

Circuit Court for Montgomery County
Case No. 137608C

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 316

September Term, 2021

SIAMAK PAYDAR

v.

STATE OF MARYLAND

Graeff,
Friedman,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: March 17, 2022

*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.

In 2018, a jury in the Circuit Court for Montgomery County convicted appellant, Siamak Paydar, of first-degree assault and false imprisonment. The jury was unable to reach a unanimous verdict on charges of attempted murder and kidnapping, and the trial court declared a mistrial as to those offenses. At Paydar’s sentencing proceeding, the State entered a *nolle prosequi* to the charges of attempted murder and kidnapping.

On direct appeal to this Court, we reversed Paydar’s convictions on an evidentiary issue and remanded to the trial court for further proceedings. *Paydar v. State*, 243 Md. App. 441 (2019). When the State then re-indicted him with attempted murder, Paydar moved to dismiss on the ground that retrying him on that charge would violate the principles of double jeopardy.¹ Following a hearing, the trial court denied Paydar’s motion to dismiss.

Paydar filed a timely notice of appeal, asking us to determine whether the double jeopardy protections of the U.S. Constitution and Maryland common law bar a second trial on the offense of attempted murder when, at the first trial, he “effectively withdrew his consent to a partial verdict and the trial judge declared a mistrial on the same offense without finding the existence of manifest necessity.”² For the reasons that follow, we affirm the trial court’s order denying the motion to dismiss.

¹ The trial court granted the State’s motion to consolidate the retrial on the charges of assault and false imprisonment following Paydar’s successful appeal with the retrial on the charge of attempted murder following the court’s declaration of a mistrial on that count.

² Although our appellate courts typically only review final judgments, appeal from some interlocutory orders is permitted by statute or if the order denies a constitutional right, such as the defense of double jeopardy. *Pulley v. State*, 287 Md. 406, 414-15 (1980). Therefore, a defendant has “the right to immediate appellate review of an adverse ruling concerning a double jeopardy claim.” *Kendall v. State*, 429 Md. 476, 484 n.10 (2012) (citing *Pulley*, 287 Md. at 414).

FACTS AND LEGAL PROCEEDINGS

Paydar and his wife, Goli Ariani, argued in their home, with the argument escalating into what Ariani described as a physical assault and death threats by her husband. According to Ariani, Paydar headbutted and choked her and banged her head against a wall. Paydar then taped her hands, feet, and mouth with electrical tape and bound her arms and legs with zip ties before putting her in the trunk of their car. When Paydar left the garage threatening to get a gun, Ariani was able to free herself and run to the house across the street to ask for help. The police were summoned, and Paydar was arrested. *Paydar*, 243 Md. App. at 443-45.

In a three-count indictment, the State charged Paydar with attempted murder, kidnapping, and first-degree assault.³ The matter was tried with a jury.

The jury began its deliberations at approximately 4:00 p.m. on June 28, and at approximately 10:00 p.m., the jurors asked if they could be excused for the night. The trial court dismissed the jury until 9:30 the next morning.

At 1:50 p.m. on June 29, the jury sent the court a note asking, “Are we required to render a verdict on all charges? [O]r [c]an we render a verdict on one charge and declare a hung jury on the other charges?” The court addressed counsel: “So, this is the kind of note

³ The verdict sheet also asked the jury to consider lesser included offenses of each charge: Count 1—attempted first-degree murder and attempted second-degree murder; Count 2—kidnapping and false imprisonment; and Count 3—first-degree assault and second-degree assault.

that we usually respond to with the *Allen* [c]harge, which is now the pattern 2.01 jury’s duty to deliberate.^[4] So, that’s what I would propose that we do.”

The State agreed, after which the following discussion occurred:

[DEFENSE]: Your Honor, we believe that the correct response to the note is yes, they can. They can render a partial verdict and a mistrial can be, or a hung jury can be declared on the other charges.

