IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
FOR HILLSBOROUGH COUNTY, FLORIDA
APPELLATE DIVISION

MARK ASHER KING,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.
_____/

Appellate Case No: 16-CF-006760
Lower Case No: 15-CM-013322

Division: F

Appeal from the County Court
for Hillsborough County:
The Honorable Lawrence Lefler

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Katherine E. Yanes, Esq.
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Appellant

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_____/

Opinion filed August 18, 2017.

Appellant, Mark Asher King, appeals his conviction for Trespass on Property other than Structure or Conveyance and raises two issues on appeal. First, Appellant argues that his trial was in violation of double jeopardy after the trial court previously declared a mistrial without a manifest necessity. Second, Appellant argues that the trial court infringed on his religious freedom and his right to testify in his own defense when the court prevented him from testifying after he refused to take the oath contained in Florida Statutes section 90.605(1).

The Court agrees with Appellant on the first issue and reverses. Because the Court finds that Appellant's retrial was in violation of double jeopardy, the Court declines to address whether the lower court improperly prevented Appellant from testifying at his retrial.

I. Facts and Procedural History

On August 22, 2015, Appellant was proselytizing his religious beliefs to passerby at Raymond James Stadium. Because Appellant was not complying with the demonstration policies of the Tampa Sports Authority, the organization that manages the stadium, security asked him to move his demonstration to the sidewalk outside of the stadium. Appellant refused and continued to preach. Appellant was then formally trespassed from the stadium, but he once again refused to leave. At this point, Appellant was arrested for trespassing and removed. Subsequently, the State charged Appellant with Trespassing on Property other than Structure or Conveyance.

At the first trial, the State raised a concern that Appellant participated in a similar demonstration outside the courthouse on the morning of trial. The trial court admonished Appellant not preach outside the courthouse while the trial was pending, but took no other action. The rule of sequestration was then invoked, the jury was sworn, and the case began.

After opening statements and the State's first witness, the State raised a second concern: during a recess, individuals associated with Appellant were speaking with a defense witness in front of the jurors. The two individuals, Israel Flagg and Adam LaCroix, were wearing easily-identifiable, matching shirts with phrases such as "Jesus Saves From Hell" and "His Lord Jesus Christ." They spoke with Diana Kline, who was scheduled to testify as a defense witness.

Officer Abe Carmack testified that Mr. Flagg and Mr. LaCroix were about ten feet from the jury when they began discussing with Ms. Kline the defense's strategy "about him getting him off the property and speaking of those things." Officer Carmack explained: "I can't tell you exact

words, but I did hear him talking about, making references to what was going to be the angle of what they were going to go towards." He also testified that one of the jurors was "intently watching and listening" and that he was sure she could hear what was being said.

Appellant's attorney, A. Jay Fowinkle, agreed not to call Ms. Kline, to avoid any issues with the rule of sequestration, but the court recognized that the jury might have also been tainted and brought them in for further inquiry. Before doing so, the court asked Mr. Fowinkle whether he would stipulate to a mistrial. He responded, "If they heard it, absolutely. . . . I think I'd have to." The court asked the jurors whether they heard any discussion about strategy, to which the jurors responded "no." The court then began to ask the jurors individually and two jurors answered "yes." At this point, the court asked again whether the defense would stipulate to a mistrial and the following exchange took place:

> MR. FOWINKLE: I think I would have liked to have heard a little bit more of what he said or what he believes he heard him say. But the fact of the matter –
>
> THE COURT: I mean, the question was –
>
> MR. FOWINKLE: – is that people were talking about the case in front of the –
>
> THE COURT: About someone's strategy.
>
> MR. FOWINKLE: And regardless of whether they heard everything or just bits and parts of pieces. My understanding from how this works, I think you clearly have enough to declare a mistrial.

To clarify the parties' positions, the Court asked, "is anyone moving for a mistrial?" The State formally moved for a mistrial and Mr. Fowinkle responded that although he understands "the Court's position," that he "would just for the record object."

Upon the defense's objection, the trial court found a manifest necessity to declare a mistrial. To avoid future issues, the court brought in Mr. Flagg and Mr. LaCroix to warn them against having any further conversations near jurors. Both expressed doubt that the jury heard

anything, but apologized. Mr. LaCroix also denied discussing strategy, although he acknowledged that he mentioned "the pamphlets," which were apparently distributed as part of Appellant's demonstration at Raymond James Stadium.

After a second trial, a jury found Appellant guilty of Trespass on Property other than Structure or Conveyance.

II. Analysis

It is a fundamental principle of our federal and state constitutions that no person shall "be twice put in jeopardy for the same offense." Art. I, §9, Fla. Const.; *see also* Amend. V, U.S. Const. Once a jury is sworn, a defendant has a presumed right to be tried by that particular jury. *Thomason v. State*, 620 So. 2d 1234, 1236–37 (Fla. 1993). This concept protects the accused's right to avoid the "'embarrassment, expense[,] and ordeal'" of multiple trials and multiple attempts by the State to secure a conviction. *Id.* (quoting *Green v. United States*, 355 U.S. 184, 187–88 (1957)).

