Circuit Court for Carroll County
Case No. C-06-CR-20-000477

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1377

September Term, 2023

MICHAEL A. BROWN

v.

STATE OF MARYLAND

Graeff,
Berger,
Zic,

JJ.

Opinion by Berger, J.

Filed: February 20, 2025

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

This case arises following the Circuit Court for Carroll County's denial of appellant Michael Brown's motion to dismiss a criminal indictment against him and bar retrial on double jeopardy grounds. On October 22, 2020, Michael Brown ("Brown") was indicted for the first-degree murder of Robert Gurecki and for use of a firearm in a crime of violence. Mr. Brown's trial began on May 10, 2022. On May 23, 2022, the jury informed the court that it was unable to reach a unanimous verdict. Thereafter, Mr. Brown moved for a mistrial, which was granted by the court.

Mr. Brown's retrial was scheduled to begin in early March 2023. On March 2, 2023, days before the retrial, the State produced a police report that it had failed to produce during the discovery period prior to Mr. Brown's first trial. Mr. Brown contends that this report contained extensive *Brady*[1] exculpatory evidence and *Giglio*[2] impeachment evidence. On April 21, 2023, Mr. Brown filed two motions to dismiss the indictment. Following a hearing on the motions, the court denied Mr. Brown's motions to dismiss on August 16, 2023. Mr. Brown noted a timely appeal.

[1] *Brady v. Maryland*, 373 U.S. 83 (1963). In *Brady*, the Supreme Court held that the prosecution must disclose any exculpatory evidence "where the evidence is material either to guilt or punishment." *Id*. at 87.

[2] *Giglio v. United States*, 405 U.S. 150 (1972). In *Giglio*, the Supreme Court held that the prosecution must disclose any material evidence that could be used to impeach a prosecution witness at trial. *Id*. at 154-55.

QUESTIONS PRESENTED

Mr. Brown presents one question for our review, which we have recast and rephrased as follows:[3]

Whether Mr. Brown's retrial is barred by double jeopardy.

For the following reasons, we affirm.

BACKGROUND

Robert Gurecki died from a single gunshot wound to the head sometime in the evening of May 3 or early morning of May 4, 2019. On May 4, 2019, Mr. Gurecki's body was found by a coworker at his office. Mr. Brown was Mr. Gurecki's business partner and is married to Mr. Gurecki's stepdaughter. The Carroll County Sheriff's Department began an investigation, led by Detective Sean O'Meara. Throughout the investigation, police completed various reports which were sequentially numbered. Mr. Brown was interviewed on several occasions, during which he relayed that he had stopped by the office to drop off an envelope of money for Mr. Gurecki the evening of May 3, and used Mr. Gurecki's vehicle key fob to obtain a cellphone charger from Mr. Gurecki's truck. Mr. Brown was ultimately arrested, and on October 22, 2020, he was indicted for first-degree murder and the use of a firearm in the commission of a crime of violence.

[3] Mr. Brown phrased the question as follows:

> May the State retry an individual after it put the accused in jeopardy, withheld exculpatory evidence, and did not convince most jurors that the defendant committed the crimes charged?

Mr. Brown's trial was originally set to begin December 6, 2021. The State had continuously provided discovery, and on October 4, 2021, Mr. Brown requested a postponement of his trial due to the "extremely voluminous" discovery provided. The trial was postponed, and on January 19, 2022, the circuit court specifically ordered the State to turn over all *Brady* evidence to the defense. This evidence included sequentially numbered police reports.

Mr. Brown's trial began on May 10, 2022. On May 17, 2022, prior to defense counsel's cross-examination of Detective O'Meara, the State confirmed to defense counsel that all of the police reports had been provided during discovery. On May 23, 2022, during jury deliberations, the jury provided the court with a note stating "we cannot reach a unanimous decision. We do not see any change." The court instructed the jury to continue deliberations, which was followed by a second note which provided: "[w]e are unable to make unanimous decision ALL Jurors has [sic] taken their firm position." Defense counsel then stated "[w]e would ask that you declare a mistrial, Your Honor, based on the jury's inability to come to a unanimous decision either way." The trial court proceeded to declare a mistrial, later noting that the jury was hung seven to five in favor of acquittal. Thereafter, the case was scheduled for retrial.