THE COURT: I agree with that. I agree that that would be a correct and truthful response to their question. However, pattern 2.01 is a jury instruction that is specifically written for ... the circumstance where the jury indicates that they’re either deadlocked or becoming deadlocked, and so—

⁴ The term “*Allen* charge” derives from a jury instruction, approved by the U.S. Supreme Court in *Allen v. United States*, 164 U.S. 492, 501 (1896), to be given to a deadlocked jury in a criminal case. Although the Court of Appeals has disapproved of the use of the traditional *Allen* charge, it has endorsed a similar jury instruction, Maryland Pattern Jury Instruction-Criminal (“MPJI-Cr.”) 2:01, referred to as a “modified *Allen* charge,” which is considered less coercive than a traditional *Allen* charge and “encourages all of the jurors to deliberate and reconsider their respective positions while not surrendering individual honest convictions.” *Armacost v. Davis*, 462 Md. 504, 519 n.9 (2019). That instruction reads:

The verdict must be the considered judgment of each of you. In order to reach a verdict, all of you must agree. In other words, your verdict must be unanimous. You must consult with one another and deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. During deliberations, do not hesitate to reexamine your own views. You should change your opinion if convinced you are wrong, but do not surrender your honest belief as to the weight or effect of the evidence only because of the opinion of your fellow jurors or for the mere purpose of reaching a verdict.

MPJI-Cr. 2:01.

[DEFENSE]: Could we have that number again, Your Honor?

THE COURT: Yes. It's Maryland pattern 2.01. It's called the jury's duty to deliberate, which is basically the instruction that we used to call the *Allen* [c]harge that's now been made a pattern [instruction]. Under the notes to it, it says this instruction may be given before the jury deliberates and/or if the jury becomes deadlocked. So, ... I don't give it in the beginning.

[DEFENSE]: Right.

THE COURT: Awaiting for the opportunity to give it if they become deadlocked.

[DEFENSE]: Your Honor, however, they haven't said they're deadlocked.

THE COURT: No, they haven't said they're deadlocked, but the note indicates to me that they might be, and so, at this point—well, let's see. They began deliberating at four o'clock yesterday. They went until 10:00. Then they came back at 9:30 today, and now it's 2:00. It's a fairly lengthy time. So, at this point, I think the best thing to do is to give this instruction. So, go and knock on the door. Tell them to come and have their seats.

[DEFENSE]: Your Honor, we're objecting. We believe to give what we'd call the *Allen* [c]harge before they're deadlocked would be coercive.

THE COURT: Okay. Go ahead. All right.

The jury re-entered the courtroom, and the court read it MPJI-Cr. 2:01. The jury then retired to continue its deliberations.

At approximately 3:00 p.m., the jury sent another note stating that it was unable to “come to a unanimous decision on one of the charges” and asking how it should proceed. Defense counsel suggested that the court “declare a mistrial and take a partial verdict.”

The court summoned the jurors, and after confirming they had the verdict sheet with them, instructed:

THE COURT: So, I received a note indicating that the jurors, we cannot come to a unanimous decision on one of the charges. How should we proceed? So, ... once I’ve received a note which then sparks the giving of the *Allen* [c]harge, which I just gave you, and the jury goes back and continues to deliberate, typically when I receive a note following that, that they’re deadlocked on at least one charge, then what we do is we take what’s called a partial verdict.

So, a partial verdict is, [you re]turn a verdict on those counts that you have reached a unanimous verdict, whether guilty or not guilty, and then on the charge where there’s no unanimous verdict, there’s no verdict. And so, we deal with that as well. So, on your verdict form, have you recorded the unanimous verdicts that you[r] group has reached?

JUROR NO. 264: Not yet.

THE COURT: Not yet. Okay. So, why don’t we do this? Why don’t you all go back into the room, record those verdicts that are unanimous on that sheet, and then ... for those counts or those questions for which there is no unanimous verdict, just leave it blank. Okay?

