Circuit Court for Charles County
Case Nos. C-08-CR-23-000048,
C-08-CR-23-000055

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 414

September Term, 2023

RALPH JOELLY DAVILA-COSME

v.

STATE OF MARYLAND

Reed,
Tang,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: May 15, 2024

Ralph Joelly Davila-Cosme, appellant, was charged with driving a vehicle while under the influence of alcohol while transporting a minor and other offenses. He was tried by a jury sitting in the Circuit Court for Charles County. During trial, the court *sua sponte* declared a mistrial after unsuccessfully attempting to cure a discovery violation by the State.

Thereafter, appellant filed a motion to dismiss on the ground of double jeopardy. After the circuit court denied that motion, he noted this interlocutory appeal.[1] Because we are constrained to conclude that, under the circumstances of this case, defense counsel's failure to object when the court declared a mistrial did not constitute implied consent to a mistrial, and because there was no manifest necessity for the court's action, we hold that the circuit court erred in denying the motion to dismiss. Accordingly, we reverse with instructions to dismiss the charges.

BACKGROUND

The Incident

On the night of September 26, 2022, appellant was driving his pickup truck on Maryland Route 224 in Charles County when he was spotted by another driver, Irving C. Best, Jr. According to Mr. Best (who happened to be a former law enforcement officer,

[1] "Ordinarily, absent a final judgment, the issue of whether a mistrial was granted properly is not appealable[.]" *State v. Fennell*, 431 Md. 500, 514 n.8 (2013). If, however, "the State attempts to re-prosecute the defendant on those counts, the defendant files a motion to dismiss based on double jeopardy, and the motion is denied by the trial court[,]" then the trial court's ruling "is appealable immediately under the collateral order doctrine[.]" *Id.*

appellant was driving erratically, with his hazard lights on, speeding up and slowing down, and swerving from side to side. Suspecting that appellant was "drunk or impaired or something," Mr. Best followed appellant's vehicle, called 911, and provided a description of the vehicle as well as its license plate number.[2] Eventually, when appellant was stopped at a red light, Mr. Best pulled up alongside, observed that a "younger child" also was in appellant's vehicle, and asked whether they were "okay." Appellant responded with a "thumb's up" hand gesture. After the light had changed, appellant, according to Mr. Best, drove a short distance, "took a left and then took a right into a tree," at "[l]ess than five miles [per] hour." He then, according to Mr. Best, drove into a nearby parking lot.

Officer Brian McCourt of the Charles County Sheriff's Office was on patrol in that area at the time the 911 call was placed. According to Officer McCourt, the 911 callers "were following [appellant's] vehicle" and "giving dispatch step by step, any time the vehicle went somewhere, whatever the case may be." By following those directions, Officer McCourt was able to locate a vehicle, matching the description given of appellant's truck, in a school parking lot.

According to Officer McCourt, appellant was sitting in the driver's seat of his truck, and a nine-year-old child was in the passenger's seat. The truck's engine was running, and, according to Officer McCourt, the "front bumper of the vehicle had a minor dent in it and it had like little pieces of a tree kind of embedded in it."

[2] Mr. Best was accompanied by his wife, who recorded some of the events on her cell phone. The video she recorded was admitted into evidence and published to the jury.

Officer McCourt noticed "a very distinct odor of an alcoholic beverage on [appellant's] breath," his "speech was very slurred," and "it was tough to determine if there was a language barrier or if it was from a level of intoxication." Officer McCourt ultimately administered a standard battery of three field sobriety tests[3] to appellant. According to Officer McCourt, appellant failed those tests,[4] and he was placed under arrest for suspicion of driving while under the influence of alcohol.

Initial Proceedings

A Statement of Charges was filed, in the District Court of Maryland for Charles County, alleging intoxicated endangerment of another person, in violation of the Alcoholic Beverages Article[5] ("AB"), § 6-320(a)(1), as well as driving under the influence of alcohol, driving under the influence of alcohol while transporting a minor, driving while impaired by alcohol, and driving while impaired by alcohol while transporting a minor, in violation of Transportation Article ("TR"), § 21-902(a)(1)(i), (a)(2)(i), (b)(1)(i), and (b)(2)(i), respectively. He prayed for a jury trial, and the case was transferred to the Circuit Court for Charles County.[6]

[3] Those tests were horizontal gaze nystagmus ("HGN"), the walk and turn test, and the one leg stand test.

[4] Officer McCourt was admitted as "an expert for field sobriety testing."

[5] In 2023, that Article was renamed to the Alcoholic Beverages and Cannabis Article. 2023 Md. Laws, ch. 254, § 6, at 108, ch. 255, § 6, at 107.

