Circuit Court for Wicomico County
Case No. C-22-CR-17-000637

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1357

September Term, 2019

CHARLES DARNELL QUAILS

v.

STATE OF MARYLAND

Nazarian,
Friedman,
Wells,

JJ.

Opinion by Wells, J.

Filed: February 22, 2021

The Grand Jury for Wicomico County returned a ten-count indictment against appellant, Charles Darnell Quails, charging him with various sexual offenses against his daughter, A.Q., and her cousin, U.J. Those charges included sexual abuse of a minor, second-degree rape, second- and third-degree sexual offense, and incest. Three jury trials in the Circuit Court for Wicomico County ensued.

The first trial ended in a mistrial, at the defense's request, after an incurable discovery violation became apparent through testimony of a State's witness The second trial also ended in a mistrial, but this time over defense objection, when a State's witness, J.W., failed to appear.

Thereafter, Quails filed a motion to dismiss on the ground of double jeopardy. The circuit court denied that motion and the matter proceeded to a third and final trial. This time, the jury found Quails guilty of all charges except incest of U.J.[1] The court imposed consecutive terms of imprisonment totaling 70 years and ordered that Quails register as a Tier 3 sex offender.

Quails now appeals from the denial of his motion to dismiss. Because we conclude that the circuit court erred in denying that motion, we are constrained to reverse and remand with instructions to dismiss the indictment.

BACKGROUND

[1] A motion for judgment of acquittal was granted as to the charge of incest against U.J. because she was not related to Quails by blood or marriage. (U.J. was the niece of A.Q.'s deceased mother, but Quails had never married A.Q.'s mother and, thus, was not related to U.J. by marriage.)

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During the summer of 2017, when the alleged offenses took place, U.J., her four siblings, and her cousin, A.Q., lived at their maternal grandparents' home in Salisbury.[2] Quails would visit every Friday or Saturday and take A.Q., U.J., and U.J.'s brother, J.J., to his nearby residence, in the basement of a house, where they would spend the weekend. While the children stayed there, all four slept on the same bed.

In September 2017, A.Q., in tears, told her uncle, D.W., that she did not "want to go with [her] daddy" but would not tell him why. D.W. informed his wife, J.W., the children's aunt, what A.Q. had said and urged her to "talk to [her] niece to find out what's going on." A.Q. disclosed to J.W. that Quails had been molesting her and U.J. After J.W. discussed the matter with a friend, the friend called the Salisbury City Police.

Salisbury Police responded to the call and, in turn, notified the Wicomico County Child Advocacy Center. The victims were interviewed by a social worker from the Wicomico County Department of Social Services, and they told her about the molestation.

Four weeks later, in October 2017, Quails was charged, in a ten-count indictment, with two counts of sexual abuse of a minor, second-degree rape, two counts of second-degree sexual offense, three counts of third-degree sexual offense, and two counts of incest. The case proceeded to a jury trial in May 2018.

[2] A.Q.'s mother had passed away in 2012. The record does not indicate why U.J. and her siblings did not live with their mother, although the mother testified that she visited "every day." After the grandmother passed away, U.J. and her siblings then went to live with their mother, while A.Q. remained with her grandfather.

That trial concluded in a mistrial on the first day. Prior to the declaration of a mistrial, five witnesses testified: D.W., J.W., both victims, and the social worker who had interviewed the victims (and whose disclosure of the SAFE examinations precipitated the mistrial). As previously noted, J.W., the witness whose subsequent absence would lead to the second mistrial, testified briefly about A.Q.'s initial disclosure of Quails' sexual abuse and that she had discussed the matter with a friend, who then notified the police. J.W. further testified that Quails was A.Q.'s father and that he was at least twenty-one years old, that the victims were (at the time of trial) nine and twelve years old and that none of the other children visited him at his residence.