After a jury is sworn, a new trial can be commenced generally in two circumstances. First, a defendant may be retried after "'a mistrial is declared upon the defendant's motion or with his consent.'" *Turner v. State*, 37 So. 3d 212, 221 (Fla. 2010) (quoting *Rutherford v. State*, 545 So. 2d 853, 855 (Fla. 1989)). However, when a mistrial is declared in the absence of the defendant's consent, or over the defendant's objection, the State bears a "heavy burden" in justifying the second trial. *Thomason*, 620 So. 2d at 1237. Any doubt about whether the mistrial was appropriate will be resolved "'in favor of the liberty of the citizen.'" *Id.* (quoting *Downum v. United States*, 372 U.S. 734, 738 (1963).

In determining whether this heavy burden was met, the Court must determine whether it was established that a "manifest necessity" justified the mistrial. *Arizona v. Washington*, 434 U.S. 497, 505 (1978). Justice Story first established this "classical test" in *United States v. Perez*, 22

U.S. (9 Wheat.) 579, 580 (1824). *See Oregon v. Kennedy*, 456 U.S. 667, 672 (1982). Although a manifest necessity evades precise definition, the most well-established scenario is when the jury cannot come to a unanimous verdict. *Arizona*, 434 U.S. at 509; *Oregon*, 456 U.S. 667. If a mistrial is declared without a manifest necessity, it is "equivalent to an acquittal and precludes a subsequent trial for the same offense." *Spaziano v. State*, 429 So. 2d 1344, 1345 (Fla. 2d DCA 1983). For the reasons that follow, the Court concludes that Appellant did not consent to a mistrial and the lower court did not establish a manifest necessity for a mistrial.

A. Defense Counsel's Objection

Relying on *Adkins v. Smith*, 197 So. 2d 865 (Fla. 4th DCA 1967), Appellee argues primarily that defense counsel impliedly consented to the mistrial. The Court disagrees. Consent to a mistrial cannot be inferred from either a defendant's "silence or his failure to object or protest against an illegal discharge of the jury before a verdict." *Spaziano*, 429 So. 2d at 1245. Instead, there must be some affirmative evidence of consent. *See Dawson v. State*, 979 So. 2d 1099, 1102 (Fla. 3d DCA 2008).

In *Adkins*, defense counsel "*suggested* that the state attorney might move for a mistrial." 197 So. 2d at 866 (emphases added). Then, when the Court asked defense counsel to comment on the motion for a mistrial, counsel responded: "'No, sir. That motion is in the record.'" *Id.* On those facts, the court found that counsel's comments indicated "an invitation for a mistrial and implie[d] consent to the granting of a mistrial." *Id.* at 867. Similarly, in *Pruitt v. State*, the trial court asked whether a mistrial should be granted and defense counsel responded "that a mistrial would be appropriate" and, after the State agreed to a mistrial, "stood mute." 830 So. 2d 895, 896 (Fla. 2d DCA 2002). These cases are distinguishable from the facts at hand.

Here, although defense counsel indicated he might stipulate to a mistrial depending on what the jury heard, he never followed through on such a stipulation. Counsel originally stated he would consent if the jurors heard the discussion. However, all that was established on the record was that two jurors heard a discussion taking place. It's not clear what, if any, specifics the jurors heard. When asked directly if that was enough for counsel to stipulate, counsel stated that he would have liked to hear more about what exactly the jury heard. Although counsel stated—incorrectly—that the court had enough to declare a mistrial, that still does not constitute consent to it being granted. Further, in the court's final attempt to clarify the positions, the State moved for a mistrial and the defense objected for the record.

The Court recognizes that counsel's position here was less than clear. However, his final position, objecting, should be accepted as a refusal to stipulate to the mistrial. In fact, the record indicates that this was how the trial court proceeded. After counsel stated his objection, the trial court went on to find a manifest necessity. This necessarily shows that the Court intended to grant the mistrial over the defense's stated objection. If the court believed that counsel was consenting to a mistrial, a finding of manifest necessity would be superfluous. *See Oregon*, 456 U.S. at 672 (holding that the "manifest necessity" standard "has no place" when a mistrial is declared with the consent of the defendant).

The Court notes that the conclusion might be different if there were any indication that counsel's lack of clarity in position was in some way attributable to an attempt to convince the court to declare a mistrial just to subsequently raise a double jeopardy claim. *Cf. Rutherford v. State*, 545 So. 2d 853, 855 (Fla. 1989) ("An exception occurs when the prosecution goads the defense into moving for a mistrial and gains an advantage from the retrial."). The Court does not believe this to be the case. In fact, trial counsel did not raise a double jeopardy objection prior to

the second trial and it was not until separate appellate counsel was retained that the issue was raised.

B. Manifest Necessity

Once it was established that the defense did not consent to the mistrial, it then became the State's burden to build a record with sufficient evidence of the manifest necessity. *See Thomason*, 620 So. 2d at 1237 (noting that "the State bears a heavy burden in justifying a mistrial over the objection of a defendant"). Here, the State failed to meet that burden for two reasons: first, the record in this case does not establish what, if any, prejudice occurred; and second, the trial court did not evaluate and discuss available alternatives to granting a mistrial.