[6] For administrative reasons, the violation of AB § 6-320 was assigned a different circuit court case number (C-08-CR-23-000048, hereinafter Case No. 048) than the charges relating to the Transportation Article (C-08-CR-23-000055, hereinafter Case No. 055). (continued)

The Aborted Trial

The defense was based upon challenging the reliability of the field sobriety tests that had been administered to appellant on the night of his arrest. In the opening statement, defense counsel declared:

> And I'm going to talk a lot about [the standardized field sobriety tests] today, and essentially they're just tests that are designed to detect the presence of alcohol in a person, and they're called standardized for a reason. They have to be performed very specifically under very specific circumstances and if they aren't performed under these very specific circumstances, then they're not an accurate assessment of whether somebody is impaired at the time.
>
> As part of these very specific circumstances, these very specific guidances, guidances that Officers are supposed to, Officers are supposed to commit to when administering these tests, they have to make sure that they provide very specific detailed instructions on how to perform these tests, because, again, they're only as accurate as someone's understanding of the instructions.
>
> And so if a person doesn't understand what the test is asking, that's a big problem. That means that the tests simply aren't as an accurate – as accurate as they were designed to be.
>
> The evidence in this case is going to show you that that didn't happen here, that [appellant], my client, was not given clear instructions and he wasn't given those clear instructions because these Officers had already made up their minds.
>
> They rushed through these tests, they didn't give [appellant] really any time to understand what was going on. They had rushed to judgment, they assumed that he committed a crime that day.

During trial, the prosecutor made an unopposed motion to consolidate the cases for trial, which the circuit court granted.

The State called two witnesses, Mr. Best and Officer McCourt, who testified as previously summarized. During direct examination of Officer McCourt, he explained in detail how he administered the field sobriety tests to appellant and the reasons he thought appellant failed them. In relating that account, Officer McCourt narrated while a dash camera video from Officer Hughes's patrol car was broadcast to the jury.[7]

Lurking beneath the surface of the proceedings was an inadvertent discovery violation by the State—the failure to disclose to the defense Officer McCourt's in-car camera video. In all, four law enforcement officers had responded to the scene on the night of appellant's arrest, and the State had intended to disclose all four of their videos to the defense, as required under Maryland Rule 4-262.[8] Because the file sizes were large, the State uploaded those videos to a file sharing service, but Officer McCourt's in-car camera video did not upload properly, and the prosecutor was unaware of the mistake. Thus, defense counsel did not receive Officer McCourt's in-car camera video, and they prepared their defense accordingly.

During cross-examination of Officer McCourt, defense counsel sought to cast doubt on his administration of the field sobriety tests. The following occurred:

> [DEFENSE COUNSEL]: There's a series of tests that have been developed by the NHTSA, and for the record, that's just the National

[7] Officer Hughes's first name does not appear in the record.

[8] Appellant demanded a jury trial on the scheduled trial date in the District Court, and therefore, Rule 4-262, rather than Rule 4-263, applied to discovery. *See* Md. Rule 4-301(b)(1)(B), (c). Appellant filed a written request for discoverable material, and it is undisputed that the State was obligated to provide the defense a copy of Officer McCourt's in-car camera video. *See* Md. Rule 4-262(d)(1), (2).

Highway and Traffic Safety Administration, I'm -- yeah, and these tests are designed to be followed precisely?

[OFFICER McCOURT]: Correct.

[DEFENSE COUNSEL]: And they have very specific instructions on how you're supposed to administer them?

[OFFICER McCOURT]: Correct.

[DEFENSE COUNSEL]: And, in fact, if any of these elements are changed, the validity of the test is compromised?

[OFFICER McCOURT]: Could be, yes.

[DEFENSE COUNSEL]: So before we get too far into the weeds of things, step one of the standardized field sobriety tests is to ask someone if they have had any injuries?

[OFFICER McCOURT]: Correct.

[DEFENSE COUNSEL]: And you have to ask this question very clearly?

[OFFICER McCOURT]: Correct.

[DEFENSE COUNSEL]: Because if someone has injuries, that could impact their ability to perform the tests?

[OFFICER McCOURT]: Correct.

[DEFENSE COUNSEL]: Okay, so very briefly as an aside, I want to circle back to the manual that you were trained from from [sic] the Charles County, the Charles County Sheriff's Office.

[OFFICER McCOURT]: Okay.

[DEFENSE COUNSEL]: **Okay, so one thing in the, one of the policies in your manual is basically saying that you have to, it's about audio recordings?**

[OFFICER McCOURT]: Okay.

[DEFENSE COUNSEL]: Yes?

[OFFICER McCOURT]: Correct.

[DEFENSE COUNSEL]: **Yes. And there's a section on body microphones?**

[OFFICER McCOURT]: Correct.

[DEFENSE COUNSEL]: **And a mobile video recorder that you're supposed to wear?**

[OFFICER McCOURT]: Correct.

