COURT OF APPEALS
DECISION
DATED AND RELEASED

March 7, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 95-2315-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PERLES PAYNE,

Defendant-Appellant.

APPEAL from an order of the circuit court for Dane County: ROBERT DE CHAMBEAU, Judge. *Reversed and cause remanded with directions.*

SUNDBY, J.[1] The United States Supreme Court has held that the Double Jeopardy Clause is "distinctive." ***Blackledge v. Perry***, 417 U.S. 21, 31 (1974) (citing ***Robinson v. Neil***, 409 U.S. 505 (1973)). It is distinctive in that a violation of the Clause goes "to the very power of the State to bring the defendant into court to answer the charge brought against him." ***Id***. at 30.

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[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS. "We" and "our" refer to the court.

In this case, the trial court granted the State's motion for a mistrial based on defense counsel's opening statement to the jury. Nine days before retrial, defendant moved the trial court to dismiss the complaint because to retry him would violate the Double Jeopardy Clause. *Sua sponte*, the trial court raised the issue whether defendant's motion was timely and when the prosecutor refused to waive the untimeliness of defendant's motion, the trial court summarily denied defendant's motion.

Because of the uniqueness of the double jeopardy protection and defendant's "weighty"[2] interest in completion of the trial before the jury which has been selected, we conclude that the trial court erroneously exercised its discretion when it summarily denied defendant's motion as untimely. We further conclude that the State failed to show that a mistrial was a "manifest necessity." We therefore reverse the order denying defendant's motion to dismiss and direct that the trial court dismiss the complaint.

[2] ***Illinois v. Somerville***, 410 U.S. 458, 471 (1973).

TIMELINESS OF MOTION

In its initial brief, the State merely noted that the trial court had dismissed defendant's motion as untimely; it did not address the timeliness of defendant's motion. The State argued that we should affirm the trial court's order because the State's retrial of the defendant did not violate his rights under the Double Jeopardy Clause. This court invited the parties to file supplemental briefs on the question whether the trial court had erroneously exercised its discretion when it summarily dismissed defendant's motion. The parties accepted our invitation. We reject the State's argument that the defendant waived his right to insist that he not be twice placed in jeopardy by failing to file a timely motion. A waiver is "a voluntary and intentional relinquishment of a known right." ***Attoe v. State Farm Mut. Auto. Ins. Co.***, 36 Wis.2d 539, 545, 153 N.W.2d 575, 579 (1967). The State's argument must be that defendant could not insist on having his motion heard because it was not timely. Therefore, the waiver cases which the State has cited are inapposite and our standard of review is whether the trial court erroneously exercised its discretion when it summarily denied defendant's motion as untimely. The State did not raise the timeliness issue. However, the trial court apparently believed that the untimeliness of defendant's motion was an absolute bar to the court's consideration of the motion. If that had been the case, the court would have had a duty to raise the issue of its lack of jurisdiction. However, we believe that the trial court may consider a motion to dismiss on double jeopardy grounds at any time before or during the trial. The question is not one of power but of administration.

At the outset of the motions' hearing before retrial, the following occurred:

> THE COURT: I have two motions here. One, a Motion To Dismiss: Double Jeopardy; the second, a Motion to Compel Disclosure of Mental Health Records. The second was filed on July 31st. The other motion, the motion to dismiss, apparently was just given to my clerk today. Ms. Gundersen, are you waiving the notice requirement on the motion to dismiss?

> MS. GUNDERSEN: No, I'm not.
>
> THE COURT: All right. We won't hear the motion to dismiss, because it is not timely, and it will be denied summarily....

The court did not give the parties an opportunity to argue its ruling; nor did it cite the notice statute on which it relied.

In any event, the cases cited by the State are either guilty-plea cases or cases in which the defendant failed to provide the appellate court with a record sufficient for the court to review defendant's double jeopardy claim. These cases are inapposite.

THE MISTRIAL

We next consider whether the trial court erroneously granted the State's motion for a mistrial. A trial court may not grant a motion for a mistrial unless "there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." ***State v. Copening***, 100 Wis.2d 700, 709, 303 N.W.2d 821, 826 (1981) (quoting ***United States v. Perez***, 22 U.S. (9 Wheat.) 579, 580 (1824)). The court granted the State's motion because defense counsel informed the jury in his opening statement that: "She [the alleged victim] was taken to a mental hospital." The jury could have inferred that the police took the alleged victim to the hospital.

