UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0573

September Term, 2015

KEITH SHEPPARD

v.

STATE OF MARYLAND

Graeff,
Friedman,
Harrell, Glenn T., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: July 21, 2016

Haste continues to make waste, it seems. The criminal trial of Appellant, Keith Sheppard, began in the Circuit Court for Montgomery County on 10 March 2015 and ended in a mistrial on the following day. A new trial was scheduled for 20 April 2015. Before that could commence, however, Sheppard moved to bar the new trial and dismiss the charges for violation of his right to be free from double jeopardy. The County Administrative Judge received testimony, heard oral arguments, and denied the motion, concluding that Sheppard consented to the mistrial and waived his right to avoid double jeopardy. Further proceedings in the circuit court have been stayed, pending the outcome of this interlocutory appeal. We shall reverse, for reasons we shall elaborate, the circuit court's denial of the motion.

FACTS AND LEGAL PROCEEDINGS

On 30 October 2014, Sheppard was indicted on five counts: armed carjacking, conspiracy to commit armed carjacking, armed robbery, conspiracy to commit armed robbery, and use of a handgun in the commission of a crime of violence. The State recovered two sets of fingerprints in its investigation of the crimes. The first set, recovered from the carjacked vehicle, found five-and-a-half hours after and 30 miles away from where the carjacking occurred, could not be connected to Sheppard. The second set, assertedly connected to Sheppard by the State shortly before the initial trial date, was taken from a cardboard beverage carrier found at the scene of the carjacking.

Sheppard and the State informed the circuit court on 26 February 2015 that they were prepared for the trial to commence on 10 March 2015. Four days before the trial

was to start, the State moved for a postponement in order to secure an expert witness through which to introduce the second set of fingerprints. In the State's motion, it explained that, because Sheppard was not identified as a suspect through DNA test results connecting him to a cigarette butt found in the carjacked vehicle until a year after the crime, its investigating officers were unable to run a fingerprint database comparison on the second set of fingerprints in a more timely fashion.[1] Sheppard responded by moving to exclude the State from calling a fingerprint expert and the second set of

[1] The record on the issue of the late disclosure of this fingerprint evidence is vague and the allegations relating to it is, at times, contradictory. According to a document produced by the State in its initial discovery response, dated 22 August 2013, the State requested that the cardboard beverage container be tested for latent prints, which was completed on 9 September 2013 and received by the State on 12 September 2013. Latent prints were pulled from the cardboard beverage container at this time.

On 25 June 2014, an Application for Statement of Charges was filed explaining that on 20 February 2014, a cigarette butt found inside the vehicle was analyzed for DNA. The results of this test were compared to the Maryland State and National DNA databases and the DNA from the cigarette butt was found to be consistent with Sheppard's DNA profile as maintained in the database. A search warrant was then issued and a comparison sample of Sheppard's DNA was taken. After a comparison on 11 June 2014, it was determined that Sheppard's DNA matched the DNA found on the cigarette butt.

In its Motion to Continue Trial, however, the State explained that "[o]n Tuesday, March 3, 2015, the State determined that a latent fingerprint of value had been recovered in this case; the print was found recovered on an item of evidence collected at the crime scene; no comparison had ever been requested as [Sheppard] was not arrested until a CODIS hit was returned from [the] cigarette butt recovered hours after [the carjacking]."

At the March 10 hearing on this motion, the State noted that "[i]n preparing for trial, we saw that the detective in this case had never requested that the print recovered from an item recovered at the scene belonging to the victim and taken from her by the defendant, had never been compared against Mr. Sheppard."

Thus, it is unclear exactly when the "ball" was dropped by the State as to the second set of fingerprints, but it seems clear that a discovery violation occurred.

prints, arguing that the State should be held responsible for its late disclosure because it waited unjustifiably until right before trial to discover and/or seek to compare the prints to available databases. Conceding that the fingerprint evidence disclosure was untimely, the State renewed nonetheless its request for a continuance. It maintained that the evidence was an "essential piece of evidence which tied this defendant to the scene of the crime," but allowed as how, because of the late notice of the existence of the second set of prints, that Sheppard be given "a week or two . . . to have this print examined."

On 10 March 2015, the circuit court granted Sheppard's motion in limine to exclude the fingerprint evidence, determining that the prejudicial nature of this evidence was significant and it was not persuaded that "prejudice would be minimized by delay of the trial date." The trial judge found also that the State's late disclosure lacked good cause. In view of this ruling, the prosecutor confirmed (albeit obscurely) with the judge that there would be a ban at trial on any "reference to the fact that nothing was tested at the time of the scene." Defense counsel agreed, adding that he certainly did not intend to "open the door" by anything he might say or do.

