Circuit Court for Baltimore City
Case No. 118094005

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1090

September Term, 2019

DOMINIQUE GRANT

v.

STATE OF MARYLAND

Reed,
Wells,
Zic,

JJ.

Opinion by Wells, J.

Filed: June 21, 2021

After the grant of a mistrial, Dominique Grant, appellant, was retried and convicted by a jury sitting in the Circuit Court for Baltimore City of various crimes related to the armed robbery and shooting of a man in a residential area of Baltimore.[1] Mr. Grant appeals his convictions raising five questions, which we have slightly rephrased for clarity:

> I. Did the trial court abuse its discretion in refusing to propound a defense requested voir dire question aimed at identifying jurors who might consider appellant's silence as evidence of guilt?
>
> II. Did the circuit court abuse its discretion in denying appellant's motion to dismiss the charges against him on grounds of double jeopardy?
>
> III. Did the trial court abuse its discretion in denying appellant's motion to exclude a certain photograph for a lack of authentication?
>
> IV. Did the trial court abuse its discretion in denying appellant's motion in limine to exclude certain telephone calls he made from jail?
>
> V. Did the trial court abuse its discretion in allowing the investigative police officer to narrate video footage taken from a closed-circuit surveillance camera?

We agree with Mr. Grant's first question and shall therefore reverse his convictions. We address his second question, regarding double jeopardy, because retrial would not be permitted if it violated the rule against double jeopardy. Finding his second question without merit, we shall remand for a new trial. Given our ruling on Mr. Grant's first two questions, we do not reach his remaining evidentiary questions.

[1] Specifically, Mr. Grant was convicted of conspiracy to commit armed robbery; attempted armed robbery; conspiracy to commit first-degree assault; first-degree assault; and use of a firearm in the commission of a crime of violence. The court imposed an aggregate sentence of 60 years of imprisonment, with 15 years of that sentence suspended.

FACTS AND DISCUSSION

I.

Prior to trial, Mr. Grant submitted to the court a written list of voir dire questions, including the following:

> 13. Every person accused of a crime has an absolute constitutional right to remain silent and not testify. If the Defendant chooses not to testify the jury may not consider his silence in any way in determining whether he/she is guilty or not guilty. Is there any member of the jury who is unable or unwilling to uphold and abide by this rule of law?

During voir dire, Mr. Grant objected to the court's refusal to ask this proposed question. The trial court responded, "the constitutional right to remain silent and not testify is fairly covered by the jury instructions. . . . I'm going to decline to give defense 13." At the end of voir dire, defense counsel stated that the empaneled jury was acceptable.

Changing prior precedence, the Court of Appeals recently held in *Kazadi v. State*, 467 Md. 1, 35-36 (2020), that if requested, a trial court must ask during voir dire "whether any prospective jurors are unwilling or unable to comply with the jury instructions on the long-standing fundamental principles of the presumption of innocence, the State's burden of proof, and the defendant's right not to testify." Although a "trial court is not required to use any particular language when complying with [such] a request," the "questions should concisely describe the fundamental right at stake and inquire as to a prospective juror's willingness and ability to follow the trial court's instruction as to that right." *Id*. at 47. The Court stated that its holding applies to the case before it and "any other cases that are pending on direct appeal" when its opinion was filed "where the relevant question has been preserved for appellate review." *Id*.

Mr. Grant argues that the trial court abused its discretion in not asking proposed voir dire question 13 because when the Court of Appeals issued its opinion in *Kazadi*, he had filed an appellate brief. The State agrees. The parties dispute, however, whether Mr. Grant waived his *Kazadi* argument for our review because, although his trial counsel objected to the trial court's refusal to give his requested instruction, Mr. Grant accepted the jury ultimately empaneled.