A second trial was scheduled to begin July 9, 2018. Several days prior to the scheduled trial date, the State disclosed that D.W., the husband of J.W., had been accused of sexual abuse of U.J., one of the victims in the present case. The trial was postponed until October 2018 to afford the defense an opportunity to investigate this new information.[3]

The second trial began in October 2018. At the beginning of voir dire, the court asked the prospective jurors whether they knew anyone closely associated with the case, including the defendant, the victims, the prosecutor, defense counsel, and the expected witnesses. After mentioning several witnesses by name, the court asked, "Are there any other witnesses who may be called?" The prosecutor replied by naming J.W., the missing

[3] A jury sitting in the Circuit Court for Wicomico County subsequently found D.W. guilty of sexual abuse of a minor and related offenses, and the court sentenced him to eight years' imprisonment. That case currently is on appeal.

witness at issue. The court replied (speaking to the prosecutor), "I thought you struck her. I'm sorry, you did not."

Thereafter, the jury was selected and sworn. The court then took a short recess, and, after it reconvened, the following took place:

> THE COURT: Now, do you want to raise this issue, this issue of unavailability?
>
> [PROSECUTOR]: Yes, Your Honor. [J.W.] is not present. She was subpoenaed, served, she lives in Delaware so she was served via certified mail. She is a crucial witness because she's the person that the victims originally reported to. She's also necessary because she can tell the family history of the family, and the State has to prove family relationships here.
>
> I looked at the hearsay exceptions. It looks like it would be under 5-804 (b)(1), former testimony. She testified fully at the last hearing, [defense counsel] was present and did cross-examine her, so I believe that her testimony would come in if the Court determines that she's unavailable, which is the [***72**] first part of the rule.
>
> The portion of the rule that I believe would apply is, is absent from the hearing and the proponent of the statement has been unable to procure her attendance.
>
> My office has spoken with Ms. [W.] numerous times. She was aware of the trial date. She informed us several times that she was coming. She asked us to make transportation arrangements.
>
> Originally she said she would get here herself, but then she told us that she would call if she needed us to pay for a bus or any other means of transportation.
>
> She told my special investigator, [C.W.], that she would be here. She also told our victim witness coordinator, [K.L.], that she would be here.
>
> She has now apparently reached out to the family of the victim and said she's not coming. She's angry because her husband has subsequently been charged here in Wicomico County.
>
> * * *

> In this case we've had numerous phone and text conversations with her where she told us she was coming, so I did not do the out-of-state subpoena process.

The defense objected, pointing out that the State had conceded that it failed to use the "process available for proper service of a subpoena on an out-of-state witness." The defense further pointed out that, at the time of the first trial, Ms. W.'s husband had not been charged with abusing J.W. The defense therefore argued that it did not have an opportunity to cross-examine Ms. W. about the allegations against her husband. The defense maintained, the allegations were "of a similar nature" to those against Quails, and involved the same victim, making it unfair to admit Ms. W.'s prior testimony.

The trial court denied the State's oral motion to admit Ms. W.'s prior testimony. The prosecutor requested a mistrial. Over defense objection, the court granted that motion.

A third trial was scheduled. Five weeks after the second trial had prematurely concluded, Quails filed a motion to dismiss on the ground of double jeopardy. He pointed out that, "[d]uring the course of voir dire," the court "called the name of every witness and asked that the witness come into the Courtroom if present" but then, when J.W.'s name was called, no one entered the courtroom. It was therefore apparent that Ms. W. "was not present during voir dire."[4] Quails further maintained that the State did not otherwise address Ms. W.'s absence until after the jury had been empaneled and sworn. Under those

[4] The State did not challenge this conclusion in its opposition to the motion to dismiss, nor does it do so in its brief before us.

circumstances, he asserted, there was no manifest necessity for a mistrial, and his case should therefore be dismissed.

The State filed an answer to the motion to dismiss, asserting that Ms. W. "was and remains a crucial witness to original disclosure, familial relationship and child's behavior" and that "there has been no misconduct on the part of the State." The circuit court denied the motion to dismiss and the matter proceeded to a third and final jury trial.

Prior to that trial, the State filed a petition for certification of out-of-state witness to ensure the presence of Ms. W., and she ultimately testified at the third trial. Both victims and the social worker also testified, and transcripts and recordings of the social worker's contemporaneous interviews with the victims were admitted into evidence. Following the jury's finding of guilt and the court's imposition of sentence, Quails noted this appeal.