With this "understanding," a jury was impaneled. The parties' attorneys gave their respective opening statements. Defense counsel argued to the jury "there is no evidence, ladies and gentlemen, that puts Mr. Sheppard at the scene of the crime." The State objected to this statement, but the judge overruled the objection. Defense counsel continued, without objection, stating that the fingerprints taken from the car did not

match Sheppard's known fingerprints.[2] After opening statements, the jury was excused for the day.

The next day, the State asked the circuit court to reconsider its in limine ruling on the second set of fingerprints. Sheppard opposed reconsideration because circumstances had not changed since the in limine ruling or the judge's over-ruling of the prosecutor's objection during the defense's opening statement. The trial judge reversed nonetheless his in limine ruling regarding the admission of the fingerprint evidence, stating that defense counsel "opened the door" by commenting on fingerprint evidence (or lack thereof) during his opening statement.

In response to the trial judge's change of mind, Sheppard moved immediately for a continuance to allow for time to examine the fingerprint evidence and procure potentially his own expert witness to defend against what it seemed the State's expert would likely say. Defense counsel explained that, during his opening statement, he was referring to the first set of fingerprints (found in the car), instead of the second set (found on the cardboard beverage carrier at the crime scene). In response, the judge stated:

> Well, it is unfair prejudice to the State to suggest that there were prints that were taken and that there's no evidence as to whether there was any positive result, and to say to limit it to the car as opposed to the scene, frankly is a distinction without a difference when you are suggesting to the jury that fingerprints were taken and there's no positive result.

[2] Defense counsel said, "You're going to hear that fingerprints were taken, yes, I'm referring to the car, when it was analyzed. I ask you to listen and see if there was a positive result for those."

Defense counsel renewed his request for a continuance. The State opposed Sheppard's request, arguing that, in light of the impanelment of the jury, only an overnight continuance would be feasible to permit defense to interview the State's off-stage expert; otherwise, the State considered the proceeding to be "a mistrial at this point in time" and asked the court to find manifest necessity to declare a mistrial. Sheppard countered that an overnight continuance would not alleviate sufficiently the latest ruling regarding the fingerprint evidence in light of its significance and prejudice to the defense's case. The trial court inquired if Sheppard also was asking for a mistrial, adding that "[i]f you're asking for a mistrial, I will find that there is manifest necessity."

Sheppard protested that, because the "evidence came up during the course of the trial . . . the procedure at that point was to ask for the continuance of the case to allow the defendant to obtain an expert." The circuit court reiterated that it was willing to grant a mistrial and stated that "the only continuance would be [to] set the trial over until tomorrow and keep the same jury impaneled." Following a brief recess, defense counsel confronted the Hobson's choice before him and his client:

> [O]n the one hand I am requesting a continuance of this trial so I could see if I can consult with a fingerprint expert, but if I'm, you know, not able to do that, I am left being unprepared to represent Mr. Sheppard because of late disclosure of the fingerprints. If it's my understanding the Court is not inclined for a continuance, then I am forced to ask for a mistrial.

The trial judge determined that it would be unreasonable to anticipate that Sheppard could find a defense expert to testify on such short notice especially, given the court's

desire to accommodate and retain the seated jury. The court found manifest necessity and declared a mistrial.[3]

On 20 April 2015, the day the scheduled new trial was to commence, Sheppard moved to dismiss the charges on double jeopardy grounds. He asked that another judge hear the motion. The trial judge granted the request and the motion was heard by the County Administrative Judge. Defense counsel argued to the Administrative Judge that Sheppard did not consent to a mistrial and that, even if it were found that he did, the consent was secured under goading or pressure attributable to the trial judge's overreaching, aided and abetted by the prosecutor. In addition, Sheppard contended that he did not "open any doors" to the fingerprint evidence in his opening statement and thus there were no grounds for manifest necessity for a mistrial because the trial judge could have employed a lesser alternative, such as a continuance, to address the circumstances.