On August 3, 2022, defense counsel emailed the prosecution, indicating that it was missing three of the sequentially numbered police reports: Report 19002078-19 ("Report 19"), Report 19002078-29 ("Report 29"), and Report 19002078-36 ("Report 36"). The prosecution emailed Detective O'Meara on August 18, 2022, and he confirmed that the reports did not exist.

On March 2, 2023, shortly before Mr. Brown's retrial was set to begin, the State received the formerly undisclosed Report 29 from Detective O'Meara. The State immediately provided the report to Mr. Brown. Report 29 is a 17-page document that is accompanied by 18 attachments. Although Report 29 was, according to the State, inadvertently not disclosed prior to March 2, 2023, 17 of the 18 attachments were provided during discovery prior to each trial. Reports 19 and 36 did not exist. Thereafter, the retrial of Mr. Brown was postponed.

On April 21, 2023, Mr. Brown filed two similar but related motions to dismiss, namely, a "Motion to Dismiss the Indictment for Violation of Defendant's Right to Due Process of Law & Double Jeopardy" (the "First Motion") and a "Motion to Dismiss The Indictment for Violation of Defendant's Right to Due Process of Law" (the "Second Motion"). The First Motion contended that Report 29 contained *Brady* exculpatory and *Giglio* impeachment evidence that was required to be disclosed before trial and was specifically ordered to be disclosed by the circuit court. Mr. Brown argued that had Report 29 been disclosed, he could have used information in the report to impeach Detective O'Meara based on a statement that "no suspects have been offered by those close to [Mr.] Gurecki." Indeed, both Mr. Gurecki's mother and wife offered names of individuals they identified as having engaged in conflict with Mr. Gurecki. Mr. Brown further argued that the report contained information that other suspects were ignored because the State was fixated on charging Brown with Mr. Gurecki's murder.

In addition, Mr. Brown alleged that Report 29 indicated that a theory of the crime was developed that necessarily identified Mr. Brown as the suspect and the police forced

the evidence to fit Mr. Brown rather than investigate other suspects. The Second Motion contained similar arguments, and particularly, contended that the theory investigators had developed demonstrated a bias that "shocks the conscience" and denied Mr. Brown due process of law, and that investigators failed to process an envelope containing money and a key fob for Mr. Gurecki's vehicle for DNA or fingerprints. Both motions requested that the court dismiss Mr. Brown's indictment with prejudice such that he may not be retried.[4]

The court heard arguments on the motions to dismiss on August 4, 2023, and denied the motions in a written order on August 16, 2023. The court expressed disappointment with the State, noting that the court had specifically ordered all *Brady* evidence to be turned over to the defense. The circuit court stated that it could not "conclude that the additional evidence cited by Defendant would have convinced the remaining jurors who sided with the State," and that it could not "conclude that the State acted deliberately in disobedience of [the court's] order or willfully with the intent to deprive the Defendant of his right to a fair trial. As a result, [the court concluded] that a retrial is not barred by double jeopardy." Mr. Brown filed this timely appeal.

[4] Mr. Brown repeatedly contends that Report 29 was willfully withheld by the State. In support of this accusation, Mr. Brown notes that the Assistant State's Attorney that prosecuted Mr. Brown in his first trial had testified to bringing *Brady* and *Giglio* evidence to her supervisors in another case, which was ignored. As a result, members of the Office of the State's Attorney for Carroll County were sanctioned by the Circuit Court for Carroll County. The trial court found Mr. Brown's accusations unpersuasive. For the reasons that follow, we need not address this contention in light of our holding that the State did not intentionally goad Mr. Brown into requesting a mistrial.

STANDARD OF REVIEW

"Whether principles of double jeopardy bar the retrial of [a defendant] is a question of law, and therefore we review the legal conclusions of the trial court *de novo*." *Giddins v. State*, 393 Md. 1, 15 (2006). As such, this Court "reviews without deference a trial court's conclusion as to whether the prohibition on double jeopardy applies." *Scott v. State*, 454 Md. 146, 167 (2017) (citing *Giddins*, 393 Md. at 15). The trial court's determination as to whether the prosecution acted with deliberate intent to provoke a mistrial is a factual finding that will not be reversed absent clear error. *Fields v. State*, 96 Md. App. 722, 755 (1993) (holding that the trial court's finding that the prosecutor did not intend to goad the defendant into requesting a mistrial was not clearly erroneous). We accept the factual findings of the trial court unless they are "so contrary to unexplained, unimpeached, unambiguous documentary evidence as to be inherently incredible and unreliable." *Kusi v. State*, 438 Md. 362, 384 (2014).

