

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 30, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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Appeal No. 2004AP1888-CR

Cir. Ct. No. 2002CF271

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT 1**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ANTONIO MAYS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 KESSLER, J. Antonio Mays appeals from a judgment of conviction for armed robbery with use of force, party to a crime, as a habitual criminal, and from an order denying his motion for postconviction relief. Mays argues that his second trial violated his constitutional protection against double jeopardy, and that

the case should therefore be dismissed with prejudice. We reject his argument and affirm the judgment and order.

BACKGROUND

¶2 Mays was charged in connection with a robbery that took place on December 24, 2001, at a private home. Two men entered the residence, shot and killed a dog, ordered several occupants to lie on the floor, and took cash and presents from the home. Mays and a co-defendant, Lamarcus Jones, were alleged to be the perpetrators.

¶3 Mays and Jones were tried together in August 2002. During three days of trial, there were numerous incidents where Mays acted out and was admonished by the trial court. On the third day, the trial court and the parties discussed in chambers the trial court's concerns about Mays's behavior, which included clapping while the trial court was speaking, threatening deputies with violence, and intentionally displaying wrist restraints to the jury. The most immediate incident had occurred over the lunch hour, when Mays kicked a wall in the bullpen and screamed so loudly that he could be heard one floor below.¹ After the in-chambers conference, the trial court summarized the discussion on the record.²

¹ The trial court noted in a subsequent hearing that before granting the mistrial, it was informed that Mays had damaged the bullpen, thrown his food around the bullpen area and had urinated on the food and throughout the bullpen area.

² Mays does not challenge the accuracy of the trial court's summation of what occurred in court, in chambers or in the bullpen.

¶4 The trial court said that it had discussed with trial counsel and the State its concerns about proceeding with the trial, given that the trial was taking longer than anticipated, in part because of disruptions by both defendants. The trial court stated that it was concerned about the safety of those in the courtroom. The trial court also indicated that it had concerns about whether both defendants could receive a fair trial, given the misconduct by Mays that the jury had observed during trial and might have heard over the lunch hour. Finally, the trial court expressed concern that Mays's behavior signaled that he might have mental health issues that needed to be addressed (including whether Mays was taking prescribed medication for his mental health). The trial court said it was considering whether to declare a mistrial so that Mays could undergo a mental health evaluation. The trial court said that in the alternative, it could continue the trial with Mays in the jail, observing the proceedings with the use of video conferencing.

¶5 The trial court asked the State and trial counsel to state their positions. Trial counsel for co-defendant Jones indicated that he had discussed the issues with his client, but trial counsel did not indicate a preference for either of the proposed courses of action.

¶6 Trial counsel for Mays said that in his opinion, Mays's mental condition had deteriorated over the course of the trial, making Mays easily agitated. Trial counsel opined that Mays's behavior had changed because Mays had not consistently taken his medication during the trial. Trial counsel concluded:

I think his ... inappropriate behavior, which is due to the lack of meds, should not be considered by the jury.... I would ask the Court to go along with our thinking on that and declare a mistrial as far as we are concerned and ask that Mr. Mays at least be evaluated as to his competency to refuse his meds.

¶7 After trial counsel finished speaking, Mays and the trial court immediately had the following exchange:

DEFENDANT MAYS: Is it too hard for you to realize these chains are too tight? This is cruel and unusual punishment. What do you think this is? The chains is on my chest. I can hold my hand down. The fuckin' chains is tight.

THE COURT: Mr. Mays –

DEFENDANT MAYS: Excuse my language. I apologize.

THE COURT: We had that – we had that discussion already. I'm not going to accept your apologies anymore.

DEFENDANT MAYS: These things is on tight from foot to arm.

THE COURT: They're on tight because when they were loose you managed to pull the middle chain off of your waist. Again, remember I told you you control your own behavior and the way you're treated.

DEFENDANT MAYS: Rights now these things squeezin' my ankles. I barely can walk. My left leg – if I'm in pain –

THE COURT: I think you need to be quiet right now, Mr. Mays.

DEFENDANT MAYS: This is justice? Ha. You see this around my legs? That's what I'm talking about.

THE COURT: The Court is going to order an in-patient examination at the Winnebago Mental Health Complex for the defendant, Antonio Mays. The Court is also pursuant to 971.14(3) directing the facility to make a determination as to the defendant's competency to refuse medications.

As a result of the defendant not – defendant Mays not being able to proceed with the trial today, the Court is granting a mistrial. The deputies will now be escorting Mr. Mays out of the court.

¶8 After Mays exited the room, none of the parties noted any objection to declaring a mistrial. They proceeded to discuss scheduling issues. The jury was dismissed.

¶9 A mental health examination was subsequently conducted. The trial court found Mays competent to proceed and scheduled separate new trials for each defendant.