The Administrative Judge denied Sheppard's motion on the ground that Sheppard consented to the mistrial. He reasoned that Sheppard waived his right to assert double jeopardy because he "did, in fact, request a mistrial. . . [a]lbeit reluctantly." The

[3] Later, before the Administrative Judge, the trial judge explained again his reasoning for invoking a mistrial: ". . . once the jury was sworn, the continuance that would have allowed defendant a reasonable opportunity to interview the State's expert, obtain their own expert, was just not realistic . . . a mistrial needed to occur in order for the defendant to defend against the evidence that they [sic] thought would not be used against the defendant at trial."

Administrative Judge refused also to find any deliberate goading on the part of the trial judge which would justify the grant of Sheppard's motion:

> I think there's a world of difference between the question of whether a judge was right or wrong, and whether the judge was improperly acting to favor the State and goading the defendant into making a request for a mistrial. And I don't think here that it is apparent or inescapable that that was the case. I think that, at the worst, you have worst for the State, best for the defendants. You have a situation . . . that falls short of goading the defendant into making such a motion. So I'm going to deny the motion to dismiss on double jeopardy grounds.

Sheppard filed a timely notice of appeal with this Court on 29 April 2015.

QUESTION PRESENTED

Sheppard presents two questions for our consideration, which we have condensed into the following question:

> Did the circuit court abuse its discretion in holding that Sheppard consented to a mistrial and if so, did it err also in finding manifest necessity, thus lifting the double jeopardy bar against retrial?[4]

For the following reasons, we reverse the circuit court's denial of Sheppard's motion to bar a new trial and dismiss the charges, holding that the grant of a mistrial was improper.

[4] Sheppard's questions were framed as follows:

1. Did Appellant consent to the declaration of a mistrial and, if so, was his consent forced?

2. Was there manifest necessity for the declaration of a mistrial?

STANDARD OF REVIEW

Maryland case law makes relatively clear that when an appellate court reviews the grant of a mistrial, the court applies ordinarily an abuse of discretion standard. *See Simmons v. State*, 436 Md. 202, 212, 81 A.3d 383, 389 (2013) ("it is well-settled that a decision to grant a mistrial lies within the sound discretion of the trial judge"). We look specifically to whether the trial judge's exercise of discretion was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Stabb v. State*, 423 Md. 454, 465, 31 A.3d 922, 928 (2011).[5] Being present to observe the witnesses and counsel places the trial judge "in a superior position to judge the effect of any of the alleged improper remarks." *Simmons*, 436 Md. at 212, 81 A.3d at 389 (quoting *Wilhelm v. State*, 272 Md. 404, 429, 326 A.2d 707, 723 (1974)).

DISCUSSION

I. Contentions

Sheppard contends that, although his comments could be parsed to be understood as agreeing to declaration of a mistrial, any such agreement was conditioned expressly on the patent assumption that the circuit court would not grant him a reasonable continuance that would allow him appropriate time to prepare a defense against the late-

[5] On occasion, the Court of Appeals will review a mistrial challenge *de novo*. *Giddins v. State*, 393 Md. 1, 15, 899 A.2d 139, 147 (2006). *Giddins* concerned whether remarks made by the trial judge in explaining his purpose for declaring a mistrial constituted as well an acquittal for double jeopardy purposes so as to bar a retrial. That involved a question of law. In the present case, the question presented challenges the exercise of discretion.

appearing potential of arguably inculpatory fingerprint evidence. Sheppard contends further that, based on the record, it was clear that the circuit court would have ordered a mistrial regardless of anything he argued. Alternatively, Sheppard maintains that, even if he agreed to the declaration of a mistrial, the circuit court pressured improperly him into it, rendering his consent invalid. Finally, manifest necessity was not present because reasonable alternatives, such as a curative instruction or continuance, existed.

The State responds that the circuit court offered a reasonable alternative to Sheppard, in the form of an overnight continuance to allow him the opportunity to examine the State's expert and fingerprint evidence. On the question of the validity of Sheppard's consent, the State argues further that it was correct for the Administrative Judge to find that the trial court did not have "an improper motive."

