrial existed, did the trial court abuse its discretion in granting the State's motion for a mistrial, and thereafter err in denying Appellant's motion to dismiss on double jeopardy grounds?"

For the reasons that follow, we shall affirm the trial court's order.

FACTUAL BACKGROUND

The Investigation

In the early morning hours of June 28, 2009, L.H. was walking alone on Livingston Road in Prince George's County after leaving a hotel where she had spent time with some friends. As the sun began to rise, an SUV began driving slowly next to her. The occupants of the vehicle—a male driver and a female passenger—offered L.H. a ride. L.H. initially refused, but ultimately decided to enter the vehicle despite the fact that she did not know either occupant. After driving around the area, the female passenger exited the vehicle, leaving L.H. and the driver alone in the vehicle. According to L.H., the driver of the vehicle locked the doors, climbed into the backseat, and proceeded to forcibly rape her. After the alleged rape occurred, L.H. was permitted to exit the vehicle. She called the police from her cell phone. Corporal George Stamp of the Prince George's County Police Department responded to the scene, and drove L.H. to police headquarters to the robbery and sexual

assault unit for an interview. L.H. was then taken to Prince George's Hospital Center, where she received a sexual assault examination.

After the initial investigation began in the summer of 2009, no progress was made on finding the perpetrator, and the case went cold for several years. The investigation was suspended until 2012 when Detective Darren Bennett, a cold case investigator for the Prince George's County Police Department, received a letter in June of 2012 from the FBI stating that it had a match to the male DNA obtained from samples taken from L.H. during her 2009 sexual assault forensic examination. However, in a follow-up letter, the FBI advised Det. Bennett that the 2012 match was not from a qualifying offense in the jurisdiction, meaning that Det. Bennett could not open an investigation based on that match and that the DNA sample, which had been erroneously uploaded to the system, had to be destroyed. Det. Bennett therefore used the fact of a DNA match solely as an investigative tool, and in 2014, was able to match Appellant's DNA to the sample taken from L.H. from a hit in a separate qualifying federal drug possession case. In 2014, the Prince George's County police officially reopened their investigation and arrested Appellant in 2015.

Det. Bennett obtained a search warrant in order to take a saliva sample from Appellant and interviewed him the same day. Det. Bennett sent the sample to the Prince George's County DNA laboratory to be analyzed, and received a confirmation report in July of 2015 that showed a match between Appellant's saliva sample and contributor DNA contained in the cervical swabs taken during L.H.'s rape kit. The case then proceeded to trial.

The January 5 Trial and the Motion for Mistrial

At Appellant's first trial on January 5th, 2016, defense counsel established a theory during her opening argument to the jury in which Appellant admitted to having sex with L.H., but denied the rape charges, insisting that he and L.H. had consensual sex on June 28, 2009 at his sister's home, and that she fabricated the story of rape because, following the sexual encounter, she wanted him to take her to purchase PCP and he refused. Defense counsel attempted to undermine L.H.'s credibility, and told the jury that it would "hear evidence from 2002 to 2012, there is a documented history of [L.H.]'s PCP use, arrests for PCP[.]" At that point, the prosecutor objected and argued the following at a bench conference:

> . . . I had no notice of any defense witnesses in the case. I never received any names. I have been trying to get that cleared today. I never received any names so we can do a proper background check for witnesses.
>
> We did a written request. We sent out the first discovery packet asking for that. I'm hearing all this. I'm assuming the defense witnesses will testify to this.
>
> The State is objecting to first of all the comments about her PCP use and how it will come out from any prior convictions. She doesn't have any convictions that will come out that could be used here when she testified. I'm confused why this is now being brought up.

Defense counsel pivoted, informing the trial court that L.H. "admitted to a judge in Superior Court [of D.C.] that she was abusing PCP. I have the transcript of that admission." The trial court told defense counsel that she could use the transcript on cross-examination, but would not allow her to be impeached by prior convictions absent a certified list of convictions. The State then responded specifically to the witnesses that defense counsel

intended to call, stating that it would "wait until we get to that portion in regard to defense witnesses [to object]. I have not received any notice of any defense witnesses that plan to testify. I will have to make another objection. I'm not sure." Defense counsel responded that she had "provided all three names of the witnesses in the voir dire[,]" but admitted that she had not provided the names of the witnesses she planned to call before the trial date, despite a written request. Defense counsel informed the court that she intended to call three witnesses, with whom the State was not familiar with, which prompted an objection from the prosecutor.[2] In response to the State's objection regarding the witness names, the court agreed to "let [the State] go further as to whether or not you object[] to any of the witnesses." Defense counsel then resumed its opening.

