

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 1467

September Term, 2015

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ANDREW BAKER

v.

STATE OF MARYLAND

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Wright,  
Nazarian,  
Serrette, Cathy Hollenberg  
(Specially Assigned),

JJ.

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Opinion by Serrette, J.

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Filed: August 4, 2016

\*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In this interlocutory appeal, Appellant Andrew Daniel Baker asserts that the Circuit Court for Cecil County abused its discretion by denying Appellant's motion to dismiss the indictments after the court declared a mistrial without manifest necessity. We find error and reverse.

## I. BACKGROUND

On February 4, 2015, Appellant was indicted on charges of: 1) possession of a regulated firearm after having been convicted of a crime of violence; and 2) possession of a regulated firearm after having been convicted of a disqualifying offense. On April 15, 2015, Appellant was indicted on charges of first and second-degree assault against Darrell Ellis and Mr. Ellis' girlfriend, Kimberly Mitchell. The cases were consolidated for trial purposes. Separately but proximately, Appellant filed charges against Mr. Ellis, pursuant to which Mr. Ellis was indicted.

On July 22, 2015, Appellant's trial commenced. When the matters were initially called, the State advised the Court that Mr. Ellis had indicated that morning that he would not be appearing to testify. Having determined that Mr. Ellis and Ms. Mitchell had been properly subpoenaed, the Court ordered that body attachments issue for both. During a recess prior to jury selection, before the body attachments had been executed, Mr. Ellis and Ms. Mitchell voluntarily met with the Assistant State's Attorney. Mr. Ellis advised the State that he intended to invoke his Fifth Amendment privilege against self-incrimination. The State offered Mr. Ellis immunity from prosecution relating to any information derived from his testimony.

After the jury was impaneled and sworn and the circuit court recessed for lunch, the State filed a motion to compel Mr. Ellis' testimony. Appellant vigorously objected to the motion, asserting that the State knew or should have known for months what information Mr. Ellis would provide.

The court granted the motion to compel testimony, stating:

I find [the Assistant State's Attorney] has indicated that Mr. Ellis' testimony is necessary and furthers the public interest. Based on that, I do believe I will entertain this motion, I would like to proceed by way of calling Mr. Ellis into the courtroom. I would like to indicate to him that it is my intention to deal with this motion, advise him that the state's attorney is offering him immunity, and that he is required to testify in this matter. Then reconvene with the jury and then have Mr. Ellis testify as the State's first witness.

The defense renewed its objection and asked that the Office of the Public Defender be called insofar as Appellant would be asking Mr. Ellis questions on cross-examination related to the charges Appellant had lodged against Mr. Ellis. Defense counsel advised the circuit court that it was his understanding that the Assistant State's Attorney's brother was Mr. Ellis' counsel in the case Appellant had initiated against Mr. Ellis.

At that point, 3:16 p.m., the circuit court took a forty-five (45) minute recess. When proceedings resumed, the court *sua sponte* declared a mistrial over Appellant's objection.

The court noted:

We had taken a recess in this matter. Mr. Karl Fockler, who is an Assistant State's Attorney prosecuting this matter, filed a motion to compel testimony. He had requested that the Court compel the testimony of Darrell Ellis, Jr., who is a material witness for the State, and he had

indicated that this witness was necessary and that it was in the public interest that this witness be compelled to testify.

He indicated in connection with his motion that he intended to offer Mr. Ellis immunity in light of the fact that he had been advised by Mr. Ellis that he intended on exercising his Fifth Amendment privilege.

Mr. Halter on behalf of Mr. Baker had provided argument with regard to this matter. In connection with the matter, the Court became aware of the fact that Mr. Darrell Ellis, Jr., has criminal charges pending against him. Those criminal charges were filed by Andrew Baker. In connection with that matter, it is my understanding that Mr. Ellis, Jr., is in fact represented by Mr. Edwin Fockler of the Public Defender's Office, who is the brother of Mr. Karl Fockler.

In light of these facts and circumstances, I do not believe it is possible for me to continue in this matter, for us to continue this trial. I do not think that I can conduct a hearing and/or permit the testimony of Mr. Ellis accompanied by his attorney being offered immunity when his attorney is the brother of the State's Attorney.

In light of that, I am going to call the members of the jury panel back in, I am going to declare a mistrial, and I am going to excuse them...

Following Appellant's objection to the declaration of a mistrial, the circuit court reiterated:

Again, as I've indicated, I did speak to counsel in chambers so that the record is clear. I indicated that I do not see how I can proceed at this time given these circumstances.