The jury returned to the deliberation room. During the brief recess that ensued, defense counsel stated his concern that the trial court’s instruction was “the first time [the

jurors] were aware that a partial verdict was a possibility.” Therefore, counsel continued, “[a]fter having been told that, they’ve gone back in and continued their deliberations now, and my concern is that they had reached a verdict, and now they’re going to come out with a different verdict, and our intervention there at the end, by simply telling them they could have a partial verdict, sending them back with the verdict sheet, has sort of interfered with the process.” Because he believed that “could be an issue,” defense counsel proposed inquiring of the jury “if that’s what happened.”

The court did not specifically respond to defense counsel’s request, and shortly thereafter, the jury indicated it had completed the verdict sheet, leaving blank any charges for which it had not reached a verdict. The court then received the jury’s verdict: guilty of the charges of false imprisonment and first-degree assault and no verdict on the charges of attempted first-degree murder, attempted second-degree murder, and kidnapping.

Defense counsel asked to approach the bench and repeated his request that the court inquire of the jury “if those are the same verdicts when they first came out.” The court responded, “I think that’s interfering with the jury’s deliberations and their function and their role. So, that’s why I asked them to just fill out the verdict form, and they indicated that they did.”

Defense counsel pointed out that the jurors had returned to the jury room for “about 15 minutes” after saying “they couldn’t reach a unanimous decision on one of the charges” and “then they come out unable to reach a decision on three of the charges.” That, in his view, indicated they had continued to deliberate during that 15-minute recess. The court

responded, “We don’t know what they did. We just know that they filled out the verdict sheet.” Counsel replied that “we will [know] if we ask them.”

The court, however, declined to question the jurors, instead assuming they had gone back to the jury room and confirmed and recorded their verdict, as instructed. Defense counsel asked for a mistrial on all counts, “[i]n light of the fact that you’re not going to ask them,” and because “we wanted the jury [to be] asked if their written verdict was consistent with the verdict they had apparently reached at three o’clock, because the note they gave us at three o’clock is inconsistent with how they filled out that form. So, we believe sending them back if they had already reached a verdict was coercive.” Counsel added his belief that to retry Paydar on the three charges on which no verdict had been rendered would violate the protections of double jeopardy. The court declared a mistrial on the charges of attempted murder and kidnapping.

As noted above, after the other counts were remanded for a new trial, the State re-indicted Paydar with attempted murder. Paydar moved to dismiss the second indictment, asserting that the double jeopardy protections of the U.S. Constitution and Maryland common law barred a second trial on the charge of attempted murder.

The trial court denied Paydar’s motion to dismiss, ruling that: (1) not only did the defense consent to the taking of a partial verdict, it asked for it; and (2) “clearly there was manifest necessity in declaring the mistrial, because the jury indicated they were deadlocked on the counts for which they didn’t return the verdict.” The trial court

concluded that “double jeopardy would not bar the State from bringing back any of the charges for which a mistrial was declared.”

DISCUSSION

“[W]e review the trial judge’s grant of a mistrial for abuse of discretion.” *State v. Baker*, 453 Md. 32, 46 (2017) (quoting *Simmons v. State*, 436 Md. 202, 212 (2013)). If a mistrial is supported by manifest necessity, then the trial court did not abuse its discretion. *See Simmons*, 436 Md. at 222-23 (holding court did not abuse discretion in granting mistrial based on manifest necessity); *cf. Baker*, 453 Md. at 37 (granting mistrial without manifest necessity was an abuse of discretion and subsequent motion to dismiss indictment was improperly denied because retrial was barred by double jeopardy principles).