[DEFENSE COUNSEL]: And you have to wear these two pieces of equipment at all times?

[OFFICER McCOURT]: Correct.

[DEFENSE COUNSEL]: It's used to collect evidence?

[OFFICER McCOURT]: Correct.

[DEFENSE COUNSEL]: To supplement a person's testimony?

[OFFICER McCOURT]: Correct.

[DEFENSE COUNSEL]: Say, at trials like today?

[OFFICER McCOURT]: Correct.

[DEFENSE COUNSEL]: It's used to enhance an Officer's safety, potentially?

[OFFICER McCOURT]: Correct.

[DEFENSE COUNSEL]: And the safety of whomever is stopped?

[OFFICER McCOURT]: Correct.

[DEFENSE COUNSEL]: And you're required to make sure that your audio recorder is working, in good working order?

[OFFICER McCOURT]: Correct.

[DEFENSE COUNSEL]: That it's functional?

[OFFICER McCOURT]: Correct.

[DEFENSE COUNSEL]: **And you're required to record several types of incidents?**

[OFFICER McCOURT]: Correct.

[DEFENSE COUNSEL]: **Specifically traffic stops?**

[OFFICER McCOURT]: Yes, ma'am.

[DEFENSE COUNSEL]: **And you're supposed to record these kinds of incidents from start to finish?**

[OFFICER McCOURT]: Correct.

[DEFENSE COUNSEL]: And to record your audio?

[OFFICER McCOURT]: Correct.

[DEFENSE COUNSEL]: For the entire incident?

[OFFICER McCOURT]: Correct.

[DEFENSE COUNSEL]: **So at no point in this incident did you activate your microphone?**

[OFFICER McCOURT]: **I disagree.**

[DEFENSE COUNSEL]: **You disagree?**

[OFFICER McCOURT]: **In the video you can see my microphone recording.**

[DEFENSE COUNSEL]: **So where -- but you can't hear your recording?**

[OFFICER McCOURT]: **I can't speak for that.**

[DEFENSE COUNSEL]: Can you hear what you were saying?

[OFFICER McCOURT]: I cannot, no.

[DEFENSE COUNSEL]: You couldn't -- could you see what you -- okay, okay.

So at this point there's no recording of you actually asking [appellant] any questions?

[OFFICER McCOURT]: **None that has been showed to me today.**

[DEFENSE COUNSEL]: **Or any video of you giving him the instructions, specifically, that we can hear you give him the instructions?**

[OFFICER McCOURT]: **That would have been on my in car camera footage, not Officer Hughes.**

[DEFENSE COUNSEL]: **Okay. So you haven't heard that today, have you?**

[OFFICER McCOURT]: **I have not heard that today, no.**

[DEFENSE COUNSEL]: Okay, so today you have not heard any audio recording of any of the instructions provided to [appellant]?

[OFFICER McCOURT]: Correct.

[DEFENSE COUNSEL]: And there's no recording of whether [appellant] heard you?

[OFFICER McCOURT]: Correct.

[DEFENSE COUNSEL]: Or understood what you were saying?

[OFFICER McCOURT]: Correct.

(Emphasis added.)

Later, defense counsel returned to the issue of whether and how Officer McCourt had instructed appellant in taking the field sobriety tests, emphasizing the absence of audio evidence of their encounter:

> [DEFENSE COUNSEL]: Okay. So in, during this test you are looking for deviations from the instructions that you provide?
>
> [OFFICER McCOURT]: Correct.
>
> [DEFENSE COUNSEL]: And it's important that someone can actually hear you provide these instructions clearly?
>
> [OFFICER McCOURT]: Correct.
>
> [DEFENSE COUNSEL]: **And again, today, during this trial we have not heard you provide the instructions to [appellant]?**
>
> [OFFICER McCOURT]: **Correct.**
>
> [DEFENSE COUNSEL]: **So there's no way to confirm if [appellant] heard these instructions?**
>
> [OFFICER McCOURT]: **Correct.**
>
> [DEFENSE COUNSEL]: Okay. Now as for the last test, what's the third test?
>
> [OFFICER McCOURT]: The one leg stand.
>
> [DEFENSE COUNSEL]: And this is another balancing test, effectively?
>
> [OFFICER McCOURT]: Divided attention, balance, yes.
>
> [DEFENSE COUNSEL]: Okay, and during this test you're also trained to give pretty detailed instructions first?
>
> [OFFICER McCOURT]: Correct.
>
> [DEFENSE COUNSEL]: **And again, today, we have not heard any audio of you giving those instructions to [appellant]?**

[OFFICER McCOURT]: **That's correct.**

[DEFENSE COUNSEL]: Or confirming that he heard you?

[OFFICER McCOURT]: Correct.

[DEFENSE COUNSEL]: Or that he understood you?