DISCUSSION

The Double Jeopardy Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, *Benton v. Maryland*, 395 U.S. 784, 794 (1969), provides that "no person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb."[5] U.S. Const. amend. V. Thus, "the State may not prosecute, for the same offense, a defendant who is either acquitted or convicted, if the conviction is upheld on

[5] Although the Constitution of Maryland lacks an express provision prohibiting double jeopardy, "Maryland common law provides well-established protections for individuals against being twice put in jeopardy." *State v. Long*, 405 Md. 527, 536 (2008) (citing *Taylor v. State*, 381 Md. 602, 610 (2004)). Quails does not contend that Maryland common law provides greater protection than the Fifth Amendment and relies exclusively upon decisions interpreting the Fifth Amendment.

appeal." *Nicholson v. State*, 157 Md. App. 304, 310 (2004) (citing *State v. Griffiths*, 338 Md. 485, 489 (1995)).

"Ordinarily, a defendant may not claim the benefit of the clause unless there has been a trial that has proceeded to verdict, but there are exceptions to this rule." *Id.* One of those exceptions applies when, during trial, a court declares a mistrial over defense objection. "Because jeopardy attaches before the judgment becomes final, the constitutional protection also embraces the defendant's 'valued right to have his trial completed by a particular tribunal.'" *Arizona v. Washington*, 434 U.S. 497, 503 (1978) (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)).

"Unlike the situation in which the trial has ended in an acquittal or conviction, retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused." *Id.* at 505. "Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused," the "valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury." *Id.* (footnote omitted). "Yet in view of the importance of the right, and the fact that it is frustrated by any mistrial," the prosecution bears a "heavy" burden if it seeks a retrial following the declaration of a mistrial over defense objection. *Id.*

Thus, once jeopardy attaches,[6] if a trial court declares a mistrial over defense objection, retrial generally is barred unless there was a "manifest necessity" for declaring the mistrial. *Id.*

The "manifest necessity" standard, however, should not be applied "mechanically." *Id.* at 506. Rather, we must apply it in the context of "the particular problem confronting the trial judge." *Id.* "Whether manifest necessity to declare a mistrial and, thus, whether the prohibition of the double jeopardy clause is triggered depend upon the unique facts and circumstances of each case." *Mansfield v. State*, 422 Md. 269, 287 (2011) (citations omitted).

Nonetheless, there are a few general principles that may be derived from the case law. Those were summarized by the Court of Appeals:

> [T]here exists "manifest necessity" for a mistrial 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.

State v. Baker, 453 Md. 32, 49 (2017).

In considering the application of the "manifest necessity" standard in a related context, we pointed out that there is "tension" between a trial court's "great discretion" to

[6] In a jury trial, jeopardy attaches when the jury is empaneled and sworn, *Hubbard v. State*, 395 Md. 73, 90 (2006) (citations omitted), whereas in a bench trial, jeopardy attaches when the court "begins to hear or receive evidence." *Mansfield v. State*, 422 Md. 269, 282 (2011) (citation and quotation omitted). In the instant case, there is no dispute that jeopardy had attached prior to the time the court granted the State's motion for mistrial.

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declare a mistrial and a defendant's constitutional right "to have his trial completed by the particular tribunal summoned to sit in judgment of him." *McCorkle v. State*, 95 Md. App. 31, 60 (1993). We further explained that the scope of a trial court's discretion may be viewed along a "sliding scale."[7] *Id.*

At one extreme is a case in which "a prosecutor proceeds to trial aware that key witnesses are not available to give testimony and a mistrial is later granted for that reason." *Washington*, 434 U.S. at 508 n.24 (citing *Downum v. United States*, 372 U.S. 734 (1963)). In such a case, "a second prosecution is barred," *id.*, that is, "the trial court has *no* discretion to grant a mistrial." *McCorkle*, 95 Md. App. at 61.

