Circuit Court for Howard County
Case No. 13-K-17-058183

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0525

September Term, 2018

HARRY HAIRSTON

v.

STATE OF MARYLAND

Wright,
Grill Graeff,
Nazarian,

JJ.

Opinion by Wright, J.

Filed: May 9, 2019

The State of Maryland, appellee, brought seven drug-related charges against Harry Hairston, appellant, in the Circuit Court for Howard County. Hairston's trial began on March 6, 2018. During opening statements, defense counsel made the following statement about the mandatory sentence for one of the charges brought against Hairston:

> [DEFENSE COUNSEL]: Now Ladies and Gentlemen, the State, in its infinite wisdom, has charged Mr. Hairston with offenses, a drug king pin charge that carries a twenty-year mandatory—

The State immediately objected to the statement and requested a mistrial, and the circuit court granted the State's request over Hairston's objection. Hairston subsequently moved to dismiss the charges against him and argued that a retrial would violate his Fifth Amendment right to be free from double jeopardy. The circuit court denied Hairston's motion to dismiss, and Hairston timely filed this appeal.

Hairston presents the following question for our review, which we have reworded and consolidated for clarity:[1]

[1] Hairston presented his questions to the Court as follows:

> 1. Was Hairston deprived of his right to be protected against twice being placed in jeopardy when the trial court granted, over his objection, the State's motion for a mistrial based upon its contention that defense counsel made improper comments in his opening statements?
>
> 2. Does the Sixth Amendment's right of confrontation guarantee Hairston's right to cross-examine a State's cooperating witness regarding the specific harsh penalties he faced but for his cooperation agreement with the State?
>
> 3. Was the high standard for finding manifest necessity to support the declaration of a mistrial met in this case?

1. Did the circuit court err in denying Hairston's motion to dismiss?

For the reasons provided below, we answer this question in the negative and affirm the circuit court's judgment.

BACKGROUND

On September 6, 2017, Hairston was indicted on seven drug-related charges in the circuit court. Hairston was charged with:

> (i) Conspiracy to distribute cocaine, in violation of the common law;
>
> (ii) Conspiracy to import cocaine into the State of Maryland, in violation of Md. Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CL") § 5-614;
>
> (iii) Conspiracy to import cocaine into the State of Maryland, in violation of the common law;
>
> (iv) Being a drug kingpin, in violation of CL § 5-614;
>
> (v) Conspiracy to be a drug kingpin, in violation of CL § 5-613; and
>
> (vi & vii) Two counts of possession of a large amount of cocaine, in violation of CL § 5-612.

Hairston's trial began on March 5, 2018, with jury selection. On March 6, 2018, the parties presented opening statements. Defense counsel's opening statement began to describe how Michael Giralde, the State's cooperating witness, was involved in the same

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> 4. Assuming, arguendo, defense counsel's opening statement was improper, was a limiting instruction and not a mistrial the proper remedy to ensure that the jury evaluated admissible evidence regarding the penalties that the cooperating witness would have faced but for his cooperation for the primary and limited purpose of assessing the witness's credibility?
>
> 5. Because there was no manifest necessity to declare a mistrial, do principals of double jeopardy bar a second trial?

drug operation as Hairston. Defense counsel gave a detailed description of various tasks that Giralde was involved in and described how Giralde ultimately "cut a hell of a deal" with the State to receive more lenient treatment. At the conclusion of defense counsel's discussion of Giralde, he said:

> [DEFENSE COUNSEL]: Now Ladies and Gentlemen, the State in its infinite wisdom has charged Mr. Hairston with offenses, a drug king pin charge that carries a twenty-year mandatory—

The State immediately objected to the statement and moved to strike it from the record. The jury was excused and the State requested a mistrial. In response to the request, Hairston argued that counsel was cut off mid-argument and did not have an opportunity to explain to the jury that Giralde could have been charged with the same crimes as Hairston. Hairston further averred that he had the right to present to the jury material that would be developed in his cross-examination of Giralde, including what charges Giralde could have faced, and the deal Giralde received by being a cooperating witness.