[OFFICER McCOURT]: Correct.

[DEFENSE COUNSEL]: And so it was at this point that you decided to charge [appellant] with driving under the influence, right?

[OFFICER McCOURT]: Correct.

[DEFENSE COUNSEL]: Okay. So you testified earlier that you played [appellant] his, let's call it the DR-15 advice of rights?

[OFFICER McCOURT]: Yes, ma'am.

[DEFENSE COUNSEL]: And you played that in Spanish?[9]

[OFFICER McCOURT]: Yes, ma'am.

[DEFENSE COUNSEL]: And so a DR-15 is essentially a long recorded statement?

[OFFICER McCOURT]: Correct.

[DEFENSE COUNSEL]: And it tells someone that they're being asked to submit to a breath test?

[OFFICER McCOURT]: Yes.

[DEFENSE COUNSEL]: And it explains why they're being asked to submit to a breath test?

[OFFICER McCOURT]: Yes, ma'am.

[9] On redirect examination, Officer McCourt testified that appellant averred that he was fluent in Japanese, English, and Spanish.

[DEFENSE COUNSEL]: And it explains what could happen if they refuse to submit to a breath test?

[OFFICER McCOURT]: Yes, ma'am.

[DEFENSE COUNSEL]: And you stated in your report that you played this recording in Spanish at 9:46 p.m.?

[OFFICER McCOURT]: Yes, ma'am.

[DEFENSE COUNSEL]: **And again, you didn't have your mic -- or I should say, I'll rephrase, there's no audio provided at this trial today demonstrating that [appellant] heard his DR-15 advisement of rights?**

[OFFICER McCOURT]: **Correct.**

[DEFENSE COUNSEL]: So we have no way of understanding whether he understood the DR-15 advice?

[OFFICER McCOURT]: Correct.

[DEFENSE COUNSEL]: And just to clarify, he didn't sign this form until 2:27 a.m. the next day?

[OFFICER McCOURT]: Correct.

[DEFENSE COUNSEL]: Once he was already in custody at the Charles County Detention Center?

[OFFICER McCOURT]: Correct.

[DEFENSE COUNSEL]: Okay, thank you.

[DEFENSE COUNSEL]: Nothing further, Your Honor.

(Emphasis added.)

Then, on redirect examination, the State followed up on whether Officer McCourt had activated his camera and microphone during the traffic stop:

[PROSECUTOR]: So when you arrived, did you have your camera and microphone on?

[OFFICER McCOURT]: I did.

[PROSECUTOR]: And they were, they were recording?

The prosecutor then sought to introduce for identification State's Exhibit 6, the inadvertently undisclosed in-car camera video. The defense requested a bench conference. The trial court granted that request, excused the jury, and convened a bench conference.

Motion to Strike and Declaration of Mistrial

Defense counsel informed the court that she[10] had not received State's Exhibit 6 in discovery, and she moved to strike Officer McCourt's testimony. The prosecutor acknowledged that the exhibit had not been provided to the defense but objected to the motion to strike Officer McCourt's testimony. According to the prosecutor, the officer's testimony had been based upon his written report (which had been provided to the defense), not his video recording, and he urged that the appropriate remedy was to exclude State's Exhibit 6. Co-counsel complained that merely excluding Officer McCourt's video was inadequate to cure the prejudice to appellant, emphasizing that, had the defense been provided the video, they would have cross-examined Officer McCourt "on the way that he gave these instructions" and on appellant's "understanding of these instructions." Co-counsel further declared that the State's failure to provide the video denied them "the

[10] We have chosen pronouns to match the particular attorney to whom it refers. At other places in this draft, we use "he" to refer to (a different, male) defense counsel.

opportunity to craft [their] case around the fact that the video exists" and that, moreover, "it's also certainly not something that can be remedied by us listening to the video now."

The court recessed briefly to allow defense counsel to view the video. When the court reconvened, defense counsel informed the court that the video was 140 minutes in duration and that it was impossible for them to obtain more than a cursory look at it during the eighteen-minute recess. The court ruled, preliminarily, that the disputed video would not be admitted into evidence, and it declared that it would hear argument the following day "regarding whatever else comes to pass over the video[.]"

The following day, the circuit court asked whether defense counsel had an opportunity to watch the video. Defense counsel averred that they did not because the file size was "extremely" large, and they had difficulty downloading it from the server. The defense then renewed its motion to strike Officer McCourt's testimony, declaring that "there's no sanction or remedy short of striking this witness' testimony that can address the issue that did come to light, this late disclosure of the recording." The defense added that a continuance would be an inadequate remedy; the overnight continuance did not provide them an opportunity even to view the video, and a longer continuance was not feasible, given that jeopardy already had attached. But most importantly, according to the defense, the "central theme" of its case was that there had been no recording of the instructions Officer McCourt gave to appellant concerning the field sobriety tests, and the belated disclosure of the video irreparably prejudiced their defense. Thus, the defense insisted:

> We can't re-open, we can't give another theory of the case, we can't make a new argument to the jury when they have already heard us say this recording doesn't exist, because to us it didn't exist; and then 80 percent of the way through the trial the State surprisingly produces this recording for the first time.