The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution and Maryland common law protect a criminal defendant from being subject twice to criminal proceedings for the same offense. U.S. CONST. amend. V; *Hubbard v. State*, 395 Md. 73, 91-92 (2006). When a trial court declares a mistrial prior to the completion of the trial, both of these bodies of law prohibit a retrial on the same charges unless (1) the defendant consented to the mistrial, *United States v. Dinitz*, 424 U.S. 600, 607 (1976); *Jourdan v. State*, 275 Md. 495, 508 (1975), or (2) the mistrial was compelled by “manifest necessity.” *Arizona v. Washington*, 434 U.S. 497, 505 (1978); *Simmons*, 436 Md. at 213.

When a mistrial is granted over the defendant’s objection, “double jeopardy principles will not bar a retrial if there exists ‘manifest necessity’ for the mistrial.” *Simmons*, 436 Md. at 213 (footnote omitted). “[W]hether manifest necessity

exists for ... a mistrial depends on the unique facts and circumstances of the case,” *id.* at 214, and “the key word ‘necessity’ cannot be interpreted literally[.]” *Washington*, 434 U.S. at 506. Instead, courts “assume that there are degrees of necessity and we require a ‘high degree’ before concluding that a mistrial is appropriate.” *Id.* (footnote omitted). “To meet this ‘high degree’ of necessity ... ‘the trial judge must ... explor[e] reasonable alternatives and determine that there is no reasonable alternative to the mistrial.’” *Simmons*, 436 Md. at 215 (quoting *Hubbard*, 395 Md. at 92).

A “genuinely deadlocked jury” is a classic example of manifest necessity for a mistrial. *Washington*, 434 U.S. at 509 (footnote omitted); *State v. Fennell*, 431 Md. 500, 516 (2013). A genuine jury deadlock exists when “further deliberations are unlikely to be productive,” *Fennell*, 431 Md. at 520 (citing *Washington*, 434 U.S. at 509), and “if deliberations were to continue, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors.” *Id.* at 516 (cleaned up). Although a trial court must determine that genuine jury deadlock exists, the court is not required to undertake specific steps prior to declaring a mistrial, such as forcing the jury to deliberate for a minimum period of time, questioning the jurors individually, consulting with or obtaining the consent of either the prosecutor or defense counsel, or issuing a supplemental jury instruction. *Id.* at 517 (quoting *Renico v. Lett*, 559 U.S. 766, 775 (2010)).

A genuine jury deadlock may occur with a multi-count indictment. When a jury indicates that it has reached an agreement on some, but not all, of the counts, “the jury may

return a verdict with respect to a count as to which it has agreed, and any count as to which the jury cannot agree may be tried again.” MD. RULE 4-327(d). Prior to declaring a mistrial on the remaining counts, “the trial judge generally should take steps to determine that genuine deadlock exists as to those counts [on which the jury has not agreed].” *Fennell*, 431 Md. at 523. The trial court ““must neither pressure the jury to reconsider what it had actually decided nor force the jury to turn a tentative decision into a final one.”” *Id.* at 523-24 (quoting *United States v. Heriot*, 496 F.3d 601, 608 (6th Cir. 2007)). When the totality of the circumstances suggest that the jury has made a tentative decision, the court “should inquire into the jury’s intention *vel non*⁵ that the verdict be final, if such inquiry can be done non-coercively; return the jury for further deliberation; or, if that is not possible and there is manifest necessity, declare a mistrial.” *Caldwell v. State*, 164 Md. App. 612, 643 (2005). Even in the case of a hung jury, the trial court must determine “that no reasonable alternative to a mistrial exists.” *Fennell*, 431 Md. at 519-20.

Here, the State argues both that: (1) Paydar waived his right to complain about a retrial because he consented to the trial court’s acceptance of a partial verdict and its declaration of a mistrial (in fact having requested both), and any attempted withdrawal of his consent was ineffective; and (2) manifest necessity existed for the court to declare a mistrial because the jury was deadlocked on some charges. Paydar acknowledges that he initially consented to the mistrial. He asserts, however, that he withdrew his consent when

⁵ The Latin phrase, *vel non*, means “or not.” *Vel non*, BLACK’S LAW DICTIONARY (10th ed. 2014). As it is used here, it means whether or not the jury intended that the verdict be final.

the jury’s verdict allegedly did not match its earlier note, and the trial court thereafter declined to ask the jury whether it had deliberated further following the court’s instruction to complete the verdict sheet, implying coercion by the court. Paydar also argues that the trial court had reasonable alternatives to declaring a mistrial, so there was no manifest necessity for the mistrial.