I am going to call the jury back in. I'm going to advise them that an issue has come up, that it cannot be resolved, it's through no fault of anyone, but I'm declaring a mistrial and they are excused.

On July 31, 2015, Appellant filed a Motion to Dismiss Indictment Based Upon Double Jeopardy Grounds. The Motion asserted that the Judge had expressed her concerns in chambers about a conflict of interest or appearance of a conflict of interest arising from the roles of the Fockler brothers. Appellant claimed that there had been a brief discussion about the possibility of contacting another attorney from the Office of the Public Defender to counsel Mr. Ellis, but that this was not done. The Motion further indicated that the Judge expressed her concern about continuing the matter to the next day in order to contact someone to advise Mr. Ellis, and stated that she saw no alternative to declaring a mistrial. Appellant argued that in rendering her decision, the trial judge failed to explore reasonable alternatives and failed to state that there was a manifest necessity for a mistrial.

Following a hearing on August 28, 2015, the circuit court denied Appellant's Motion to Dismiss Indictment. The court opined that it would have been a conflict of interest to have had the prosecutor's brother advise Mr. Ellis regarding his right not to testify in this matter given the familial relationship, and that it would not have been proper to assign Mr. Ellis a new attorney for this purpose. The court further stated:

Specifically he [Mr. Ellis] has the right to have his own counsel represent him. And additionally, this matter involved the same parties as the other. And I did not think it was proper to advise Mr. Ellis that he had the right to rely on the advise [sic] of another attorney chosen by the Public Defender's Office without the benefit of his counsel who was representing him in the other matter.

The Court certainly believed that the charges relating to January 15, 2015, filed against Mr. Ellis would have been brought out, either they may have been subject to the

immunity and/or that they would be subject to cross-examination.

Based on the fact that the Court did not believe it appropriate to randomly assign a Public Defender other than Mr. Edwin Fockler to Mr. Ellis to advise him with regard to his Fifth Amendment privileges, advise him with regard to possible consequences of immunity, I found no reasonable alternatives at the time. The Court believed there was a manifest necessity to grant the mistrial. And in light of those findings, the Court is going to deny defendant's motion today.

On August 28, 2015, Appellant filed a Notice of Appeal and moved to stay further proceedings pending appeal. Additional facts are incorporated below as relevant to each issue.

## II. DISCUSSION

Appellant challenges the circuit court's decision to declare a mistrial over Appellant's objection and the denial of the Motion to Dismiss Indictment Based Upon Double Jeopardy Grounds.<sup>1</sup>

### *Standard of Review*

"[O]ur cases make clear that we apply the abuse of discretion standard of review in cases of mistrial." *Simmons v. State*, 436 Md. 202, 212, (2013) (citing *Carter v. State*, 366 Md. 574, 589, (2001) ("It is well-settled that a decision to grant a mistrial lies within the sound discretion of the trial judge and that the trial judge's determination will not be

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<sup>1</sup> Mr. Baker phrased the issue as follows in his brief: The trial court abused its discretion in multiple respects by declaring a mistrial without manifest necessity and by later denying the motion to dismiss.

disturbed on appeal unless there is abuse of discretion.”)). “[A] mistrial is generally an extraordinary remedy and that, under most circumstances, the trial judge has considerable discretion regarding when to invoke it.” *Whack v. State*, 433 Md. 728 (2013) (quoting *Powell v. State*, 406 Md. 679, 694 (2008) (citing in turn *Cooley v. State*, 385 Md. 165, 173 (2005)). To determine abuse of discretion, “we look to whether the trial judge's exercise of discretion was manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Simmons*, 436 Md. at 212-13 (2013) (citing *Stabb v. State*, 423 Md. 454, 465 (2011) (citations and quotations omitted)).

### ***Double Jeopardy***

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides: “. . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. amend. V; *see also Benton v. Maryland*, 395 U.S. 784 (1969). “Maryland common law double jeopardy principles also protect an accused against twice being put in jeopardy for the same offense.” *State v. Woodson*, 338 Md. 322, 328 (1995) (quoting *Gianiny v. State*, 320 Md. 337, 342 (1990)). “In a jury trial, the Double Jeopardy Clause generally bars the retrial of a criminal defendant for the same offense once a jury has been empaneled and sworn.” *Simmons v. State*, 436 Md. at 213-14 (2013) (citing *Illinois v. Somerville*, 410 U.S. 458, 467 (1973); *Taylor v. State*, 381 Md. 602, 610–11 (2004)). “Thus, after jeopardy attaches, retrial is barred if a mistrial is declared without the defendant's consent unless there is a showing of ‘manifest necessity’ to declare the

mistrial. *State v. Woodson*, 338 at 329 (1995) (citing *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824) (holding that a trial court may discharge a jury without the defendant's consent whenever “taking all the circumstances into consideration, there is a manifest necessity for the act...”).”