The State responded that defense counsel told the jury that the drug kingpin charge carried a mandatory minimum sentence of twenty years, and that giving that allegedly prejudicial information to the jury made it impossible for the State to have a fair trial. The State further contended that Giralde was never charged as a drug kingpin and never faced a twenty-year sentence. The State agreed that defense counsel could introduce to the jury his plan for cross-examining the witness, but argued that defense counsel could not engage the jury in weighing the equities of a sentence. After hearing the partial

arguments and reviewing the testimony in chambers, the circuit court declared a mistrial over Hairston's objection.

Hairston subsequently filed a motion to dismiss the indictment and argued that the Double Jeopardy Clause barred his retrial. Specifically, Hairston first argued that a mistrial should not have been granted because defense counsel's statement was not improper. Hairston also averred that even if defense counsel made an improper statement, there was no manifest necessity to declare a mistrial because there were alternative means to cure any prejudice resulting from the allegedly improper opening statement. The State countered that defense counsel deprived the State of a fair trial by informing the jury that Hairston faced a mandatory sentence of 20 years if convicted of being a drug kingpin. The State therefore argued that there was manifest necessity for the circuit court to declare a mistrial. After argument on April 18, 2018, the circuit court ultimately denied Hairston's motion to dismiss.

On April 23, 2018, Hairston filed a timely appeal from the denial of his motion to dismiss. The circuit court stayed further proceedings pending the outcome of this appeal.

STANDARD OF REVIEW

We review the circuit court's grant of mistrial for abuse of discretion. *Simmons v. State*, 436 Md. 202, 212 (2013). "It is well-settled that a decision to grant a mistrial lies within the sound discretion of the trial judge and that the trial judge's determination will not be disturbed on appeal unless there is abuse of discretion." *Id.* (quoting *Carter v. State*, 366 Md. 574, 589 (2001)). To determine whether an abuse of discretion has occurred, "we look to whether the trial judge's exercise of discretion was manifestly

unreasonable, or exercised on untenable grounds, or for untenable reasons." *State v. Baker*, 453 Md. 32, 46 (2017) (quotations and citation omitted).

DISCUSSION

The Court of Appeals has previously explained the Fifth Amendment's Double Jeopardy Clause as follows:

> The Fifth Amendment to the United States Constitution contains a Double Jeopardy Clause. That clause, like the Amendment itself, is made applicable to State criminal prosecutions through the Fourteenth amendment. . . . Providing that no person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb, the Fifth Amendment guarantee against double jeopardy, the double jeopardy clause, prohibits both successive prosecutions for the same offense as well as multiple punishment for the same offense. . . . Jeopardy . . . attaches when the defendant has been put to trial before the trier of facts, whether the trier be a jury or a judge, and thereby subjected to the risk of conviction.

Mansfield v. State, 422 Md. 269, 280-82 (2011) (cleaned up).[2]

The basic purpose for enforcing the Double Jeopardy Clause is to "prevent the State from making repeated attempts to convict an individual, thereby subjecting him to the hazards of trial, embarrassment, expense, and anxiety as well as enhancing the possibility that even if innocent, he may still be found guilty." *Parks v. State*, 287 Md. 11, 14 (1980). In accordance with this purpose, the United States Supreme Court and the

[2] The Court of Appeals recently explained the recent increase in use of "cleaned up" as a parenthetical. The parenthetical "signals that the current author has sought to improve readability by removing extraneous, non-substantive clutter (such as brackets, quotation marks, ellipses, footnote signals, internal citations or made un-bracketed changes to capitalization) without altering the substance of the quotation." *Lopez v. State*, 458 Md. 164, 195 n.13 (2018).

Maryland Court of Appeals have applied certain constitutional guarantees to protect the accused against unwarranted retrial.