We choose not to resolve the close factual question of whether Paydar effectively withdrew his consent to the mistrial. Instead, we conclude that the issue of Paydar’s consent is immaterial because the trial court acted within its discretion in determining that there was manifest necessity to declare a mistrial.

The circumstances here supported a finding of a genuinely deadlocked jury and manifest necessity for declaring a mistrial, with no reasonable alternative. After more than 10 hours of deliberations over two days, the jury sent the court a note asking if it was required to render a verdict on all charges or if it could render a partial verdict, suggesting that it was having difficulty coming to a unanimous verdict on all charges. Although the jury’s note did not state, specifically, that it was deadlocked, the trial court advised counsel that “the note indicates to me that they might be,” and proposed giving the instruction on the jury’s duty to continue to deliberate,⁶ which it did, over defense counsel’s objection.

Approximately one hour later, the jury revealed that it was unable to come to a unanimous decision on at least one charge. The trial court agreed with defense counsel’s request that it take a partial verdict and declare a mistrial on the counts on which the jury

⁶ MPJI-Cr. 2:01, *supra* note 4.

could not agree, stating, “[T]ypically, once I’ve given the *Allen* [c]harge and they come back and they’ve said that they’re deadlocked on a charge, I usually take a partial verdict.”

The court summoned the jurors and confirmed that they could not reach a verdict on at least one charge. Because it had not recorded its decision on the verdict sheet, the court sent the jury back to the deliberation room to reduce its decision to writing, leaving blank any questions on which it had not been able to render a verdict. The jury returned to the courtroom approximately 15 minutes later and affirmed that it had indicated a guilty or not guilty verdict on any count for which it had reached a unanimous verdict and left blank any count for which it had not reached a unanimous verdict.

Although defense counsel expressed concern that the jury, after being made aware that a partial verdict was a possibility, may have continued to deliberate during that 15 minutes, he proposed no action, other than inquiring of the jury if its written verdict was consistent with the verdict it had “apparently reached at three o’clock.” The trial court declined, reasoning that defense counsel’s assertion that the jury had deliberated further was nothing more than speculation and assuming that the jury had done what the court had instructed it to do. The court further found that such an inquiry would interfere with the jury’s deliberations and its function.

In light of the jury’s notes, after almost 12 hours of deliberation “in a pretty straightforward case,” and a modified *Allen* charge, the trial court determined that the jury was genuinely deadlocked on some charges, and the jury, when summoned to the courtroom, did not dispel that determination. And, the trial court permitted defense counsel

the opportunity to be heard before declaring a mistrial, which is a reasonable alternative to a mistrial. *See Washington*, 434 U.S. at 515-16.

Given the totality of the circumstances, no other reasonable alternative to mistrial existed, and the trial court properly found that there was a manifest necessity to declare a mistrial as to the charges on which the jury was unable to reach a verdict. And, because manifest necessity existed for the grant of a mistrial as to some of the charged offenses, the State was permitted, in its discretion, to retry Paydar on these remaining charges following the mistrial. *See Wynn v. State*, 388 Md. 423, 429 (2005). Therefore, the trial court did not abuse its discretion in declaring a mistrial, and it did not err in denying Paydar’s motion to dismiss the second indictment on the ground that it violated the protections of double jeopardy.

**ORDER OF THE CIRCUIT COURT FOR
MONTGOMERY COUNTY AFFIRMED;
COSTS ASSESSED TO APPELLANT.**