¶10 A new attorney was appointed for Mays. This attorney later became standby counsel for Mays when Mays asked to represent himself. The jury found Mays guilty of armed robbery and not guilty of two other crimes.³

¶11 Mays was again represented by counsel at sentencing. He was sentenced to ten years in prison and ten years of extended supervision. Mays filed a motion for postconviction relief, alleging that his right to be free from being tried twice for the same crime had been violated. The motion also asserted that if the trial court were to conclude that Mays waived his double jeopardy protections when trial counsel requested the mistrial, then trial counsel provided ineffective assistance. The trial court denied Mays's motion without a hearing. This appeal followed.

LEGAL STANDARDS

¶12 “The Fifth Amendment to the U.S. Constitution and Article I, Section 8 of the Wisconsin Constitution protect a criminal defendant from being

³ The Honorable Mary M. Kuhnmuensch heard the first trial and declared the mistrial. At Mays's request, Judge Kuhnmuensch recused herself and the second trial was held before the Honorable M. Joseph Donald. Due to judicial assignment, the postconviction motion was later heard by the Honorable Richard J. Sankovitz.

placed in jeopardy twice for the same offense.” *State v. Williams*, 2004 WI App 56, ¶23, 270 Wis. 2d 761, 677 N.W.2d 691. Jeopardy attaches in a jury trial when the jury has been selected and sworn. *Id.* However, “[a] defendant’s right to have his or her trial concluded by a particular tribunal can be, under certain circumstances, subordinated to the public interest in affording the State one full and fair opportunity to present its evidence to an impartial jury.” *Id.*, ¶24. Where there is a “manifest necessity” for any mistrial ordered over the objection of the defendant, the defendant may be retried without violating the defendant’s constitutional rights. *See id.*

¶13 The decision to grant a motion for a mistrial lies within the sound discretion of the trial court. *State v. Ross*, 2003 WI App 27, ¶47, 260 Wis. 2d 291, 659 N.W.2d 122. On appeal of a trial court’s decision to grant a mistrial, appellate courts consider whether the trial court erroneously exercised its discretion when it declared a mistrial, and apply varying levels of deference to the trial court’s exercise of discretion depending on the facts of the case. *See Williams*, 270 Wis. 2d 761, ¶¶25-30.

DISCUSSION

¶14 At issue is Mays’s constitutional right to be free from double jeopardy. We begin by addressing two issues: (1) whether Mays failed to preserve his right to argue a double jeopardy violation when he failed to raise the issue prior to his second trial; and (2) whether trial counsel’s request for the mistrial waived Mays’s right to challenge his retrial. Next, because we decline to find waiver on either of the two issues, we address Mays’s claims that his trial counsel was ineffective for requesting a mistrial and that the trial court lacked a

sufficient basis to grant the mistrial. Ultimately, we conclude that there was no double jeopardy violation and, therefore, affirm the conviction.

I. Waiver by failure to raise double jeopardy issue prior to trial

¶15 The State, citing *State v. Mink*, 146 Wis. 2d 1, 429 N.W.2d 99 (Ct. App. 1988), argues that Mays waived the right to raise the double jeopardy issue when, prior to the second trial, he failed to move for dismissal of the charges or claim that the second trial was a violation of his double jeopardy protection. In *Mink*, this court held that if the State moves to retry the defendant after a mistrial, “the defendant must move for dismissal on double jeopardy grounds to avoid waiver.” *Id.* at 10.

¶16 In response to the State’s argument, Mays contends that this court is not required to apply the waiver rule, and that it should not do so, because he represented himself and, he implies, did not realize he had to raise this issue. He also asserts that in the interest of justice, this court should address his claim on its merits.

¶17 It appears that under *Mink*, Mays waived his right to argue a violation of double jeopardy. However, we decline to apply the waiver rule in this case and, instead, will address Mays’s arguments with respect to double jeopardy.

II. Waiver based on trial counsel’s request for a mistrial

¶18 The State argues that because trial counsel requested the mistrial that led to a second trial for Mays, the propriety of the mistrial order is not a proper subject for appellate review.

[W]hen a defendant successfully requests a mistrial, the general rule is that the double jeopardy clause does not bar

a retrial, because the defendant is exercising control over the mistrial decision: since a mistrial ordinarily implicitly means a new trial, the defendant is choosing to be tried by another tribunal.⁴

State v. Hill, 2000 WI App 259, ¶11, 240 Wis. 2d 1, 622 N.W.2d 34. Consistent with this general rule, the State contends, Mays should not be allowed to raise his double jeopardy argument on appeal, because his trial attorney requested the mistrial.

¶19 Mays presents two alternative responses to this argument: that the trial court sua sponte declared a mistrial, and that if instead it was Mays's trial counsel who sought the mistrial, then trial counsel was ineffective for doing so. First, he asserts that the trial court sua sponte declared a mistrial when it "informed counsel for the State and the defendant at trial, that the trial court was going to discharge the jury and that Mr. Mays was not going to be allowed to be in the courtroom any longer without a mental health evaluation." Mays mischaracterizes the trial court's actions. The trial court explicitly told the parties that it was "leaning towards" declaring a mistrial, but the trial court did not sua sponte declare one. Instead, the trial court proposed an alternative—allowing Mays to watch the proceedings via video conferencing—and asked the parties to state their positions concerning how the trial court should address Mays's behavior. In response, Mays's trial counsel requested a mistrial.