Despite the important interests that it protects, the Double Jeopardy Clause is not an absolute bar to retrial when a mistrial has been declared. *Hubbard v. State*, 395 Md. 73, 89 (2006) (explaining that "[r]etrial is not automatically barred . . . when a criminal proceeding is concluded after jeopardy attaches but without resolving the merits of the case."). In *United States v. Perez*, the United States Supreme Court, addressing the issue of a mistrial's impact on double jeopardy for the first time, established the rule that is still followed today:

> We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a *manifest necessity* for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in [favor] of the prisoner.

22 U.S. 579, 580 (1824) (emphasis added).

In other words, "retrial is barred if a mistrial is declared without the defendant's consent unless there is a showing of 'manifest necessity' to declare the mistrial." *Taylor v. State*, 381 Md. 602, 611 (2004) (citations omitted). As such, our task here is to first determine whether the statement made by defense counsel was prejudicial. If the statement is found to be prejudicial, we must then determine whether there was manifest necessity to justify the circuit court's declaration of a mistrial.

A. Prejudicial Statement

The parties first dispute whether the statement made by defense counsel in his opening statement was prejudicial. Hairston primarily argues that defense counsel's statement was not prejudicial because it was made in the context of discussing Giralde, the State's key witness, and that it was not actually directed at Hairston. Specifically, he argues that the statement was not prejudicial because Giralde would have been subject to cross-examination about the potential penalties he faced with respect to the charges in his 2017 indictment. Because Giralde would be cross-examined about his potential drug kingpin charge, Hairston avers that the jury would have inevitably heard about the mandatory sentence for the drug kingpin charge that Hairston faced. This argument is based on the premise that Hairston had a right to inquire into Giralde's self-interest and biases and how those interests may affect his testimony. Finally, Hairston argues that even though Giralde was not actually charged with the drug kingpin offense, the evidence in the case would establish that Giralde's conduct satisfied all elements of the offense.

The State responds that defense counsel's statement directly informed the jury of the potential sentence that Hairston, not Giralde, would face if convicted, and that Hairston did not have the right to inform the jury as such.[3] The State contends that information about the potential sentence a defendant would receive if convicted is not

[3] As stated above, defense counsel stated the following in his opening statement: "[n]ow Ladies and Gentlemen, the State in its infinite wisdom has charged Mr. Hairston with offenses, a drug king pin charge that carries a twenty-year mandatory—."

relevant for the jury's determination of the individual's guilt or innocence. Further, the State argues that such commentary is highly prejudicial to the State because it asks the jury to abandon its role as a neutral fact-finder and instead render its verdict based upon inappropriate sentencing considerations.

A prejudicial statement may lead to the declaration of a mistrial if the court finds the statement constitutes irreversible error that removes the possibility of a fair trial. *See Goldberg v. Boone*, 396 Md. 94, 119 (2006). When counsel makes an improper statement during opening statements, "[t]he applicable test for prejudice is whether we can say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment [would not be] substantially swayed by the error." *Tierco Md., Inc. v. Williams*, 381 Md. 378, 413 (2004).

More specific to the case at hand, it is well-established that juries should not consider the consequences of their verdicts:

> The jury's function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged. The judge, by contrast, imposes [a] sentence on the defendant after the jury has arrived at a guilty verdict. Information regarding the consequences of a verdict is therefore irrelevant to the jury's task. Moreover, providing jurors sentencing information *invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion.*

Shannon v. United States, 512 U.S. 573, 579 (1994) (emphasis added).

In *Shoemaker v. State*, 228 Md. 462, 469 (1962), the Court of Appeals held that a prosecutor's remarks regarding the defendant's possibility of parole in a capital punishment case were improper, and stated:

> In the context of the prosecutor's request for mercy by asking the jury to spare the defendant from capital punishment, the natural tendency and effect of the statements about parole was to suggest to the members of the jury that they might resolve any question about the defendant's guilt beyond a reasonable doubt with the thought that, even if they made a mistake, no great harm would be done since he might soon be paroled.

Stated differently, a jury's knowledge of the consequences of a verdict causes the jury to consider the moral repercussions (or lack thereof) of its factual conclusions, and thus blurs the line between a jury's duty of interpreting fact and the judge's duty of sentencing.