DISCUSSION

I. MR. BROWN'S RETRIAL IS NOT BARRED BY DOUBLE JEOPARDY. THE CIRCUIT COURT, THEREFORE, DID NOT ERR WHEN IT DENIED MR. BROWN'S MOTIONS TO DISMISS.

A. Parties' Contentions

Mr. Brown argues that the circuit court erred when it denied his motions to dismiss his indictment based on the State's misconduct in failing to provide Mr. Brown with Report 29 during discovery prior to his first trial. Mr. Brown attests that the State willfully withheld Report 29, and that the failure to provide Report 29 was a violation of *Brady v. Maryland*. Per Mr. Brown, this *Brady* violation resulted in the hung jury and mistrial.

Therefore, the State should be barred from retrying Mr. Brown because the hung jury and subsequent mistrial resulted from the State's own misconduct.

The State acknowledges that Report 29 was not disclosed to Mr. Brown prior to his first trial -- and only days before his second trial -- but argues that the State was not aware of the report's existence. The State additionally contends that Report 29 does not contain any exculpatory evidence that Mr. Brown had not already had access to, as all information referenced in the report had otherwise been provided to the defense. Finally, the State argues that Mr. Brown's retrial is not barred on double jeopardy grounds because Mr. Brown has presented no evidence to show that the State goaded Mr. Brown into requesting a mistrial, and, therefore, Mr. Brown has waived his double jeopardy claim.

B. Double Jeopardy Following a Mistrial

The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Although the Maryland constitution does not contain a corresponding clause, Maryland common law has long protected individuals from being tried or sentenced for the same offense twice. *See, e.g., Scott*, 454 Md. at 167; *Taylor v. State*, 381 Md. 602, 610 (2004) (citing Maryland cases).

It is well established that when the defense moves for a mistrial, there is generally no bar to retrial on double jeopardy grounds. *See, e.g., United States v. Scott*, 437 U.S. 82, 93 (1978) ("Where . . . a defendant successfully seeks to avoid his trial prior to its conclusion by a motion for mistrial, the Double Jeopardy Clause is not offended by a second prosecution. 'A motion by the defendant for mistrial is ordinarily assumed to

remove any barrier to reprosecution, even if the defendant's motion is necessitated by a prosecutorial or judicial error.'") (quoting *United States v. Jorn*, 400 U.S. 470, 485 (1971)); *West v. State*, 52 Md. App. 624, 631 (1982) ("Ordinarily, a defense request for a mistrial is treated as a waiver of any double jeopardy claim.").

There exists, however, a narrow exception to this general waiver: "Only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982). Although the Supreme Court declined to define a flat rule such that a defendant may *never* invoke double jeopardy after successfully moving for a mistrial, it emphasized that cases where a defendant may raise double jeopardy as a bar to a retrial "are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." *Id*. at 679.

Mr. Brown concedes that "the prosecutor didn't goad the Defendant into requesting a mistrial by her bad act during trial," but argues that a mistrial for manifest necessity may still bar a retrial when the reason for the mistrial is motivated by bad faith. *United States v. Dinitz*, 424 U.S. 600, 611 (1976). This argument is unpersuasive, however, because Mr. Brown's mistrial was not granted because of manifest necessity. Indeed, when "the defendant himself has elected to terminate the proceedings against him, . . . the 'manifest necessity' standard has no place in the application of the Double Jeopardy Clause." *Kennedy*, 456 U.S. at 672 (citing *Dinitz*, 424 U.S. at 607-610).

Despite Mr. Brown's concession that the prosecution did not goad him into requesting a mistrial, Mr. Brown now argues, essentially, that when prosecutorial misconduct, such as a *Brady* violation, occurs, a retrial is necessarily barred by double jeopardy. Mr. Brown contends that the content of Report 29, which he claims includes extensive *Brady* and *Giglio* evidence, "would only have moved the five people who voted to convict to consider acquittal." As a result, the State's failure to turn over the report prior to trial is just as problematic as "goading" the defense into moving for a mistrial.