¶20 Based on our review of the transcript of the proceedings, it appears that Mays waived his double jeopardy protections when his trial counsel requested

⁴ There is an exception to this general rule: "[R]etrial is barred when a defendant moves for and obtains a mistrial due to prosecutorial overreaching." *State v. Hill*, 2000 WI App 259, ¶11, 240 Wis. 2d 1, 622 N.W.2d 34. There is no allegation that this exception is applicable here.

the mistrial. *See id.* Our inquiry is not at an end, however, because Mays argues that if trial counsel's request for a mistrial waived Mays's double jeopardy rights, then trial counsel provided ineffective assistance. Mays contends that his trial counsel did not consult with him prior to asking for a mistrial and that Mays did not consent to the mistrial. Thus, Mays argues, he did not abandon his double jeopardy protections.

¶21 Assuming for purposes of this opinion that trial counsel should have consulted with Mays, and that Mays did not consent to the request for mistrial, we nonetheless conclude that Mays is not entitled to a reversal, because even if Mays had not requested the mistrial, the trial court had abundant reasons to grant the mistrial on its own initiative.⁵

III. Basis for the mistrial

¶22 When a trial is terminated over the defendant's objection and without his or her consent, such as upon the State's motion for mistrial or the trial court's sua sponte decision, then retrial is barred unless the proceedings were terminated because of manifest necessity. *State v. Lettice*, 221 Wis. 2d 69, 80, 585 N.W.2d 171 (Ct. App. 1998). Under the manifest necessity test, a "high degree" of necessity must be found before a mistrial is appropriate." *State v. Collier*, 220 Wis. 2d 825, 834, 584 N.W.2d 689 (Ct. App. 1998) (citation omitted). "Whether a 'high degree' of necessity exists rests within the trial court's discretion

⁵ Although we decline to fully analyze trial counsel's decision to seek a mistrial, we note that under the circumstances, trial counsel's request certainly seems appropriate. Indeed, a trial counsel's failure to seek a mistrial where a jury has likely formed a negative impression of the defendant based on his outrageous conduct in the courtroom could be the basis of a claim for ineffective assistance of counsel.

because that court is in the best position to determine whether the [S]tate seeks a mistrial to gain unfair advantage over the defendant.” *Id.* at 835.

¶23 In exercising its discretion, the trial court must examine the circumstances leading to the contemplated mistrial and “should consider the alternatives before depriving the defendant of the right to have the original tribunal render a final verdict.” *Id.* The standard of review of a trial court decision to grant a mistrial varies according to the facts—the scrutiny is stricter if the State requests the mistrial. *Id.* If a trial court has not erroneously exercised its discretion in declaring a mistrial, retrial is not barred by double jeopardy. *See Williams*, 270 Wis. 2d 761, ¶¶24, 29.

¶24 We conclude that there is an adequate basis to sustain the trial court’s discretionary decision to declare a mistrial, and that Mays’s retrial was therefore not barred. The trial court offered numerous reasons for its concern about proceeding with the trial. These included: (1) the defendants’ behavior presented safety concerns that had already required the trial court to order that the defendants be chained at their ankles and legs; (2) the defendants might not receive a fair trial because the jury might be negatively influenced after observing Mays’s behavior in court and possibly hearing Mays yelling and kicking in the bullpen over the noon hour; (3) Mays’s behavior was so outrageous that the trial court had reason to doubt his competency, especially in light of evidence that Mays was not taking his medication consistently; and (4) the trial was taking longer than had been anticipated, which was problematic for jurors who had not planned on a longer trial. The trial court’s discussion of these issues illustrates that the trial court properly considered, at length, the circumstances in this case that may require a mistrial.

¶25 A trial court is also required to consider alternatives to a mistrial. *Collier*, 220 Wis. 2d at 835. Here, the trial court considered whether to have Mays immediately evaluated by a mental health professional, and whether to have Mays watch the trial via video conferencing from the jail. The trial court also asked the parties for their suggestions, noting: “I’m not Mr. Jones’ lawyer and I’m not Mr. Mays’s lawyer. I’m not the State’s lawyer. I’m simply the person who is responsible for making sure that a trial is fair and ... [that] the playing field remains level throughout the proceedings.”

¶26 Under any level of scrutiny, *see id.*, we are satisfied that the trial court reasonably exercised its discretion when it declared a mistrial. The trial court’s implicit conclusion that there was a high degree of necessity for the mistrial is well supported by the undisputed facts. One might fairly describe Mays’s trial conduct, particularly over the lunch hour, as out of control, such that it put the personal safety of others in the courtroom at risk. A more classic situation creating a manifest necessity for a mistrial is difficult to imagine. Because the trial court did not erroneously exercise its discretion when it declared a mistrial, Mays’s double jeopardy rights are not offended by retrial. *See Williams*, 270 Wis. 2d 761, ¶24.

By the Court.—Judgment and order affirmed.

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