In this case, the circuit court's declaration of a mistrial occurred directly after defense counsel referenced the mandatory sentence that would result from a conviction on Hairston's drug kingpin charge. Though Hairston argues that the statement was made in reference to Giralde, on its face the statement relates to the penalty that Hairston, and *not* Giralde, would face if convicted. Because defense counsel's statement directly implicated the sentence that Hairston would face, the statement is prejudicial under *Shoemaker*. *See Shoemaker*, 228 Md. at 468.

Assuming *arguendo* that defense counsel's statement referred to a sentence that Giralde could face, we still cannot conclude that the statement would have been free from prejudice. Defendants are afforded a threshold level of inquiry as to a State witness's motive to testify. *See* Md. Rule 5-616(a)(4).[4] Before doing so, defendants must proffer a

[4] Md. Rule 5-616(a)(4) states that "[t]he credibility of a witness may be attached through questions asked of the witness, including questions that are directed at . . . [p]roving that the witness is biased, prejudiced, interested in the outcome of the proceeding, or has a motive to testify falsely."

sufficient factual foundation to permit inquiry into such motivation. *Manchame-Guerra v. State*, 457 Md. 300, 312 (2018). "[W]hen the trier of fact is a jury, questions permitted by [Md.] Rule 5-616(a)(4) should be prohibited only if (1) there is no factual foundation for such an inquiry in the presence of the jury, or (2) the probative value of such an inquiry is substantially outweighed by the danger of undue prejudice or confusion." *Id.* (quotation, citation, and emphasis omitted).

Furthermore, this Court has previously explained the primary purpose of an opening statement:

> [T]o explain with reasonable clarity to the trier of facts the questions involved and what the State or defense expects to prove so as to prepare the trier of the facts for the evidence to be offered. While [counsel] should be allowed a reasonable latitude in his opening statement, he should be confined to statements *based on facts that can be proved* and his statement should not include facts that are inadmissible and which he cannot or will not be permitted to prove or which he in good faith does not expect to prove.

Ott v. State, 11 Md. App. 259, 266 (1971) (emphasis added).

Here, we cannot say that there is a sufficient factual foundation for an inquiry into Giralde's alleged deal with the State to avoid a drug kingpin charge. The State explained that it never sought to bring a drug kingpin charge against Giralde. While Hairston argues that there was circumstantial evidence to prove that Giralde could have been charged as a drug kingpin, this mere assertion does not convince us that there was a sufficient basis for cross-examination into the possible charge *or* for defense counsel's remark in his opening statement.

Even if there was a sufficient factual basis for defense counsel's statement, the statement's prejudicial impact likely outweighs any probative value that the statement may have had. As we explained above, any statement that causes a jury to consider the sentencing consequences of its verdict is highly prejudicial. *See Manchame-Guerra*, 457 Md. at 314. Because the probative value of defense counsel's statement is very likely outweighed by the danger of undue prejudice, we cannot conclude that the statement would have been admissible even if it were about Giralde.

B. Manifest Necessity & Declaration of a Mistrial

Having concluded that defense counsel's statement was prejudicial, we must next determine whether that prejudice created manifest necessity for a mistrial. If there is no manifest necessity, the circuit court abused its discretion in declaring the mistrial, and retrial is barred by the Double Jeopardy Clause. *Baker*, 453 Md. at 47.

The question of whether manifest necessity exists for purposes of double jeopardy depends on the unique facts and circumstances of the case, and the Supreme Court has declined to create a rigid test for determining manifest necessity. *See Blueford v. Arkansas*, 566 U.S. 599, 609 (2012). However, courts refer to three factors to determine whether manifest necessity exists:

> 1) [Whether] there was a high degree of necessity for the mistrial;
>
> 2) [Whether] the trial court engaged in the process of exploring reasonable alternatives to a mistrial and determined that none was available; and
>
> 3) [Whether] no reasonable alternative to a mistrial was, in fact, available.

Baker, 453 Md. at 49 (quotations omitted).