Defense counsel continued:

> There's no way that this jury can be told -- we can't undo what they've already heard. There's no curative instruction that will fix this, there's no way for us to just give another argument to the jury.
>
> Frankly, Your Honor, if, if this Officer's allowed to testify, it appears to the jury that [co-counsel] and I simply did not know what videos actually existed and simply did not know what evidence actually existed in this case. And that would cause [appellant] enormous prejudice, certainly through no fault of his, and certainly through no fault of [co-counsel] and I.
>
> Anything short of striking this Officer's testimony, it's just, it's going to leave that jury knowing that we opened and prepared for this case on assumptions that turned out to be incorrect. And there's just no way to cure that.

As for whether re-cross examining Officer McCourt could cure the prejudice suffered, defense counsel asserted:

> We may be able to re-cross the Officer on some of these aspects, but again, that does not solve the prejudice that happens when the jury heard [co-counsel] cross-examine this Officer on this theory that we reasonably believed was true, which was that this recording just did not exist and was not in discovery.
>
> And so I think this is an extreme sanction, right, it's not one that I would ask for in ordinary circumstances, it's not one that I would expect the Court to give in ordinary circumstances, but these are not ordinary circumstances.
>
> And the only sufficient remedy here is to strike this Officer's testimony.

The prosecutor explained to the court how the discovery violation occurred, and he then asserted that the undisclosed video "is substantially the same as the report that was given and provided by Officer McCourt, it was substantially the same [as] his testimony[.]" The prosecutor further explained that, because the video had not been admitted into evidence, and "the jury has not seen it or heard it," it was "sufficient" to exclude the video. The prosecutor continued:

> At the end of the trial the presentation to the jury will be there's this recording, you didn't get to hear it, you can hold that against the State, but the Officer did testify that there was a recording, that his body camera was on and you could see that it was on in the video and the question -- well wasn't -- isn't here.

The court expressed its disbelief that defense counsel would have asked the question had she been provided "that discovery." The prosecutor countered that the defense was aware that Officer McCourt had activated his in-car camera because his report, so indicating, had been provided to the defense in discovery.

The circuit court then announced its ruling on the defense motion to strike Officer McCourt's testimony, declaring:

> Okay. The Court, having heard argument regarding the discovery violation and heard, granted the continuance to try to remedy it, it does not appear that Defense's theory of the case can be remedied by any further continuance. **The Court finds a manifest necessity to declare a mistrial.**
>
> You guys will have a status April 7th before Judge West for new trial dates.
>
> Can we bring in the jury, please.
>
> (Whereupon, the Jury entered the Courtroom and the following occurred in open Court.)

> [THE COURT]: Welcome back, jury.
>
> All right, jury, I am going to dismiss you. This case has concluded. I do appreciate you coming back in this morning. I'm going to discharge you with the sincere thanks of this Court.

(Emphasis added.)

Motion to Dismiss

Less than two weeks later, the defense filed a motion to dismiss on the ground of double jeopardy. In that motion, defense counsel asserted that the circuit court *sua sponte* had declared a mistrial, but that there had been no manifest necessity to do so because other, less drastic remedies, such as striking Officer McCourt's testimony or giving a curative instruction (such as a missing evidence instruction), were available.[11]

Three weeks after the motion to dismiss had been filed, the circuit court held a motions hearing. There, defense counsel asserted, among other things, that the circuit court had failed to consider other, less drastic remedies suggested by the parties in lieu of declaring a mistrial. Once again, and contrary to its argument on the motion to strike,

[11] This was directly contrary to the defense's previous position. During argument on the motion to strike Officer McCourt's testimony, defense counsel declared, "There's no curative instruction that will fix this, there's no way for us to just give another argument to the jury."

defense counsel asserted that she had "asked for a curative instruction"[12] and that Officer McCourt's testimony be stricken "in part" or completely.[13]

The prosecutor countered that the court "had already made several attempts to find reasonable alternatives to the mistrial in this matter before declaring a mistrial" and that a mistrial was within the court's discretion. Moreover, the prosecutor asserted, "no objection from the Defense was heard."