Kazadi did not explain what is required to preserve this type of claim for appellate review, but we recently addressed the particular waiver question before us in *Foster v. State*, 247 Md. App. 642 (2020). In that case, defense counsel objected to the trial court's refusal to ask its proposed *Kazadi* voir dire questions but accepted the jury as empaneled. *Foster*, 247 Md. App. at 647. Applying *Marquardt v. State*, 164 Md. App. 95 (2005), *overruled in part on other grounds by Kazadi*, 467 Md. at 27, 35-36, and *State v. Stringfellow*, 425 Md. 461 (2012), we held that "Foster did not waive his *Kazadi* claim through his unqualified acceptance of the empaneled jury." *Id*. at 648-51. Accordingly, we reversed his convictions. We employed the same reasoning and reached the same conclusion in an earlier unreported opinion. *See Ablonczy v. State*, No. 3219, Sept. Term, 2018 (Md. App. June 19, 2020). The Court of Appeals granted the State's request for certiorari in *Ablonczy*, on October 6, 2020, and our decision in *Foster* is subject to a pending petition for writ of certiorari.

Foster is controlling. If, while this appeal remains pending, the Court of Appeals reverses our decisions in either *Ablonczy* or *Foster* and applies that ruling to cases pending on appeal, the State may reassert the waiver contention it has raised here. Until that time,

Mr. Grant's unqualified acceptance of the empaneled jury did not constitute a waiver under our decision in *Foster*. Accordingly, we shall vacate Mr. Grant's convictions and remand for a new trial.

II.

This was Mr. Grant's second trial. His first trial ended on the third day of proceedings when the trial court granted his request for a mistrial. Mr. Grant subsequently filed a written motion to dismiss the charges against him on grounds of double jeopardy, characterizing the trial court's actions regarding his motion for a mistrial as a dismissal of the charges. The circuit court denied his motion. Mr. Grant appeals from the denial. We shall provide a brief recital of the facts to place Mr. Grant's double jeopardy question in context.

Mr. Grant's first trial began on March 5, 2019 and lasted three days. During that time, the State elicited evidence that on February 19, 2018, Demetrius Coker was approached by a woman he knew. The woman wanted to purchase marijuana from him. As he proceeded with the sale, a man came from behind a tree with a handgun and shot Mr. Coker. As Mr. Coker lay on the ground, someone went through his pockets and he heard the woman say, "give me that bitch, dummy." Someone shot Mr. Coker a second time. A week after the shooting, Mr. Coker identified Mr. Grant as the person who shot him from a police photographic array. The police subsequently arrested Mr. Grant.

During trial, defense counsel alleged four separate discovery violations. The trial court found that the State had not committed a discovery violation in three of the instances. It is the fourth alleged violation that is at issue here.

On the third day of trial, during the cross-examination of the State's final witness, the lead detective, defense counsel elicited that the detective had executed a search warrant for appellant's home. A bench conference ensued. Defense counsel advised the trial court that the State had never disclosed the search warrant in discovery. Counsel then asked the court to strike all of the detective's testimony or grant a mistrial. The detective testified outside the presence of the jury that he had given a copy of the search warrant to the prosecutor. The detective revealed that while executing the warrant, two cell phones had been recovered. The prosecutor advised the court that she knew nothing about the search warrant. She was aware of the cell phones but believed that they had been recovered from Mr. Grant's person when he was arrested. In any event, the prosecutor had informed defense counsel of the phones' existence.

While reemphasizing that the non-disclosure was unintentional, the prosecutor admitted that she had committed a discovery violation. The following colloquy occurred:

> [THE STATE]: . . . I'm not objecting to the defense's request for a mistrial, Your Honor, in this case. Because I – because I don't think that just postponing it until tomorrow – they need for us to look through everything, because I'm surprised by this issue. I was not ready for this issue.
>
> It is just to have a couple hours to look at it. But I don't think that dismissal, or striking the detective's testimony, is the appropriate remedy.
>
> Striking the detective's entire testimony is not the appropriate remedy. If the Court is thinking about that type of remedy, then I know the defense moved for a mistrial. Or maybe just revisiting this issue in the morning, so I can look through everything.
>
> So, Your Honor, I'm not going to stand here and say that I had the search and seizure warrant and didn't disclose it.