II. Analysis

Because granting a mistrial is a drastic remedy, the discretionary power of the courts in this regard ought to be deployed with great caution, under only urgent circumstances or for very plain and obvious causes. *Jourdan v. State*, 275 Md. 495, 510, 341 A.2d 388, 397 (1975). Applicable to the decision to grant a mistrial, the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, states that, "no . . . person shall be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

In a state jury trial, jeopardy attaches when the jury is impaneled and sworn. *See Illinois v. Somerville*, 410 U.S. 458, 460 (1973), *West v. State*, 52 Md. App. 624, 628,

451 A.2d 1229, 1232 (1982) ("the magic moment when jeopardy begins is the instant that the jury is sworn."), *Jourdan*, 275 Md. at 507, 341 A.2d at 395 (1975) ("at the time the mistrial was declared . . . jeopardy had attached to Jourdan, as the jury had been empaneled and sworn."). Thus, when a trial is not completed and a mistrial is declared, the Double Jeopardy Clause will prohibit the retrial of a defendant unless that defendant consented to the mistrial, *United States v. Dinitz*, 424 U.S. 600, 607 (1976), *Jourdan*, 275 Md. at 508, 341 A.2d at 396, or unless the mistrial was compelled by "manifest necessity," *Arizona v. Washington*, 434 U.S. 497, 505 (1978).

a. Validity of Sheppard's "Consent"

When a mistrial is declared with a defendant's consent, it removes ordinarily any barrier to re-prosecution. *United States v. Jorn*, 400 U.S. 470, 485 (1971). As a result, the manifest necessity standard does not figure in the analysis because the defendant's act constitutes an election to forgo the "valued right to have his guilt or innocence determined by the first trier of fact." *Martinez v. Caldwell*, 644 F.3d 238, 243 (5th Cir. 2011).

A party's seeming verbal agreement to a mistrial does not suffice invariably as consent per se. If a defendant fails to object timely to the declaration of a mistrial, he or she may be held to have consented impliedly to the mistrial and may be tried in a later proceeding. *Martinez*, 644 F.3d at 243. Conversely, when a party does nothing to

contribute to the circumstances leading to the declaration of a mistrial[6], objects consistently to any notion of mistrial, is left by the trial court with no viable options other than a mistrial, or then acquiesces in a mistrial under protest, justice requires that it not be concluded that the party consented to the mistrial, despite appearances to the contrary.

In *Jourdan*, when the trial court stated that "there is no opposition to the court declaring a mistrial under the circumstances," the defense counsel responded, "under the circumstances." 275 Md. at 500, 341 A.2d at 391. The State asked again, "so far as the defendant is concerned there is no problem declaring a mistrial, is that correct?" *Id.* The defense replied, "that is correct." *Id.* The Court of Appeals held nevertheless that the defendant did not consent to a mistrial, notwithstanding the superficial indications to the contrary. It considered the defense attorney's seeming conciliatory remark in the context of his lack of meaningful options at trial, explaining:

> It should be remembered that these comments by the defense attorney were made after the defense attorney had refused to take a position or even

[6] The trial judge here found that the defense counsel, through reference to the fingerprints taken from the car when it was found at some distance from the crime scene, somehow "opened the door" for the State to counter with the evidence of the fingerprints recovered from the cardboard beverage container recovered from the carjacking scene (but obviously not within the vehicle). This finding, although perhaps understandable due to the confusing nature of how the evidence was obtained as explained by the State, is incorrect. Throughout his opening statement, defense counsel repeated that all evidence he might refer was that taken from or within the car. He did not refer to anything recovered from the physical location of the carjacking. Defense counsel's commentary on the evidence was measured, and did not create irredeemable prejudice for the State at the time uttered.

> comment on declaring a mistrial, were made after the court stated for the record that there was no indication that the defendant "voluntarily consents," and were made after the determination that "the court is going to declare a mistrial" [anyways].

Jourdan, 275 Md. at 509, 341 A.2d at 396.

A narrow exception exists also when a defendant's motion for (or acquiescence in declaration of) a mistrial is the result of judicial or prosecutorial impropriety *that was intended to provoke* the defendant into such a course of action. *Oregon v. Kennedy*, 456 U.S. 667, 679 (1982) (emphasis added). If there is evidence of this type of provocation, then the defendant is said not to have consented and the Double Jeopardy Clause bars retrial. *Giddins v. State*, 393 Md. 1, 18, 899 A.2d 139, 148-49 (2006). To qualify for this exception, the defendant bears the burden "of demonstrating judicial impropriety sufficient to show that the [judge's actions were] intended to provoke a mistrial," and the reviewing court must scrutinize the objective facts and circumstances. *Butler v. State*, 95 A.3d 21, 33 (Del. 2014). Thus, even if a defendant consents, the Double Jeopardy Clause may bar still retrial if "bad faith conduct by judge or prosecutor threatens harassment of an accused…so as to afford the prosecution more favorable opportunity to convict the defendant." *Martinez*, 644 F.3d at 243 (citation omitted).