The circuit court denied the motion to dismiss, finding that there had been a manifest necessity to declare a mistrial. The court stated in part:

> One, the record will reflect that there was 140 minutes missing of body cam footage. In opening statement and other times throughout the trial it was mentioned that there was no audio. That was not something that the Court found the jury could unhear or a bell that could be unrung.
>
> The other issue is the video[14] had already been shown. The video was a number of minutes long. [Appellant] was doing the field sobriety tests, the minor child was in the video. So even if we had stricken the Officer's testimony, the viewing of that video is not something that could be cured by a verbal statement from the Court.

[12] Oddly enough, the prosecutor also misstated what had occurred during the hearing on the motion to strike, declaring that the defense had asked "to strike Officer McCourt's testimony in whole [which was correct] and have a curative instruction [which was not]."

[13] During the argument on the motion to strike, defense counsel adamantly insisted that Officer McCourt's testimony be stricken in its entirety.

[14] Here, the court was referring to Officer Hughes's dash camera video, which had no audio component.

The court then examined the reasonable alternatives it had considered, but it found that none of them was adequate to cure the prejudice ensuing from the discovery violation. Finally, the court determined that "there was a high necessity for the mistrial" because the video "was extremely prejudicial if it was still going to have been seen[,]" and "no cross-examination of the audio[15] could possibly be done in an effective way" because defense counsel had no opportunity "to see it."

This timely interlocutory appeal followed.

DISCUSSION

Parties' Contentions

Appellant contends that the circuit court *sua sponte* declared a mistrial, which triggered the State's "heavy burden" to show "manifest necessity." According to appellant, he did not consent to a mistrial, as the circuit court purportedly acknowledged during the hearing on his motion to dismiss. Moreover, according to appellant, none of the three requirements for manifest necessity were established. Appellant asserts that the State's discovery violation did not establish a "high degree" of necessity to declare a mistrial; that the circuit court failed to explore less drastic alternatives to a mistrial; and that two reasonable alternatives, in fact, existed. Therefore, he contends, double jeopardy barred his retrial, and the circuit court erred in denying his motion to dismiss.

[15] Here, the court was referring to Officer McCourt's in-car camera video, which also had audio.

The State counters that, because appellant did not object when the circuit court declared a mistrial, despite having had an opportunity to do so, he impliedly consented to a mistrial. In addition, the State maintains that the circuit court did explore less drastic alternatives to a mistrial but found that they were inadequate to cure the prejudice that had resulted from the State's inadvertent discovery violation. Therefore, according to the State, there was manifest necessity for the mistrial, and the circuit court did not abuse its discretion in so declaring. Therefore, according to the State, the circuit court did not err in denying the motion to dismiss.

Analysis

We begin by setting forth the applicable law of double jeopardy in the context of mistrials, followed by its application to the facts of this case.

Double Jeopardy and Mistrials

The Double Jeopardy Clause of the Fifth Amendment, applicable to the States through the Due Process Clause of 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[.]"[16] The Double Jeopardy Clause "had its origin

[16] Although the Constitution of Maryland does not have a double jeopardy clause, our common law "provides well-established protections for individuals against being twice put in jeopardy." *Scriber v. State*, 437 Md. 399, 408 (2014). The protections afforded under both federal and Maryland law are, in this respect, virtually the same, and appellant does not contend otherwise, relying upon precedent from both the United States Supreme Court and Maryland appellate courts. *See State v. Baker*, 453 Md. 32, 47 n.8 (2017) ("focus[ing] solely on constitutional double jeopardy principles, as interpreted by both Maryland courts and the United States Supreme Court" because the petitioner in that case (continued)

in the three common-law pleas of *autrefois acquit*, *autrefois convict*, and pardon." *United States v. Scott*, 437 U.S. 82, 87 (1978). Those three pleas, respectively, "prevented the retrial of a person who had previously been acquitted, convicted, or pardoned for the same offense." *Id.*

"Because jeopardy attaches before the judgment becomes final,[17] 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)). "Retrial," however, "is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused." *Id.* at 505. Thus, once jeopardy attaches, retrial is barred if a mistrial is declared over a defendant's objection or without his consent, "unless there is a showing of 'manifest necessity' to declare the mistrial." *State v. Woodson*, 338 Md. 322, 329 (1995). *See United States v. Dinitz*, 424 U.S. 600, 606-07 (1976) (explaining that, for double jeopardy purposes, a defendant's request for a mistrial is treated the same as his consent to one).

"Different considerations obtain, however, when the mistrial has been declared at the defendant's request [or with his consent]." *Dinitz*, 424 U.S. at 607. In that case, retrial

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did not "argue[] that the double jeopardy prohibition under Maryland common law sweeps more broadly than that under the federal Constitution").