As the Court of Appeals explained in *Hubbard*, the first and third factors are examined in conjunction with one another:

> If there was no reasonable alternative, ordinarily the mistrial is manifestly necessary, and retrial is not barred by double jeopardy principles. If there is a reasonable alternative, the mistrial is not manifestly necessary, and a defendant cannot be retried. Any doubt should be resolved in favor of the defendant.

Hubbard, 395 Md. at 91-93. The State has the burden of establishing that there is manifest necessity for a mistrial. *Baker*, 453 Md. at 47-48.

For ease of discussion, our analysis begins with the second factor of the *Baker* test. Here, the circuit court explored potential alternatives to a mistrial when it considered the utility of various curative instructions and heard arguments from both parties on the issue. See *Baker*, 453 Md. at 49. Specifically, the circuit court asked defense counsel how he suggested the court fix the problem "short of a mistrial," and after hearing the arguments, the trial judge went back to chambers to privately consider alternatives to a mistrial. This indicates that the circuit court "engaged in the process of exploring reasonable alternatives to a mistrial and determined that none was available[.]" *Baker*, 453 Md. at 49.

As the second factor of the *Baker* test was satisfied, we will next focus on the first and third factors of the test. Hairston contends that there were reasonable alternatives to declaring a mistrial. Specifically, Hairston avers that the court could have:

> [Instructed the] jury to disregard the statement and remind the jury what the circuit court had instructed the jury during the *voir dire* process; or that the issue and question of punishment if Hairston were to be convicted was a matter reserved solely for the judge and that such a factor should not be considered by the jury as it determined the issue of guilt or innocence.

Hairston also suggests that the circuit court could have given the jury a limiting instruction explaining "that the potential penalty associated with any of the counts of the indictment was information that was to be considered only in assessing the credibility and reliability of Giralde."

In response, the State argues that any curative instruction would not have cured the prejudice created by defense counsel's statement. Specifically, the State contends that because defense counsel's highly prejudicial statement was made in the "powerful setting" of an opening statement, the statement "was a bell that could not be unrung, a nail hole that could not be removed, or an incurable infection of the jurors' minds that the court could not effectively remedy."

We find *Simmons v. State*, 436 Md. 202 (2013), to be instructive. In *Simmons*, defense counsel referred to a lie detector test during his opening statement.[5] *Id*. at 207. In an effort to establish Simmons' innocence, counsel stated that "Simmons offered to take a lie detector test." *Id.* The State objected and moved for a mistrial, "claiming that defense counsel's reference to the lie detector test had prejudiced the jury, such prejudice

[5] "[I]n Maryland, it is universally held that evidence of the defendant's willingness or unwillingness to submit to a lie detector is inadmissible[,]" and that "'polygraph' is a ['']dirty word['']" in criminal trials." *Simmons*, 436 Md. at 220 (quotations and citations omitted). Relevant to this case, it is "a general rule [that] a jury should not be told about the consequences of its verdict – the jury should be focused on the issue before it, the guilt or innocence of the defendant, and not what happens as a result of its decision on that issue." *Mitchell v. State*, 338 Md. 536, 540 (1995). While we recognize that the prohibition on statements made to the jury about the consequences of its verdict may not be quite as strong as the prohibition on references to polygraph tests, we are convinced that these two "general rules" are sufficiently similar such that the reasoning on *Simmons* applies to this case.

could not be overcome, and the State was deprived of a fair trial." *Id.* at 208. The State's request was ultimately granted. *Id*.

The circuit court found that defense counsel's statement was sufficiently prejudicial such that manifest necessity supported the declaration of a mistrial. *Id*. at 209. The circuit court relied on three major considerations: (1) that "an opening statement is a powerful setting;" (2) that the improper remark was "not unexpectedly presented by a witness," but rather, it was "carefully made as part of a preview of the evidence to the jury;" and (3) that the statement, in effect, "constituted a substitute for the defendant's testimony . . . [and] credibility [was] central to the prosecution of the case." *Id*. at 209. Based on these considerations, the Court determined that any curative instruction would be insufficient to cure the prejudice resulting from defense counsel's statement. *Id*. at 209.