We looked in *West* "not to the error itself and not to the plight of the defendant who [had] been afflicted by that error but rather to *the intent* with which the error was committed." 52 Md. App. at 633-34, 451 A.2d at 1234 (emphasis added). There, in the course of direct examination, an inexperienced police officer blurted inadvertently that an absent witness, under police questioning, implicated the defendant in the crime. This

led the defense to move for a mistrial due to the prejudicial nature of the blurt. We held there to be insufficient evidence to establish a specific intent on the part of the prosecutor to gain an unfair advantage over the defendant. *West*, 52 Md. App. at 638, 451 A.2d at 1236.

In *Martinez*, the trial judge learned inadvertently that the jury was deadlocked, but failed to disclose this fact to the parties. Although the judge admitted that he withheld the status of the jury deliberation, he testified that he did not want a mistrial and that, during sidebar conferences, counsel for both parties asked him not to disclose such information. *Martinez*, 644 F.3d at 244. The reviewing court held that there was insufficient evidence to demonstrate that the state court judge intended to goad the defense into consenting to a mistrial through his failure to disclose his knowledge of the status of the jury's deliberations. *Id.*

Sheppard moved for a continuance immediately following the trial judge's announcement that he had "revisited [his in limine] ruling and was not changing [the reversal of same]." The State opposed Appellant's proposed continuance, suggesting in its place either an overnight opportunity to prepare a defense against the imminent new material evidence or a mistrial based on manifest necessity. Only after the trial judge accepted the State's suggestion and stated he would not consider favorably any other remedies did Sheppard acquiesce reluctantly in a mistrial declaration. It was understandable for Sheppard to reject as inadequate the overnight "Alka-Seltzer" remedy, given the substantial prejudice to the defense of the State's new evidence,

especially without the likelihood of having time to engage a defense expert. It was reasonable also for Sheppard to believe that, despite his protests, the trial court would declare a mistrial regardless. Under those circumstances, Sheppard lacked any meaningful choice, which led to his announcement that he acquiesced in a mistrial. His verbal consent lacked legal validity.[7]

b. Manifest Necessity to Support Declaration of a Mistrial

It is apparent that if a defendant consents to a mistrial, in the absence of a trial judge's bad faith, he or she has waived any double jeopardy claim. When, however, a mistrial is granted over a defendant's objection, double jeopardy will not bar a retrial if there exists "manifest necessity" for declaration of the mistrial. *Simmons*, 436 Md. at 213, 81 A3d at 390. Whether manifest necessity to declare a mistrial exists is based upon the unique facts and circumstances of each case, and "the trial judge must engage in the process of exploring reasonable alternatives." *Hubbard v. State*, 395 Md. 73, 92, 909 A.2d 270, 281 (2006). If there was a reasonable alternative, but a mistrial was granted nevertheless, the mistrial was not necessary manifestly, and the defendant may not be retried. If there were no reasonable alternatives, ordinarily the mistrial was necessary

[7] Sheppard and the State argue vigorously in their briefs whether the trial judge and the prosecutor goaded improperly Sheppard into acquiescing in a mistrial, thereby making his consent invalid. Because we find Sheppard's motion for mistrial invalid on other grounds, we need not resolve this dispute. Suffice to say that invalidating Sheppard's consent to mistrial on the grounds of goading requires exacting proof of bad faith on the part of the trial judge. *See Earnest v. Dorsey*, 87 F.3d 1123, 1130 (1996) (citing *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982)).

manifestly, and retrial is not barred.[8] Any doubt on the question of manifest necessity should be resolved in favor of the defendant. *In re Mark R.*, 294 Md. 244, 262, 449 A.2d 393, 403 (1982) (citing *Downum v. United States*, 372 U.S. 734, 738 (1963)).

Because we conclude that Sheppard's consent was without validity, he did not waive his rights under the Double Jeopardy clause. Because the mistrial was declared over Sheppard's presumed objection, the State must shoulder the heavy burden of demonstrating manifest necessity to avoid the double jeopardy bar to retrial. *Hubbard*, 395 Md. at 89, 909 A.2d at 279. The State must show that the trial judge explored reasonable alternatives to a mistrial and determined that none were available. *Simmons*, 436 Md. at 215, 81 A.3d at 391 (citing *Hubbard*, 395 Md. at 92, 909 A.2d at 281). Here, the State did not meet that burden because reasonable alternatives to mistrial, such as a timely curative instruction, existed.