In a second category is a case in which "the prosecutor has proceeded to trial unaware" that critical evidence is unavailable; if the trial court later declares a mistrial for that reason, we review its decision under the "strictest scrutiny." *Id.* (quoting *Washington*, 434 U.S. at 508). In other words, in such a case, the trial court "is vested with *limited* discretion to grant a mistrial." *Id.*

Finally, at the opposite extreme is a case in which the trial court has declared a mistrial "premised upon" its "belief that the jury is unable to reach a verdict, long considered the classic basis for a proper mistrial." *Washington*, 434 U.S. at 509 (citing *Downum*, 372 U.S. at 735-36). "[W]ithout exception, the courts have held that the trial

[7] Similarly, in *Baker*, 453 Md. at 54-55, the Court of Appeals described a "spectrum of circumstances precipitating the declaration of a mistrial," with a case in which a mistrial is declared to give a prosecutor "an unfair advantage" at one end, and a hung jury at the other.

judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial," and a trial judge's decision to declare a mistrial upon finding that a jury is deadlocked is "accorded great deference by a reviewing court." *Id.* at 509-10 (footnote omitted).

Turning to this case, we observe that it is far closer to the first extreme. Even under the interpretation of the record most generous to the State, we conclude that the prosecutor, prior to the empaneling of the jury, must have known that the missing witness, J.W., was unavailable. She had been trying, to no avail, to persuade J.W. to appear; she acknowledged that she had neglected to file a petition for certification of out-of-state witness, which would have compelled J.W. to appear, instead attempting to serve J.W. with a subpoena by sending a process server to court proceedings in D.W.'s Maryland criminal case but without success; she knew that J.W. was angry that her husband had been charged with crimes, which called J.W.'s continued cooperation into question; and finally, when, during voir dire, just before the jury was selected and sworn, it became apparent that J.W. was not present, she did not ask for a continuance. Under these circumstances, where the "prosecutor proceeds to trial aware that key witnesses are not available to give testimony and a mistrial is later granted for that reason," a "second prosecution is barred." *Washington*, 434 U.S. at 508 n.24 (citing *Downum*, 372 U.S. 734 (1963)).

There are further reasons "manifest necessity" has not been established in this case. It appears that the only alternative to a mistrial the court considered was to introduce J.W.'s prior testimony, which it correctly determined was not feasible. But there were other alternatives that should have been considered, and at least one of them was feasible.

Two options that could have been considered are: (1) granting a continuance to the State to afford it an opportunity to file a petition for certification of out-of-state witness (as it subsequently did prior to the third trial), or (2) proceeding to trial without J.W.'s testimony. The first possibility was not considered, and from this vantage point, we cannot say whether it would have been feasible. The jurors had been told that the trial would last no longer than two days, and we do not know whether J.W.'s appearance could have been secured within that time frame, although it is by no means clear that it would have been impossible to do so. From the record we have, the court did not consider the possibility that the State could have proceeded with its remaining witnesses while seeking to compel J.W.'s appearance.

In any event, the State could have proceeded without J.W.'s testimony. She was, at most, a corroborating witness. We understand that the State would have preferred to have her testimony, but under the circumstances, we fail to see that it was essential. Not only were both victims available to testify, but so was the social worker who interviewed them the same day that the abuse was reported to authorities. The State could have also introduced into evidence recordings and transcripts of those interviews, as it ultimately did at the third trial. As for the State's contention that J.W.'s testimony was required to establish Quails' familial relationship to the victims, that would have been necessary for at most a single charge of incest against A.Q. but was not necessary as to the other charges. Moreover, the State could have established that relationship by other means, such as public records or perhaps a birth certificate. But even if the result would have been a failure to prove an element of that charge, there still would not have been manifest necessity. *See*

Downum, 372 U.S. at 737 (noting that the missing witness "was essential only for two of the six counts concerning petitioner," and that the matter could have proceeded on the remaining four counts of the indictment).