> THE COURT: I understand. I understand. But just so you know, these are the options. Not necessarily the options the Court is considering, but these are the options.
>
> *If there is a mistrial, it is done*.
>
> [THE STATE]: Yes.
>
> THE COURT: *Done deal. Over. Done. Doesn't come back. It has gone away forever*.
>
> [THE STATE]: Okay.
>
> THE COURT: To strike this officer's testimony – or this detective's testimony is almost impossible. I mean, that bell can't be un-rung. That is just – he has been on the stand for hours.
>
> So, I would assume, however, that the State is going to ask for some kind of remedy.
>
> [THE STATE]: Mm-hmm.
>
> THE COURT: You're not going to agree to a mistrial, are you?
>
> [THE STATE]: No. I'm not agreeing to a mistrial, Your Honor.
>
> THE COURT: Okay.

(Emphasis added.)

Finding that the State had committed a discovery violation that was "not reparable," the trial court granted "the defense's request for a *mistrial*." (Emphasis added). The trial court emphasized: "[a]though the Court is finding a discovery violation and is *granting the request for a mistrial*, the Court is, under no circumstances, making a finding that there was any malice on the part of any party in this matter." (Emphasis added). The court then dismissed the jury.

Mr. Grant subsequently filed in circuit court a written "motion to dismiss with prejudice" the charges against him on grounds of double jeopardy, characterizing the trial court's actions regarding his mistrial motion as a dismissal of the charges. The circuit court denied the motion after a hearing. It is from that denial that Mr. Grant appeals.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides, in pertinent part, that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The Double Jeopardy rule protects against, among other things, retrials following mistrials. *Giddins v. State*, 163 Md. App. 322, 325-26 (2005) (citation omitted), *aff'd*, 393 Md. 1 (2006). Ordinarily, however, "where the defendant moves for a mistrial . . . the Double Jeopardy Clause is no bar to retrial." *Oregon v. Kennedy*, 456 U.S. 667, 673 (1982) (citations omitted). That general rule, however, is subject to a narrow exception for "prosecutorial or judicial overreaching." i.e., where the prosecutor "goad[ed] the defendant into moving for a mistrial[.]" *Id*. at 670, 676 (quotation marks and citations omitted).

Mr. Grant acknowledges the above case law. He also acknowledges that "[t]his case does not involve prosecutorial overreaching to goad a mistrial, and the lower court correctly so found." Nonetheless, Mr. Grant argues that double jeopardy principles barred his retrial because of the "unique" circumstances of his case, specifically, "the cumulative effect of the discovery problems"; the State's prosecutor's "overall carelessness" and "the egregiousness" of the discovery violation; the trial court's remarks that a mistrial would

mean that the case was "done" and "gone away forever"; and Mr. Grant's "reliance on the court's unequivocal" remarks.

We reject his reasoning for three reasons. *First*, neither the court nor the parties ever discussed dismissing the charges. Defense counsel requested only a mistrial. The court repeatedly stated that it was granting Mr. Grant's request for a *mistrial*, not a dismissal of the charges *Second*, given that no one ever mentioned dismissal of the charges, Mr. Grant's characterization of the trial court's remarks that the case was "done" as unequivocal assurances that would bring a permanent end to his criminal case is nothing more than wishful thinking when viewed within the context they were made. *Third*, there is no authority to support Mr. Grant's argument that we should create a new, second exception to the general waiver rule to benefit him, even if we were to agree with his characterization of the record and the "uniqueness" of his circumstances, which we do not.

In summary, Mr. Grant requested a mistrial and the trial court granted his request. The trial court found that the prosecutor had not acted in bad faith. The court's findings are not clearly erroneous. For those reasons, retrial is not barred by double jeopardy.[2]

[2] Because we reverse Mr. Grant's convictions based on his *Kazadi* claim, we decline to address his remaining arguments in this appeal. *See Pearson v. State*, 437 Md. 350, 364 n.5 (2014) (noting that "where an appellate court reverses a trial court's judgment on one ground, the appellate court does not address other grounds on which the trial court's judgment could be reversed, as such grounds are moot.").

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. CASE REMANDED TO THAT COURT FOR A NEW TRIAL. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.