This Court has noted that for prosecutorial misconduct resulting in a mistrial to bar retrial, the intent of the prosecution to "sabotage" the trial is the deciding factor. *West*, 52 Md. App. at 633, 635 ("It is not enough that the prosecutor has smuggled prejudicial contraband aboard the train hoping it will reach its destination; it is required that he has deliberately accepted the high risk of derailing the train, either hoping for the derailment or indifferent to the possibility."). The distinction is between "1) an ordinary 'prosecutorial or judicial impropriety justifying a mistrial,' and 2) an otherwise indistinguishable prosecutorial or judicial impropriety save for the additional and aggravating *mens rea* that the impropriety proceed 'from a fear that the jury was likely to acquit the accused.'" *Fields*, 96 Md. App. at 737 (quoting *United States v. Tateo*, 377 U.S. 463, 468 n. 3 (1964)). In determining whether double jeopardy bars retrial following purported prosecutorial misconduct, the only relevant consideration is "the motive behind the error." *Id*. at 738. "To punish a prosecutor for creating grounds for reversal by violating the precepts of *Brady*, however, is not among the purposes of double jeopardy protection." *Ware v. State*, 360 Md. 650, 710 (2000).

Thus, for Mr. Brown's retrial to be barred on double jeopardy grounds following his mistrial, he must demonstrate that in failing to disclose Report 29, the State intentionally acted to sabotage Mr. Brown's trial after it realized the jury was likely to acquit by goading Mr. Brown into moving for a mistrial. That is simply not what occurred in this case. Here, the State, in failing to produce Report 29 prior to Mr. Brown's first trial, may have committed a potential *Brady* violation. Notably, the alleged prosecutorial misconduct did not occur through the actions of the State during the trial as a reaction to a "fear that the jury was likely to acquit" Mr. Brown. *Fields*, 96 Md. App. at 737. The court stated that it could not "conclude that the additional evidence cited by Defendant would have convinced the remaining jurors who sided with the State." Although it expressed disappointment with the State, the court expressly noted that it could not "conclude that the State acted deliberately in disobedience of [the court's] order or willfully with the intent to deprive the Defendant of his right to a fair trial."

Critically, the proper remedy for a *Brady* violation is typically a new trial. *Williams v. State*, 183 Md. App. 517, 525-27 (2008), *rev'd on other grounds*, 416 Md. 670 (2010) (noting that "the provision of a new trial is the standard remedy for a *Brady* violation, for the simple reason that evidence, which was initially suppressed, can then be presented to a new jury."). "A court may, however, dismiss an indictment as a sanction in an extraordinary case of misconduct by the State where no less drastic remedy is available." *Smith v. State*, 484 Md. 1, 16 (2023). To determine whether dismissal of an indictment on due process grounds is appropriate, the defendant must demonstrate: "(1) willful misconduct, *i.e.*, intentional, knowing, or reckless misconduct, which may be shown

through egregious misconduct or a pattern of repeated misconduct, along with: (2) irreparable prejudice; and (3) no less feasible alternative to dismissal to alleviate the prejudice." *Id*. The circuit court found that Mr. Brown failed to demonstrate the State acted with willful misconduct. In our view, the trial court's determination is not clearly erroneous. We, therefore, need not address irreparable prejudice or other feasible alternatives. We make no determination on whether the information provided by Report 29 contains *Brady* or *Giglio* evidence. Assuming *arguendo* that the information contained in Report 29 has material that constitutes *Brady* or *Gislio* evidence, the proper remedy would be, at most, a new trial.

CONCLUSION

We hold that Mr. Brown's request for a mistrial effectively waived any double jeopardy claim because Mr. Brown has presented no evidence that the State goaded or intentionally urged Mr. Brown into requesting a mistrial. Accordingly, he State's failure to disclose Report 29 did not effectively goad Mr. Brown into moving for a mistrial. Accordingly, the circuit court did not err in denying Mr. Brown's motions for dismissal of his indictment on double jeopardy grounds. We, therefore, affirm.

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