In *Simmons*, the Court of Appeals held that the defense counsel's reference, during opening statements, to the defendant's willingness to take a lie detector test to

[8] The phrase "manifest necessity" characterizes fairly "the magnitude of the prosecutor's burden." *Arizona v. Washington*, 434 U.S. 497, 505 (1978). There are degrees of necessity. A "high degree" is required before concluding that a mistrial is appropriate. *Arizona*, 434 U.S. at 506. Typical examples include a hung jury, improper remarks by counsel, and juror misconduct or bias. *See Downum v. United States*, 372 U.S. 734, 735-736 (mistrial was premised upon the trial judge's belief that the jury was unable to reach a verdict); *Simmons v. State*, 436 Md. 202, 220, 81 A.3d 383, 394 (2013) (defense counsel's remark, during opening statement, about defendant's willingness to take a lie detector test to prove his innocence creates manifest necessity for a mistrial); and *Thompson v. United States*, 155 U.S. 271, 274 (1894) (one of the trial jurors served on the grand jury that indicted the defendant).

prove his innocence, created manifest necessity for a mistrial. 436 Md. at 223, 81 A.3d at 395. The Court of Appeals found that a curative jury instruction would be inadequate to cure the prejudice, explaining:

> [A]n opening statement is a powerful setting, and that in this particular instance, we're dealing with a statement not . . . unexpectedly presented by a witness, but a statement carefully made as part of a preview of the evidence to the jury. . . The statement, in effect, constituted a substitute for the defendant's testimony. . . [and] credibility is central to the prosecution of this case. . . there is no way to erase the potential infection of the jurors' minds as to [Petitioner's] offer to take a lie detector test.

Simmons, 436 Md. at 221-22, 81 A.3d at 394-95 (internal quotation marks omitted).

On the other hand, even an unexpected development at trial, such as the illness of counsel, does not preclude necessarily reasonable alternatives to, and therefore justify, a mistrial. In *Jourdan*, the Court of Appeals found no manifest necessity for the *sua sponte* declaration of a mistrial when the Deputy State's Attorney became ill after the trial began. The Court reasoned that a continuance would have been proper because another assistant state's attorney, who was equally experienced in such cases, could have been as well prepared and could have stepped in. *Jourdan*, 275 Md. at 510, 341 A.2d at 397. In the alternative, the case could have been continued for a reasonable period of time until the Deputy State's Attorney recovered and resumed his duties. *Jourdan*, 275 Md. at 511, 341 A.2d at 398.

Here, defense counsel's opening statement, alleging in a non-specific manner that no fingerprint evidence would be adduced from the car connecting Sheppard to the crime (which would have been a reliable expectation at the time it was uttered, based on

the trial judge's then still intact in limine ruling), was far less prejudicial to the State than the defendant's offer to take a lie detector test in *Simmons*. Unlike the defendant in *Simmons*, who offered as direct proof of his innocence through a lie detector test and therefore unduly influenced the jury's assessment of his credibility, Sheppard referred merely to a rational expectation of a lack of a genre of typically incriminating evidence. Hence, the circuit court's finding, based on one general remark during the opening statement about a lack of fingerprint evidence from the car, that the jury would be biased in favor of Sheppard and therefore be unable to render a fair outcome, was unbalanced. A timely and accurate curative instruction by the trial judge could have repaired any bias against the State at this stage of the proceeding.

Even assuming that Sheppard opened the door in his opening statement regarding the second set of fingerprints, the effect of the circuit court's reversal of its in limine evidentiary ruling (made after the court overruled the State's objection to defense counsel's argument in his opening statement) was that Sheppard was caught suddenly unprepared (after jeopardy attached) in his defense. Under those circumstances, it was reasonable for the defendant to ask for, and customary for the court to grant, a continuance of a reasonable length of time. Similar to the prosecution in *Jourdan*, where additional time was needed to cope with an unexpected and prejudicial development at trial, here Sheppard could have benefitted from a relatively short (but longer than overnight) continuance. Under these circumstances, the circuit court abused its discretion in not allowing any reasonable length of continuance.

Because the mistrial was declared over Sheppard's presumed objection and because manifest necessity did not exist due to the viable alternatives of a curative jury instruction or a continuance, retrial is barred on double jeopardy grounds. The Administrative Judge's ruling is reversed. Sheppard's motion to dismiss should be granted.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED. CASE REMANDED TO THAT COURT WITH DIRECTIONS TO DISMISS THE CHARGES AGAINST APPELLANT. COSTS TO BE PAID BY MONTGOMERY COUNTY.