In affirming the circuit court, the Court of Appeals relied on the Supreme Court's decision in *Arizona v. Washington*, 434 U.S. 497 (1978). The *Simmons* Court summarized the facts of *Washington* as follows:

> In [*Washington*], the defendant was being tried a second time due to the prosecutor's failure to disclose exculpatory evidence during the defendant's first trial. *Washington*, 434 U.S. at 498. During defense counsel's opening statement, he made a comment about the 'hidden evidence' in the first trial and stated that the second trial was granted because of that prosecutorial misconduct. [*Id*.] at 499. The prosecutor moved for a mistrial at the end of opening statements. The motion was denied at that time, and the [S]tate proceeded with its case, calling two witnesses. The next morning, the prosecutor renewed his motion for a mistrial. As noted by the Supreme Court, '[f]ortified by an evening's research, [the prosecutor] argued that there was no theory on which the basis for the new trial ruling could be brought to the attention of the jury, that the prejudice to the jury could not be repaired by any cautionary instructions, and that a mistrial was a

> 'manifest necessity.'" [*Id*.] at 500. The trial judge granted the motion over the defendant's objection[.]

Simmons, 436 Md. at 217.

In upholding the grant of a mistrial, the Supreme Court in *Washington* stated:

> An improper opening statement unquestionably tends to frustrate the public interest in having a just judgment reached by an impartial tribunal. Indeed, such statements create a risk, often not present in the individual juror bias situation, that the entire panel may be tainted. The trial judge, of course, may instruct the jury to disregard the improper comment. In extreme cases, he may discipline counsel, or even remove him from the trial as he did in *United States v. Dinitz*, 424 U.S. 600 (1976). Those actions, however, will not necessarily remove the risk of bias that may be created by improper argument. Unless unscrupulous defense counsel are to be allowed an unfair advantage, the trial judge must have the power to declare a mistrial in appropriate cases. The interest in orderly, impartial procedure would be impaired if he were deterred from exercising that power by a concern that any time a reviewing court disagreed with his assessment of the trial situation a retrial would automatically be barred.

Simmons, 436 Md. at 218 (quoting *Washington*, 434 U.S. at 512-13).

Informed by *Simmons* and *Washington*, we conclude that Hairston's proposed curative instructions would not provide a reasonable alternative to mistrial. Here, defense counsel's improper statement was made during opening statements, it was part of the defense's preview of the evidence to the jury, and the statement effectively undermined the State's key witness' credibility,[6] which was central to the prosecution of the case.

Moreover, defense counsel's statement was highly prejudicial, as it forced jurors to consider the sentencing consequences of their factual determinations. *See Shoemaker*, 228 Md. at 469. As the Supreme Court stated in *Washington*, 434 U.S. at 512, "[a]n

[6] Defense counsel would be able to call in question the witness' testimony without calling the appellant as a witness to give a contrary narrative.

improper opening statement unquestionably tends to frustrate the public interest in having a just judgment reached by an impartial tribunal." Because defense counsel's statement was made at such an imperative point in the trial, and because it was highly prejudicial, we conclude that a curative or cautionary instruction would not repair the damage from the statement.

As a final point, this Court cannot fathom any other alternative that would have remedied defense counsel's statement. As there was no reasonable alternative to a mistrial, we also conclude that a "high degree of necessity" existed to justify the mistrial. All the *Baker* factors have therefore been satisfied, and we hold that there existed manifest necessity to support the declaration of a mistrial.

We reiterate that "a decision to grant a mistrial lies within the sound discretion of the trial judge and that the trial judge's determination will not be disturbed on appeal unless there is an abuse of discretion. *Id*. at 46. That is, we will not overturn the circuit court's grant of a mistrial unless "it was manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Baker*, 453 Md. at 47 (quotations and citation omitted). We hold that the circuit court did not abuse its discretion in determining that manifest necessity supported the declaration of a mistrial, and therefore, that the court did not err in denying Hairston's motion to dismiss.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.