[17] In a jury trial, jeopardy attaches when the jury is empaneled and sworn, *Harris v. State*, 406 Md. 115, 131 (2008); in a bench trial, jeopardy "ordinarily" attaches when the first witness is sworn. *Johnson v. State*, 452 Md. 702, 724 (2017). In the instant case, there is no dispute that jeopardy had attached well before the trial court declared a mistrial.

generally is permitted except in rare circumstances, not at issue here.[18] *Id.* at 607-11. Moreover, "where the defendant sought or consented to the mistrial," the "manifest necessity" standard does not apply, and "further examination into the reasons for the mistrial" is unnecessary. *Jourdan v. State*, 275 Md. 495, 508 (1975).

Although we review a trial judge's decision to declare a mistrial over defense objection for abuse of discretion, it is a discretion that is constrained by the defendant's "valued right to have his trial completed by a particular tribunal." *Washington*, 434 U.S. at 503. *See Simmons v. State*, 436 Md. 202, 214 (2013) (explicating the standard of review). Under that circumstance, the prosecutor bears a "heavy" burden to show that "manifest necessity" exists. *Washington*, 434 U.S. at 505. The "manifest necessity" standard, however, should not be applied "mechanically"; instead, we must apply it in the context of "the particular problem confronting the trial judge." *Id.* at 506. "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).

It is perhaps easier to explain the "manifest necessity" standard by setting out two extreme categories. "At one extreme are cases in which a prosecutor requests a mistrial in order to buttress weaknesses in his evidence[,]" or where "a prosecutor proceeds to trial aware that key witnesses are not available to give testimony and a mistrial is later granted

[18] If a defendant's request for a mistrial is provoked by "'bad-faith conduct by judge or prosecutor,'" then retrial is barred by double jeopardy. *Dinitz*, 424 U.S. at 611 (quoting *United States v. Jorn*, 400 U.S. 470, 485 (1971) (plurality opinion)).

for that reason"; in such cases, there is no manifest necessity for a mistrial, and a retrial is barred. *Washington*, 434 U.S. at 507-08 & n.24. "Thus, the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused." *Id.* at 508 (footnotes omitted).

"At the other extreme is the mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict, long considered the classic basis for a proper mistrial." *Id.* at 509 (footnote omitted). Thus, "without exception, the courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial." *Id.*

Between these two poles is a "spectrum" of cases, turning on their particular facts. *State v. Crutchfield*, 318 Md. 200, 209 (1989). *See also McCorkle v. State*, 95 Md. App. 31, 60-61 (1993) (discussing a "sliding scale of discretion" that a trial court should apply, depending upon the degree of culpability of the prosecutor for the unavailability of critical evidence). Regardless of where a particular case falls on this spectrum, generally, three conditions must be satisfied for there to be manifest necessity for a mistrial over defense objection:

> 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).

Acquiescence/Implied Consent

Initially, we address the State's contention that appellant impliedly consented to a mistrial. Were that contention correct, appellant's double jeopardy claim would be foreclosed. *See*, *e.g.*, *United States v. DiPietro*, 936 F.2d 6, 9 & n.12 (1st Cir. 1991) (declaring that the "manifest necessity test does not apply when the defendant has requested or effectually consented to the mistrial") (citing *Oregon v. Kennedy*, 456 U.S. 667, 672 (1982), and *Dinitz*, *supra*, 424 U.S. at 608). *See also Jourdan*, *supra*, 275 Md. at 508 (explaining that "[o]ne circumstance where a retrial is normally permitted after a mistrial, without further examination into the reasons for the mistrial, is where the defendant sought or consented to the mistrial").

In *State v. Fennell*, 431 Md. 500 (2013), the Supreme Court of Maryland considered a similar issue. There, the jury had deadlocked during its deliberations but indicated it had agreed to acquit on several counts of the indictment. *Id.* at 505-06. Defense counsel asked the trial court to take a partial verdict, but the court refused, declaring, "I'm not going to take a verdict at all[,]" to which defense counsel replied, "Okay." *Id.* at 510.

On appeal, the State asserted that defense counsel had waived Fennell's double jeopardy claim by failing to object to the trial court's declaration despite having had an opportunity to do so and that, in replying "Okay," defense counsel had "acquiesced" in the trial court's ruling. *Id.* at 515 n.9. The Court rejected the State's assertion, reasoning that Maryland Rule 4-323(c)[19] requires either that a party inform the trial court of the action it

[19] Maryland Rule 4-323(c) provides:

(continued)

wants the court to take, or make a prompt objection to its ruling, and that, under the circumstances of that case, defense counsel had made known to the trial court the action sought. *Fennell*, 431 Md. at 515 n.9.