1. Prejudice

Although the circumstances justifying a mistrial over the defendant's objection are not well-defined, the Second District Court of Appeal has described a valid reason as "some misfortune which, although the fault of neither party, renders continuation of the trial impossible or unreasonably prejudicial to the substantial interest of either the judicial process itself, the defendant, the state, or both." *Spaziano v. State*, 429 So. 2d 1344, 1346 (Fla. 2d DCA 1983) (footnote omitted). This is a "fact-intensive inquiry" and so it is important that the lower court establish facts on the record which show that it is impossible to continue the trial. *United States v. Chica*, 14 F.3d 1527, 1531 (11th Cir. 1994).

However, the record in this case is devoid of any indication that either side was *actually* prejudiced by this conversation. The lower court established only that two jurors overheard a conversation taking place. No juror was asked what, if any, substantive information was heard from the conversation. The record suggests that the conversation was about the testimony of the State's first witness. It is entirely possible that the two jurors heard nothing more than a restatement

of the witness's testimony, which the jurors already heard. Although this would clearly be a violation of the rule of sequestration, the defense remedied that problem by agreeing not to call the witness who was part of the conversation.

Without the substance of what the jurors heard, the record does not establish that the conversation was so prejudicial to the parties as to make continuation of the trial impossible. *See Merchant v. State*, 201 So. 3d 146, 152 (Fla. 3d DCA 2016) ("The trial court's decision to declare a mistrial, without the consent of the defendant, appears to have resulted from a series of assumptions and inferences, rather than from competent record evidence."); *see also State v. Robinson*, 191 P.3d 906, 912 (Wash. Ct. App. 2008) (holding that the trial court failed to develop a record establishing a manifest necessity based upon jury misconduct).

2. Alternatives to Mistrial

The Court also finds that the mistrial in this case was improvidently granted because the trial court did not first explore and reject reasonable alternatives to the mistrial. In *Thomason v. State*, the Florida Supreme Court held that the "double jeopardy provision of the Florida Constitution requires a trial judge to consider and reject all possible alternatives before declaring a mistrial over the objection of the defendant." 620 So. 2d at 1239. This requires an "assiduous inquiry" into ways to avoid the declaration of a mistrial. *Merchant*, 201 So. 3d at 155 (citing *Baez v. State*, 699 So. 2d 305, 306 (Fla. 3d DCA 1997) ("That condition was obviously not satisfied in the county court if only because, without any inquiry into the precise condition of the allegedly impaired juror, there could be no showing that he was not competent to deliberate with the consequence that he need not have been excused at all.")).

Here, after two jurors responded that they heard a conversation, the Court found a manifest necessity for a mistrial without discussing any alternative courses of action. Appellee argues that

evaluating options such as excusing the jurors would have been fruitless, as there were not two alternative jurors. However, this argument ignores other unconsidered alternatives. For example, had any of the jurors been tainted by the substance of the overheard conversation, the trial court could have inquired as to whether the defendant wished to waive his right to a six-person jury and proceed with the remaining jurors. *See Blair v. State*, 698 So. 2d 1210, 1217 (Fla. 1997) (holding that a defendant may waive the right to a six-person jury).

Yet, the more obvious alternative would have been for the trial judge to simply inquire as to the substance of what the jurors heard and, if they heard anything prejudicial, to inquire as to whether they could disregard what they heard. *See Carter v. Brown & Williamson Tobacco Corp.*, 778 So. 2d 932, 942 (Fla. 2000) ("Absent a finding to the contrary, juries are presumed to follow the instructions given them."); *see also Torres v. State*, 808 So. 2d 234, 235 (Fla. 2d DCA 2001) ("Here, the trial judge failed to entertain alternatives, or even to fully inquire as to whether the two jurors had actual, rather than perceived, time conflicts."); *Rodriguez v. State*, 719 So. 2d 1215, 1216–17 (Fla. 2d DCA 1998) (finding that "because the court did not inquire of the jurors, we do not actually know that it would have been difficult, let alone impossible, for them to return after a month."). The record does not indicate that the trial court considered these or any other alternatives before declaring the mistrial.

III. Conclusion

As Justice Story explained, the power of the courts to declare a mistrial over a defendant's stated objection "ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and . . . Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner." *Perez*, 22 U.S. at 580. Based on this direction, we "resolve any doubt in favor of the liberty of the citizen." *Downum v. United States*, 372 U.S.

734, 737 (1963) (internal quotation omitted). The Court does so here. Because the State did not meet its heavy burden in demonstrating a manifest necessity and because the lower court failed to consider and reject available alternatives, the Court finds that the lower court abused its discretion in granting a mistrial over the defendant's objection. Thus, Appellant's subsequent trial and conviction was in violation of the constitutional protection against double jeopardy.

Appellant's conviction is reversed and this case is remanded with directions to discharge the defendant.

KIMBERLY K. FERNANDEZ, Circuit Judge

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