In *Arizona v. Washington*, 434 U.S. 497, 505 (1978), the United States Supreme Court cautioned:

Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury. Yet in view of the importance of the right, and the fact that it is frustrated by any mistrial, the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate “manifest necessity” for any mistrial declared over the objection of the defendant.

(Footnote omitted).

### ***Manifest Necessity***

“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); citing *Perez*, 22 U.S. 579-80 (1824); *Cornish v. State*, 272 Md. at 313 (1974). “While it is in the sound discretion of the trial judge to declare a mistrial, he or she may do so only if a ‘high degree’ of necessity

demands that he or she do so.” *Mansfield*, 422 Md. 269, 287 (2011) (citing *State v. Crutchfield*, 318 Md. 200, 208 (1989) (quoting *Arizona v. Washington*, 434 U.S. 497 (1978))).

In *Hubbard v State*, 395 Md. 73, 92 (2006), the Court of Appeals explained:

Thus, to determine whether manifest necessity to declare a mistrial over defense objection exists, the trial judge must engage in the process of exploring reasonable alternatives and determine that there is no reasonable alternative to the mistrial. Unlike the rule propounded by the Court of Special Appeals, application of this standard in manifest necessity cases does not only consider whether alternatives were analyzed, but also goes to whether a reasonable alternative to a mistrial was available. If there was no reasonable alternative, ordinarily the mistrial is manifestly necessary, and retrial is not barred by double jeopardy principles. If there is a reasonable alternative, the mistrial is not manifestly necessary, and a defendant cannot be retried. Any doubt should be resolved in favor of the defendant.

In the case *sub judice*, following an in chambers meeting with counsel, the circuit court declared a mistrial, noting on the record that in light of the motion to compel Mr. Ellis’s testimony, the State’s representation that he was a material witness, the State’s offer of immunity following Mr. Ellis’s disclosure of his intent to invoke his Fifth Amendment privilege, and the revelation that Mr. Ellis was represented by the prosecutor’s brother on temporally related charges, it was not possible to continue with the trial.

The trial record is void of an explicit “manifest necessity” determination. More significant than the absence of the words “manifest necessity,” however, was the absence of a sufficient analysis to support the determination that there was no reasonable

alternative. The Court failed to identify what, if any, alternatives were considered prior to declaring a mistrial. There was no conversation with Mr. Ellis’s counsel, no discussion of a continuance, no Md. Rule 5-403 analysis regarding the exclusion of Mr. Ellis’s testimony,<sup>2</sup> and no other alternatives discussed.

At the subsequent hearing on the Motion to Dismiss Indictment Based Upon Double Jeopardy Grounds, the circuit court clarified that it had found that the familial relationship between the prosecutor and Mr. Ellis’s attorney created a conflict of interest and that it had determined that it would not have been fair to Mr. Ellis to have appointed a different attorney to advise him about testifying in this matter. The court concluded, “I found no other reasonable alternatives available at the time. The [c]ourt believed there was a manifest necessity to grant the mistrial.”

Although the court declared that it had found manifest necessity and “no other reasonable alternatives,” there was no explanation of alternatives considered. The court expounded its concerns regarding Mr. Ellis’ rights, but failed to note what had been considered to protect Appellant’s rights as is required by case law.

### **III. CONCLUSION**

We hold that the trial court abused its discretion by declaring a mistrial without a sufficient basis to support a manifest necessity determination and therefore erred when it failed to grant the Motion to Dismiss Indictments.

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<sup>2</sup> The court had indicated that Mr. Ellis was a material witness based upon the State’s representation that Mr. Ellis’s testimony was necessary and furthered the public interest.

**JUDGMENT OF THE CIRCUIT COURT  
FOR CECIL COUNTY IS REVERSED.  
CASES ARE REMANDED TO THE  
CIRCUIT COURT FOR CECIL COUNTY  
WITH DIRECTIONS TO DISMISS THE  
INDICTMENTS. COSTS TO BE PAID BY  
CECIL COUNTY.**