During defense counsel's opening, she told the jury that they would hear testimony from Appellant's nephew, Mark Bigelow, that on the morning that the alleged rape occurred, he let Appellant and L.H. into his mother's house, and observed them "cuddled up on the couch watching TV together." At the end of defense counsel's closing, the court called a recess and called both parties up to the bench, where the following occurred:

> THE COURT: I took a recess only because I don't – I don't like recessing in the middle of the opening, but the State had an objection. I will hear from you. A preliminary matter based on the defense opening.
>
> * * *
>
> [THE STATE]: The State did not receive any notice of any defense witnesses that planned to testify. We did ask in writing for all witnesses the defense plans to call. I can get the date. . . .

[2] The potential witnesses were: Eugene Clark, an acquaintance of L.H.'s, who had been arrested while smoking PCP with her and could provide information about her extensive PCP use; Samika Whitfield, the woman who had been in the car with Appellant when he offered L.H. a ride on June 28, 2009; and Mark Bigelow, Appellant's nephew.

> That would have been back on July 14th of [2014]. We made a written request asking for all witnesses. I never received any notice of any witnesses that planned to testify today so that my office could do a full record check, as we would do for any witness, and do our background investigation, and see if there is anything additionally we would need to do in regards to investigate the case based on the witnesses and the proffer what they would testify to.

Defense counsel responded that she had "provided those names this morning. I did not hear any objection from the State at that point about the witnesses." The court responded that it had heard the State's prior objection to the witnesses, and asked defense counsel why she had waited until the morning of trial to disclose the witnesses when she had received a written request nearly seven months prior. Defense counsel informed the court that although she knew of the existence of the witnesses "probably two months ago[,]" she did not inform the State at that time because she "wanted to speak to them and figure out if they would be useful witnesses or not. So I only determined that I would call these witnesses very recently and in the past short time."

Chiding defense counsel for her failure to recognize "an ongoing duty and obligation to comply with the discovery," the trial court found "defense counsel's representations to the court to be absolutely inconsistent with the rule" regarding her obligation to provide and supplement discovery with the names of potential witnesses. Finding no good cause for defense counsel's discovery violation, the court ruled it would preclude the defense from offering the testimony of the three defense witnesses.

The State then expressed concern about the potential post-conviction consequences of precluding the defense from adducing testimony of any witnesses. Because the jury had

been sworn, the prosecutor stated, a mistrial "is the only thing that can be done" in light of the fact that the "case comes back if they are successful on post-conviction." The court also acknowledged the likelihood of successful post-conviction proceedings, and asked defense counsel to respond to the request for a mistrial. Defense counsel agreed with the State's assessment, stating "I think it absolutely were to come back if there were to be a conviction." With regard to the mistrial request, however, defense counsel averred that a mistrial was not the court's only option, and accused the State of "goading a mistrial."[3]

The court flatly disagreed with defense counsel, and made the following findings:

> There is nothing that has been indicated in court on the record and review that the State has done something. If anything, the defense did not do what they were supposed to do. You did not provide the discovery, specifically the names of these individuals for all the reasons I have outlined. I don't think that you are even denying that you did not provide them. You acknowledge that you didn't. Thus you have violated the discovery rule.
>
> In creating a situation of which the rules we are seeking to avoid, and the case law from the appellate court [sic] have been replete with avoiding this whole scenario of surprise and shock. That is what has happened by the defense failing to comply with the rules of discovery as you were supposed to do.
>
> So when you say here at the bench the State allowed—her actions, the State's actions, I have no idea what you are talking about. If you are saying because the defense witnesses were excused and you asked me to—the power of the subpoena. That does not absolve you of your obligation and your duty.