The trial court did not find that a mistrial was manifestly necessary, or that the ends of public justice would be defeated if the court did not declare a mistrial. However, the record need only show sufficient justification for the trial court's ruling. *See* ***Arizona v. Washington***, 434 U.S. 497, 516-17 (1978). "To determine if a mistrial was manifestly necessary in a particular case, we review `the entire record in the case without limiting [ourselves] to the actual findings of the trial court.'" ***United States v. Chica***, 14 F.3d 1527, 1531 (11th Cir. 1994) (quoted source omitted).

To determine whether the trial court erroneously denied Payne's motion to dismiss, we must accept that the defense could present evidence to

support the facts stated in counsel's opening statement. We conclude that the trial court erred when it ruled that: "What the police did or did not do is not relevant to the issues that this jury has to decide." Defendant's theory of defense was that his significant other, Angela Terry (the alleged victim), attacked him violently and he simply defended himself. Because police are charged with the duty to cause emergency detention of persons dangerous to themselves or others, the decision of the police to take Terry into emergency custody and take her to a mental hospital was extremely relevant to Payne's self-defense claim. Under § 51.15(1)(a), STATS., a law enforcement officer may take an individual into custody if the officer has cause to believe that such individual is mentally ill and demonstrates by recent acts a substantial probability of physical harm to herself or others. Each law enforcement agency must provide training in emergency detention procedures for at least one officer. *See* § 51.15(11m). Thus, the police may have had the expertise to testify that they believed they had cause to place Terry in emergency detention. We do not know whether the police acted under § 51.15(1) because the trial court did not allow defense counsel to make an offer of proof.

Motions for a mistrial are frequently based on statements made in opening or closing argument. We have refused to affirm a declaration of a mistrial unless such statements "[rise] to the level of creating something that would interfere with fundamental fairness in the trial itself." ***State v. Hagen***, 181 Wis.2d 934, 948, 512 N.W.2d 180, 185 (Ct. App. 1994). We give great weight to curative instructions as an alternative to ordering a mistrial. *See* ***State v. Bembenek***, 111 Wis.2d 617, 634, 331 N.W.2d 616, 625 (Ct. App. 1983).

Courts must strive to protect the defendant's right to have his or her trial completed by a particular tribunal. *See* ***United States v. Jorn***, 400 U.S. 470, 484 (1971). In this case, the record shows that the defense conducted extensive voir dire and challenged several potential jurors for cause. The defendant's interest is "a weighty one," ***Illinois v. Somerville***, 410 U.S. 458, 471 (1973), given that a second prosecution:

> increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the

> defendant exists whenever a trial is aborted before it is completed.

Washington, 434 U.S. at 503-04 (footnotes omitted).

Because of defendant's "weighty interest" in having his or her trial completed by a particular tribunal, "the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar," when the prosecutor successfully moves for a mistrial over the defendant's objection. ***Chica***, 14 F.3d at 1531 (quoting ***Washington***, 434 U.S. at 505). "The prosecutor must demonstrate `manifest necessity' for any mistrial declared over the objection of the defendant." ***Washington***, 434 U.S. at 505.

The latter case dealt with defense counsel's allegedly improper opening statement. The Court stated:

> An improper opening statement unquestionably tends to frustrate the public interest in having a just judgment reached by an impartial tribunal. Indeed, such statements create a risk, often not present in the individual juror bias situation, that the entire panel may be tainted. The trial judge, of course, may instruct the jury to disregard the improper comment.... Unless unscrupulous defense counsel are to be allowed an unfair advantage, the trial judge must have the power to declare a mistrial in appropriate cases. The interest in orderly, impartial procedure would be impaired if he were deterred from exercising that power by a concern that anytime a reviewing court disagreed with his assessment of the trial situation a retrial would automatically be barred. The adoption of a stringent standard of appellate review in this area, therefore, would seriously impede the trial judge in the proper performance of his "duty, in order to protect the integrity of the trial, to take prompt and affirmative action to stop ... professional misconduct."

Id. at 512-13 (quoting ***United States v. Dinitz***, 424 U.S. 600, 612 (1976)) (footnote omitted).