Here, the State contends that appellant impliedly consented to the court's *sua sponte* declaration of a mistrial because he failed to object despite having had an opportunity to do so. Were we writing on a blank slate, we might be inclined to agree. (After all, defense counsel did not object, and, according to the transcript, neither party commented while the jury was brought into the courtroom. We are not, however, writing on a blank slate. The instant case is not meaningfully distinguishable[20] on this issue from *Fennell*. Here, as in *Fennell*, defense counsel satisfied the requirement of Rule 4-323(c) that he "make[] known to the court the action that [he] desires the court to take." Here, as in *Fennell*, 431 Md. at 515 n.9, the trial court, nonetheless, *sua sponte* declared a mistrial. Applying *Fennell*, we

> **(c) Objections to Other Rulings or Orders.** For the purposes of review by the trial court or on appeal of any other ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court. The grounds for the objection need not be stated unless these rules expressly provide otherwise or the court so directs. If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection at that time does not constitute a waiver of the objection.

[20] Characterizing defense counsel's failure to object as a "waiver" and as "acquiesce[ence]" (as in *Fennell*) or as "acquiescence or implied consent" (as in this case) is not, in our view, a meaningful distinction. Regardless of how we characterize the same action or lack of action by defense counsel, the result is the same—an appellate court refuses to consider the double jeopardy claim.

are constrained to conclude that no further objection was required to preserve the issue for appeal, and therefore, the "manifest necessity" standard applies.

Manifest Necessity

This appeal presents the unfortunate circumstance of both parties having substantially reversed their positions from those they took in the circuit court. In the circuit court, appellant adamantly opposed the prosecutor's proposed remedy for curing the prejudice sustained as a result of the State's discovery violation, namely, that State's Exhibit 6 be excluded but that Officer McCourt's testimony be admitted. Now, appellant has changed his position 180 degrees, asserting that

> [e]ither the exclusion of the officer's testimony, as the defense proposed, or the exclusion of the recording alone (State's Exhibit 6), as the prosecution proposed, were reasonable alternatives to a mistrial.

Appellant fails even to acknowledge the patent inconsistency between his position before the circuit court and the position he now takes on appeal.

The State, not to be outdone, insisted in the circuit court that exclusion of State's Exhibit 6 was sufficient to cure any unfair prejudice to appellant resulting from the State's discovery violation. But now, before us, the State insists that the prejudice appellant suffered was so egregious that only a mistrial was sufficient to cure it.

We acknowledge that the trial court explored alternatives to a mistrial, including granting a continuance to provide defense counsel an opportunity to view the inadvertently undisclosed in-car camera video, ruling that video to be inadmissible, and striking Officer McCourt's testimony. In addition, the court carefully weighed the degree of prejudice the

defense suffered as it explored those alternatives. But there were, in fact, at least two alternatives to a mistrial, and therefore there was no manifest necessity to declare a mistrial.

One alternative, advanced by the prosecutor in the circuit court, was to exclude State's Exhibit 6 but deny the defense motion to strike Officer McCourt's testimony. This alternative could have been bolstered by giving a curative instruction (such as a missing evidence instruction), which the prosecutor suggested during the hearing on the motion to strike. To further diminish any prejudice to appellant, the court could have ordered the prosecutor to provide the defense a flash drive containing a copy of the disputed video, which could have been done in court in a few minutes and which would have alleviated any problems the defense claimed in downloading the exhibit, continued the trial until the next day, and then offered the defense a second opportunity to cross-examine Officer McCourt. If the defense still protested, the court should have put counsel to a choice—accept the remedy offered, or consent to a mistrial.

Of course, the court also could have granted the defense's wish and excluded Officer McCourt's testimony. Under at least some circumstances, such a drastic remedy has been considered a reasonable alternative to declaring a mistrial over defense objection. *See Hubbard v. State*, 395 Md. 73, 96 (2006) (holding that there was no manifest necessity to declare a mistrial over defense objection because a reasonable alternative would have been to exclude a witness's testimony). Although we think defense counsel's protestations of

prejudice may have been somewhat overblown,[21] and granting this remedy would have greatly increased the likelihood of an acquittal, it nonetheless would not have been unreasonable for the court to take this alternative, even if, were we in the trial judge's shoes, we might have done otherwise.

Because there were reasonable alternatives to declaring a mistrial, there was no manifest necessity for the circuit court's *sua sponte* declaration of one. Therefore, the circuit court erred in denying the motion to dismiss.

ORDER OF THE CIRCUIT COURT FOR CHARLES COUNTY REVERSED. CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO DISMISS THE CHARGES. COSTS TO BE PAID BY CHARLES COUNTY.

[21] For example, during opening statement, defense counsel never told the jury that no video evidence of the field sobriety tests existed; instead, she merely said that appellant had never been given clear instructions when he took the field sobriety tests, a defense which would have been perfectly consistent with excluding State's Exhibit 6 but allowing Officer McCourt's testimony, especially if the court added a missing evidence instruction. Thus, defense counsel's assertion, during argument on the motion to strike Officer McCourt's testimony, that "we can't make a new argument to the jury when they have already heard us say this recording doesn't exist," is not supported by the record.