[3] The State had earlier requested a continuance because the FBI agent who identified a hit from the DNA taken from L.H. during her forensic examination and one of the DNA analysis witnesses were not then available to testify. Although the prosecutor withdrew her request for a continuance when defense counsel agreed to stipulate to the expected testimony of the DNA witnesses, defense counsel argued that the court's grant of a mistrial would give the State the continuance it had clearly wanted since the start of the day's proceedings.

> The way I recollect a couple of things have happened. The defense has created, had a long opening in front of the jury outlining what these witnesses were going to say, giving them the names, what they were a witness to, what they observed and what they will tell you. What I noted now is based upon my rulings, which I think is clear and consistent with the rules that now they will not hear those things. They will not hear the things because the defense did not provide a proper response to discovery, that is why they won't hear them.
>
> The court recognizes the nature of the offense against the defendant. Certainly the severity of it. Recognizes the importance of a defendant being able to have his day in court. So despite the fact that the reason we are here is because defense counsel did not provide the discovery as she was supposed to, I will not ignore the fact that the defendant should be entitled to a full and complete defense.
>
> I do find a manifest necessity to grant a mistrial for all of those reasons said. . . . As a result of that, recognizing the violation of the discovery rule, recognizing the proper remedy was to preclude those witnesses from testifying, recognizing the defense counsel's opening was replete with what the witnesses would say and now this jury would not hear from them. Recognizing the nature of charges against the defendant. Recognizing the court is here to ensure a fair trial. I find it necessary to grant the mistrial finding a manifest necessity for all of those reasons. The court is in recess for a moment.

Defense counsel continued to advocate "alternatives" to a mistrial, including either recessing to give the State the opportunity to interview the three witnesses or permitting the defense to elicit its evidence in some manner other than the live testimony of the excluded witnesses. The court declined to reverse its ruling on the defense's discovery violation or its grant of the State's motion for mistrial.

On February 22, 2016, Appellant filed a Motion to Dismiss Indictment for Double Jeopardy Violation challenging the court's decision to grant a mistrial and allowing the State to re-indict him on sexual assault charges. The court addressed the motion at the beginning of Appellant's second trial on March 7, 2016, and denied the motion, stating:

> . . . I do recall the circumstances of which the Court granted the mistrial and recall it. And the fact that afterwards the State didn't do everything the defense thinks they could have done, doesn't affect the court's conclusion at the time of the information it had. And based on my ruling, the motion before today to dismiss [the indictment] is denied.

Appellant noted his appeal to the trial court's denial of his motion to dismiss the indictment on March 22, 2016.[4] Additional facts relevant to this appeal will be supplied in the discussion.

DISCUSSION

We review the trial court's decision to grant a mistrial for abuse of discretion. *State v. Baker*, 453 Md. 32, 46 (2017). An abuse of discretion has been defined as an exercise of discretion that "was 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Id.* (quoting *Simmons v. State*, 436 Md. 202, 212 (2013)) (additional citation omitted).

Appellant contends that the trial court abused its discretion when it granted the State's motion for a mistrial over his objection because there were reasonable alternatives to a mistrial available to the court and thus no manifest necessity for the mistrial. In furtherance of this argument, Appellant asserts that the State failed to justify the mistrial, and suggests that the court had ample alternatives to a mistrial that it could have considered

[4] *See Bunting v. State,* 312 Md. 472, 477-78 (1988) ("[U]nder the collateral order doctrine, a defendant may take an immediate appeal from the denial of a motion to dismiss on the ground of double jeopardy."); *Cornish v. State,* 272 Md. 312, 316 n. 1 (1974) ("[T]he denial of a motion to dismiss an indictment on the ground of double jeopardy is immediately appealable, and the defendant need not await the outcome of his retrial before taking an appeal.").

before ruling on the State's request for a mistrial. Additionally, Appellant contends that the State had knowledge that a discovery violation may have occurred prior to defense counsel's opening argument, which eliminated the "element of surprise" required to declare a mistrial. Therefore, Appellant argues, the State improperly used the motion for mistrial as a vehicle to secure a continuance at Appellant's expense. As a result, he concludes, a retrial would violate state and federal double jeopardy principles, and the court erred in declining to grant his motion to dismiss the indictment against him.