The State's reliance upon *McCorkle* is misplaced, as that case is readily distinguishable from the matter before us. In *McCorkle*, a key witness who had been expected to appear and testify apparently developed cold feet while the trial was in progress. The trial took place over a one-week period, the witness had been present the first two days of trial but had not yet been called to testify, and it was not until the third day, when the State wished to call him to testify, that he was absent. 95 Md. App. at 35, 38 n.3. When the trial reconvened the following Tuesday, the fourth day of the trial, and the witness still failed to appear, claiming that he was ill, the trial judge and opposing counsel conducted a telephone conference call with him to ascertain his condition and subsequent availability. *Id.* at 36-37. Furthermore, the prosecution was required to call all its remaining witnesses, and the defense also was required to call several witnesses out of order. *Id.* at 34-35, 38. Finally, because the witness lived in northern Virginia, the State sought the cooperation of Virginia authorities to locate and compel the witness to testify but were unable to find him. *Id.* at 38. It was only after these extraordinary measures that the court declared a mistrial, and, on appeal, we held that there had been manifest necessity to do so. *Id.* at 39, 61-62. Obviously, the most important difference between *McCorkle* and the instant case is that in the former, the witness actually was present when the jury was empaneled and sworn, unlike here. And of course, in *McCorkle*, unlike here, the trial

court painstakingly explored alternatives to a mistrial before resorting to such a drastic remedy.

Nor are we persuaded by *Hughey v. State*, 522 A.2d 335 (Del. 1987). Hughey was charged with vehicular homicide, and the witness at issue, Westover, who had been a passenger in Hughey's vehicle, was an Air Force servicemember stationed in New York. *Id.* at 337. As was the case here, the prosecution failed to invoke the interstate compact to compel Westover's presence believing that he would voluntarily appear for the trial. *Id.* Westover traveled to Delaware the day before trial but, after conferring with counsel and being advised that he "did not have to appear," changed his mind and, "without contacting the prosecutor or defense counsel, concealed his whereabouts and returned to his base in New York." *Id.* at 337-38. The following day, the case was called for trial, and a jury was empaneled and sworn. *Id.* at 338. Because the State could not locate Westover, the case was continued until the following day. *Id.* Ultimately, the State learned that Westover had left Delaware and returned to New York, and, two days after the jury had been sworn, the trial court declared a mistrial over defense objection. *Id.* After Hughey's pretrial motion to dismiss was denied, and he was convicted of a lesser included offense, driving while under the influence of alcohol, he appealed. *Id.*

The Supreme Court of Delaware held that there had been manifest necessity to declare a mistrial. The Court reasoned as follows:

> Given the arrangements that the State made to ensure Westover's appearance and his evident cooperation with the State, we find its failure to properly subpoena this essential out-of-state witness to be [regrettable] but not the cause of the witness' failure to appear at trial. Clearly Westover traveled to Delaware intending to testify and then changed his mind, for

> reasons not apparent on this record, and went into hiding. Further, we decline to establish a hard-and-fast rule as a matter of law that the failure of a party to properly subpoena an out-of-state witness precludes the party from invoking the doctrine of "manifest necessity" after jeopardy has attached.

Id. at 340 (citation omitted) (footnote omitted).

Completely absent from this analysis is any discussion whatsoever of reasonable alternatives to the declaration of a mistrial. *See Baker*, *supra*, 453 Md. at 49 (precluding a finding of manifest necessity unless no reasonable alternative is available). Moreover, unlike the case here, Westover's testimony was, in the words of the Delaware High Court, necessary "to establish the elements of" the charged offense. *Id.* at 337. We decline the State's invitation to apply *Hughey* to the facts of this case.

In *Morris v. State*, 153 Md. App. 480 (2003), *cert. denied*, 380 Md. 618 (2004), we explained the rationale behind reversing a criminal conviction. While the Due Process Clause of the United States Constitution is far more than "a technical" basis for reversal, Judge Moylan aptly describes the rationale for our decision in this case:

> When due process demands, the law will reverse the conviction of an undisputed and cold-blooded killer even on a technicality, *because it must*. A critical component of that principle, however, is the qualifying clause "because it must." It is not with any sense of satisfaction that a court reverses on a technicality. When it does so, it does so reluctantly and with heavy heart, and *only because it must*.

Id. at 522-23.

JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY REVERSED. CASE REMANDED WITH INSTRUCTIONS TO DISMISS THE INDICTMENT. COSTS TO BE PAID BY WICOMICO COUNTY.