"[P]recisely what constitutes manifest necessity is not at all clear." ***United States v. Sloan***, 36 F.3d 386, 394 (4th Cir. 1994). "Each case must turn on its facts." ***Downum v. United States***, 372 U.S. 734, 737 (1963). "It is well established, however, that `manifest necessity' means that a `high degree' of necessity is required before a `mistrial is appropriate.'" ***Sloan***, 36 F.3d at 394 (citing ***Washington***, 434 U.S. at 506); *see also* ***Copening***, 100 Wis.2d at 711, 303 N.W.2d at 827. The "valued right" of a defendant to have his or her trial completed by the same jury may be subordinated to the public interest only "when there is an imperious necessity to do so," ***Downum***, 372 U.S. at 736, and "only in very extraordinary and striking circumstances," ***id***. (quoting ***United States v. Coolidge***, 25 F. Cas. 622, 623 (C.C. Mass. 1815)).

Whether manifest necessity exists is a fact-intensive inquiry. ***Chica***, 14 F.3d at 1531 (citing ***Somerville***, 410 U.S. at 461-62). We make that inquiry by reviewing the record.

Because we must accord the highest degree of respect to the trial judge's evaluation of possible prejudice resulting from defense counsel's statement, we must thoroughly review the record to determine first whether defense counsel was guilty of unprofessional misconduct. Although the trial court did not make a finding to this effect, the fair administration of justice requires that we determine that question independently. As the ***Arizona v. Washington*** Court held, counsel may not be allowed to gain an unfair advantage through improper opening argument. If we find that defense counsel did not deliberately attempt to obtain an unfair advantage, and we so conclude, we must nonetheless determine whether defense counsel's argument increased the risk of jury bias to an impermissible degree.

Prior to trial, the State moved the court *in limine* to preclude the defense from attempting to introduce "other acts," or ***Whitty***,[3] evidence of the alleged victim's previous violent conduct directed at Payne. The court heard the State's motion at the outset of trial. The trial court stated that it could not

[3] ***State v. Whitty***, 34 Wis.2d 278, 149 N.W.2d 557 (1967), *cert. denied*, 390 U.S. 959 (1968).

address the State's motion because it did not have any evidence before it at that time. When the prosecutor persisted, defense counsel suggested:

> Why don't we just hash this out right here and now. I intend to bring in other [acts] evidence but not [to] use it as ***Whitty*** evidence. I intend to use it simply to show that my client was aware of prior specific instances of the victim's violence, which I'm going to use to establish what he reasonably knew about the dangerousness of the victim ....

The following colloquy then took place between the prosecutor and the court:

> [THE PROSECUTOR]: [He] can call it whatever he likes, I think it still is properly analyzed under the ***Whitty***--under sec. 904.04(2).
>
> THE COURT: You are wrong, counsel, because ... if there is self-defense, he can testify ... as to what is in his mind, whether true or untrue.... [T]hat's the state of the law, and what he believes that person's reputation is, the victim's reputation for--for being an aggressive person.

This case required a ***Miranda-Goodchild*** hearing. Immediately prior thereto, the prosecutor expressed her concern that during voir dire defense counsel attempted to talk about mental illness. She said: "There is absolutely no evidence of mental illness.... I think any mention of that is entirely inappropriate, and I would ask the court if it would warn [defense counsel] that he may not bring that out in his opening argument ...." Defense counsel replied that he had told the assistant district attorney at the plea hearing that "this was going to be [a] self-defense case. I said there were issues of mental illness ...." A colloquy occurred between defense counsel and the court as to how the defense was going to prove that the alleged victim was mentally ill and how it was relevant that the alleged victim had been in a mental hospital. After further argument, the trial court stated:

> Just a minute, both of you. You can sit and puff ... all you want, but what I'm going to tell the jury, and what the jury will be instructed, is ... prove it.... [E]ven where I thought I was right but needed an evidentiary ruling out of the court, I didn't tell the jury I was going to prove it, because I didn't know, because ... in most situations, as to the admissibility of evidence, and, again, I can't give you a ruling at this juncture. I don't know what the evidence will be.... [I]t is risky what you say, but an opening statement isn't evidence. All that is is I expect to prove. I expect the evidence to show such and such. If it doesn't, you got a jury sitting there saying I can't believe that attorney, they didn't keep their word to us, but ... I'm going to tell the jury right here what opening statements are. It's what each attorney expects to prove, but it isn't evidence and don't consider it as evidence. But I can't really fashion one's opening statement either, counsel.... You do it at your own risk....