In response, the State argues that the trial court's grant of its motion for a mistrial was proper, citing the court's "inability to guarantee a fair trial" after determining that several crucial defense witnesses were precluded from testifying because of substantial discovery violations. The State contends that because "the trial court's ruling deprived [Appellant] of witnesses who could support a substantive defense[,]" a manifest necessity existed to justify the mistrial. Finally, the State argues that had the trial court allowed the trial to proceed without testimony from crucial defense witnesses, Appellant would likely be able to establish a "clear case of ineffective assistance of counsel that would all but guarantee an award of post-conviction relief."

The Fifth Amendment to the United States Constitution provides, in relevant portion, that ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." This provision, known as the Double Jeopardy Clause, is made applicable to the states via the Fourteenth Amendment. *Simmons*, 436 Md. at 213. The Court of Appeals has recognized that despite there being "no double jeopardy clause in the Maryland Constitution, it is well established that Maryland common law double jeopardy

principles also protect an accused against twice being put in jeopardy for the same offense." *Id.* (internal quotation marks omitted). Jeopardy does not attach, however, until a jury is empaneled and sworn. *Illinois v. Somerville*, 410 U.S. 458, 467 (1973). While the attachment of jeopardy generally bars a retrial for the same offense, it does not follow that a subsequent trial will always be barred. As the Court of Appeals explained in *Simmons*, "[w]hen a mistrial is granted over the objection of the defendant, double jeopardy principles will not bar a retrial if there exists 'manifest necessity' for the mistrial. In that situation, the prosecutor bears the heavy burden of demonstrating manifest necessity." 436 Md. at 213-14 (footnote omitted). In the instant case, at the time the trial court declared a mistrial, the jury had been empaneled and sworn, so jeopardy had attached. *Hubbard v. State*, 395 Md. 73, 90 (2006).

"Manifest necessity" for a mistrial exists only if "1) there was a 'high degree' of necessity for the mistrial; 2) the trial court engaged 'in 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." *Baker*, 453 Md. at 49. "[I]n order to determine [whether] manifest necessity [exists] to declare a mistrial, the trial judge must weigh the unique facts and circumstances of each case, explore reasonable alternatives, and determine that no reasonable alternative exists." *Quinones v. State*, 215 Md. App. 1, 17 (2013) (citing *Hubbard*, 395 Md. at 92) (additional citation omitted).

If "reasonable alternatives to a mistrial, such as a continuance, are feasible [to] cure the problem," retrial is barred by the Fifth Amendment. *Cornish v. State*, 272 Md. 312, 320 (1974). On the other hand, if the court's action "is necessary to protect the interest of

the defendant," *id*. at 319, or the court finds that a trial error will almost certainly result in reversal upon appeal of a conviction, the court is well within its discretion in declaring a mistrial, and a retrial is permitted. *State v. Crutchfield*, 318 Md. 200, 214 (1989).

In this matter, defense counsel, in her opening statement, immediately informed the jury that L.H. falsely reported a rape because she was angry at Appellant for his refusal to take her to buy PCP following consensual sex. Counsel then referred to witnesses who would testify to L.H.'s PCP use dating back to 2002. Counsel referred to Appellant's nephew by name as a witness who would refute L.H.'s claim that she was raped by testifying that he saw L.H. and Appellant cuddling together contentedly on the couch at Appellant's sister's house on the morning of the alleged rape.

When the prosecutor objected and informed the court that the defense had provided no information about any potential witness during discovery, or at any time prior to voir dire, the court ruled that the testimony of those three witnesses would be excluded from trial. That ruling was consistent with authority provided under Maryland Rule 4-263(e)(1) and (n), granting a trial court discretion to disqualify the testimony of a witness, or impose other sanctions, if the defense does not timely disclose the identity and statements of each potential defense witness.

The preclusion of testimony by any undisclosed defense witness, in turn, led the prosecutor to surmise that Appellant would initiate post-conviction proceedings if convicted, which would likely be successful. Defense counsel and the court agreed that successful post-conviction proceedings would be likely if the trial continued. Therefore, in light of the potential prejudice to Appellant in continuing with trial without being able

to present witnesses who were expected to refute L.H.'s claim of rape, after advising the jury that it would hear such evidence, the court agreed with the prosecution that a mistrial was a manifest necessity, given Appellant's entitlement to "a full and complete defense." We agree with the trial court that a fair trial, with a complete defense, would have been impossible for Appellant after the exclusion of all his witnesses, who may have been successful in raising reasonable doubt that Appellant had raped L.H.[5] Indeed, in his brief, Appellant acknowledges that the trial court's exclusion of his witnesses "gutt[ed] the defense case" and "depriv[ed] the defendant of his right to present a defense."