Plainly, the trial court gave defense counsel the benefit of the court's considerable trial experience, but left it up to counsel whether he wished to risk telling the jury that he intended to show that the alleged victim suffered from a mental illness, and then not be able to prove that fact, either because of a failure of proof or because of an exclusionary ruling.

We conclude, therefore, that there was not a "manifest necessity" to declare a mistrial because of defense counsel's misconduct. We next consider whether a mistrial was manifestly necessary because defense counsel's opening statement created an impermissible risk of jury bias. Counsel began as follows:

What you are about to hear is going to be a sad story, a very sad
> story. It is going to be a story about domestic abuse, and it is going to be a story about mental illness. [No objection.]

Defense counsel then described how Terry grew up in an unbelievably dysfunctional family in Milwaukee's inner city; how she was repeatedly raped by members of her family beginning when she was six or seven years of age; how she turned to the streets for family and joined the Crips gang who required as a condition of membership that she allow a member of the gang to shoot her in the leg, or she fight someone [Objection. State expects defense to present this evidence at trial]; how when she grew older she could not accept the gang life and was taken in by the Payne family; how she and defendant have been friends since the seventh or eighth grade; how they suffered the same ridicule and taunts because of their deafness; how soon after high school she had a child as a result of a one-night stand "thing"; how she and defendant developed a romantic relationship; how she suddenly changed from a happy, caring person to a "harpy" who became increasingly violent toward defendant; how on the night of the alleged offense she "went totally wild. You'll hear that she was suicidal." [Objection. Sidebar conference, no instruction to jury]; how Terry attacked defendant by slapping him repeatedly in the face; how defendant objected to the way Terry was bad-mouthing the family; how their argument continued in the bedroom where Terry continued to slap defendant in the face and he took it until finally he slapped her back; how Terry ran to the kitchen and attempted to get a knife out of a cabinet drawer but defendant prevented her by slamming the drawer on her fingers; how she again began to slap defendant harder and harder and he attempted to restrain her; how at this point another member of the family called 911 and informed the dispatcher that Terry was "out of control" and asked for assistance; how Terry ran to a neighboring house which the police surrounded and grabbed her when she came out and placed her in their squad car; how the police asked defendant whether he wanted her arrested and "he said, `No, there is something wrong with her. She's sick. She needs help.' The police judging those actions--." [Objection. Sidebar. THE COURT: "It's not relevant and what you are telling the jury is you are going to prove hearsay .... No, move on.... [Y]ou've gone as far as you can in this area. What the police did or did not do is not relevant to the issues that this jury has to decide."]; how defense counsel renewed his opening statement and informed the jury: "She was taken to a mental hospital." [Objection. THE COURT: "Sustained. [Counsel], you were instructed specifically not to get into that area."]

The prosecutor then moved for a mistrial. She argued that defense counsel had been admonished, "I don't know how many times, regarding that." The only admonition that appears in the record was the court's instruction to counsel to move on because what the police did was hearsay and not relevant.

The record does not show that defense counsel had been admonished, "I don't know how many times," as argued by the prosecutor. We cannot review what may have been said at the two sidebar conferences because no record was made of those conferences, nor did the prosecutor ask the court in arguing her motion to place that matter in the record for our review.

It appears from the record that the prosecutor's concern was that she had not had access to Terry's psychiatric records: "I don't know if she ever went to a mental hospital, and, in fact, he can't prove it. I have no access to these psychiatric records." Those records were ordered by the court on August 22, 1995. Whether defendant would have been able to produce those records at the first trial should not have affected the court's ruling on the State's motion because, as the trial court pointed out to defense counsel prior to opening statements, counsel bore the risk of incurring the jury's displeasure and disbelief if he was unable to fulfill his promise to them. The prosecutor did not argue that defendant had failed to comply with a pre-trial order requiring the defense to produce such records, nor would such an order have been possible because the records could not have been made available except through court order.

In view of the unobjected-to statements of defense counsel that Terry was mentally ill and violent and that the police took her to a mental hospital, which evidence we conclude was relevant, we conclude that defense counsel's opening statement did not "[rise] to the level of creating something that would interfere with fundamental fairness in the trial itself." ***Hagen***, 181 Wis.2d at 948, 512 N.W.2d at 185. We conclude that the State failed to carry its burden to show that a mistrial was a manifest necessity, or necessary to prevent the ends of justice from being defeated.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.