At trial, Appellant suggested several alternatives to a mistrial, but we agree with the trial court that none were reasonable. Appellant advocated: 1) the court's reversal of its ruling precluding the testimony of his witnesses; 2) a recess so the State would have time to meet with and interview the potential witnesses, or; 3) that the trial proceed without the witnesses but with Appellant presenting their expected evidence in some other manner.[6]

[5] Appellant's first retrial also ended in a mistrial because the jury could not reach a unanimous verdict.

[6] In his brief, Appellant also faults the State for not objecting to "potentially objectionable witness testimony prior to jeopardy attaching and prior to any reference to it in opening statements," based on the fact that the State had heard that the defense had three potential witnesses before the jury was sworn. Although we agree that the State could have objected to the discovery violation as soon as defense counsel added the names to its list of potential witnesses at the end of voir dire, the failure to lodge a contemporaneous objection at the time that a mistrial could have been declared does not automatically function as a waiver of the right to request a mistrial. *Cf. Hill v. State*, 355 Md. 206, 219-21 (1999) (holding that the defendant's motion for mistrial, although raised after the jury retired for deliberation, was ultimately preserved for appellate review).

Regardless of the prosecutor's knowledge or actions, the court was not made aware of the extent of the defense's discovery violation until so notified by the State after opening

Addressing Appellant's first suggestion, the court had already exercised its discretion and prohibited all of the undisclosed witnesses from testifying. Appellant made virtually no argument furthering this position at trial beyond proposing that one remedy for the discovery violation "would be for the judge not to rule that the defense witnesses are precluded[,]" which the court immediately dismissed. The trial court's decision to exclude the witnesses was reasonable given the facts of this case. *C.f. Taliaferro v. State*, 295 Md. 376, 390-91 (1983) (noting that the trial court has discretion to craft a sanction to fit the seriousness of the discovery violation with regard to witnesses).

Appellant's second suggestion, that the State had ample time to interview the undisclosed witnesses, is similarly unavailing. While the court was within its discretion to choose this avenue, it was not required to do so. *See id.* Additionally, the court informed counsel that due to time constraints, allowing time for the State to interview all three witnesses would not be feasible. Moreover, the court expressed concern about obligating the jury to remain available during the State's investigation period.

Noting Appellant's third suggestion—that it could elicit similar testimony from other, unidentified sources—did not create a reasonable alternative because the defense proffered absolutely no manner in which it could permissibly bring out the evidence it had

statements. By the time the State was compelled to move for a mistrial, the court had already made its ruling on the exclusion of the defense witnesses, and the court was therefore left with no other option but to declare a mistrial based on the facts before it at the time. *See Mansfield v. State*, 422 Md. 269, 292 (2011) (suggesting that information conveyed to the trial court during trial, after jeopardy had attached, can support a mistrial based on manifest necessity, although the grant of a mistrial based on the same knowledge obtained by the court pre-jeopardy might comprise an abuse of discretion).

promised to the jury in the absence of any live witnesses. *See Johnson v. State*, 229 Md. App. 159, 163, *cert. denied*, 450 Md. 229 (2016) (holding that the trial court did not abuse its discretion in declaring mistrial based on manifest necessity when defense counsel presented the jury with an "extremely detailed exculpatory narrative[]" during opening statement and then "failed to present any evidence whatsoever to support it.").

The lack of a reasonable alternative to a mistrial under the circumstances, along with the court's and attorneys' agreement that successful post-conviction proceedings would probably ensue if Appellant were convicted, persuades us that the court's finding of manifest necessity for a mistrial was a proper exercise of its discretion. *See Neal v. State*, 272 Md. 323, 326 (1974) (noting that a mistrial is appropriate once the trial court perceives that a trial cannot proceed). Because we conclude that the trial court's grant of the State's motion for mistrial was proper, we further conclude that the court did not err in denying Appellant's motion to dismiss the indictment on double jeopardy grounds.

ORDER OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS ASSESSED TO APPELLANT.