STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DESHAWN ANTHONY WILLIAMS,

Defendant-Appellant.

UNPUBLISHED
October 23, 1998

No. 199994
Recorder's Court
LC No. 94-007770

Before: Saad, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The court sentenced defendant to a two-year term for the felony-firearm conviction, and a two-to-ten year term for the armed robbery conviction, to be served consecutively. Defendant appeals by right, and we affirm.

I

Defendant argues that his retrial before Judge Townsend was barred by the double jeopardy clauses of the United States and Michigan Constitutions. US Const, Ams V, XIV; Const 1963, art 1, § 15. We disagree.

This issue raises two interrelated questions regarding the constitutional guarantee against double jeopardy and the propriety of the trial court's decision to declare a mistrial. We review double jeopardy issues de novo, *People v Pena*, 224 Mich App 650, 657; 569 NW2d 871 (1997), and a trial court's grant or denial of a mistrial for an abuse of discretion. *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 941 (1995). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). While we conclude that the trial court abused its discretion in declaring a mistrial, we nonetheless hold that retrial of defendant did not violate the prohibition against double jeopardy because the mistrial was the result of defendant's own conduct.

The double jeopardy clauses of the United States and Michigan Constitutions prohibit a defendant from being placed twice in jeopardy. US Const, Ams V, XIV; Const 1963, art 1, § 15;

People v Booker, 208 Mich App 163, 172; 527 NW2d 42 (1994), citing *People v Dawson*, 431 Mich 234, 250; 427 NW2d 886 (1988). "The constitutional protections of the Double Jeopardy Clauses are implicated only when jeopardy has 'attached.' Jeopardy attaches in a jury trial when the jury has been impaneled and sworn." *People v Anderson*, 409 Mich 474, 482; 295 NW2d 482 (1980). The attachment of jeopardy, however, does not mechanically preclude retrial.

The double jeopardy clauses secure defendant's interests in (1) the finality of judgments, and (2) protection against multiple prosecutions. *Anderson, supra*, 409 Mich 482-483. However, if a trial or proceeding does not end in a judgment of acquittal or conviction, only defendant's interest in protection against multiple prosecutions is implicated, and the constitutional protections against double jeopardy are not absolute. *Id.* at 483.

Here, Judge Baxter found that defense counsel's unavailability when the trial resumed constituted manifest necessity for the declaration of a mistrial. "The doctrine of manifest necessity allows a trial judge to declare a mistrial when a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." *People v Blackburn*, 94 Mich App 711, 714; 290 NW2d 61 (1980). When determining whether manifest necessity requires the declaration of a mistrial, the trial court must, in the exercise of its discretion, determine whether reasonable alternatives exist before declaring a mistrial. *People v Hicks*, 447 Mich 819, 841; 528 NW2d 136 (1994).

We find that the trial court did not consider all reasonable alternatives before declaring the mistrial. The trial court attempted to secure defense counsel's release from his other trial, but did not consider whether the other defense counsel, who was present in court, could have assumed defendant's case without undue delay, and without prejudice to defendant or further inconvenience to the jury. The trial court's failure to consider alternatives precludes a finding that manifest necessity required the declaration of a mistrial. *Hicks, supra*, 447 Mich 841. Therefore, since no manifest necessity required a mistrial, the trial court abused its discretion in declaring one. *Blackburn, supra*, 94 Mich App 714.

However, this determination does not end this Court's inquiry because "the state is not barred from reprosecution when a mistrial is declared out of manifest necessity *or upon defendant's consent*." *Blackburn, supra*, 94 Mich App 716 (emphasis added). This Court held in *Anderson, supra*, 409 Mich 485:

> Where the defendant himself brings about the termination of the proceeding on a basis unrelated to factual guilt or innocence, retrial is generally permitted. The defendant, having deliberately chosen to take the case from the jury cannot complain of the loss of the first trier of fact or of prosecutorial harassment through multiple prosecutions; he must live with "the consequences of his voluntary choice."

Therefore, if "defendant himself brought about the termination of the proceeding on a basis unrelated to factual guilt or innocence," retrial is permitted. *Id.*

Here, defendant himself was responsible for the termination of the proceedings. When trial resumed, the prosecution, prosecution witnesses, defendant and the original impaneled jury were present. Defense counsel, however, was not. The trial court delayed the start of the trial in an attempt to secure counsel's presence, but this attempt was unsuccessful, and, on this basis, the court declared a mistrial. Thus, we find that the mistrial was the result of defense counsel's conduct in failing to appear for the resumption of trial following an already lengthy delay. Where a mistrial is declared because of the conduct of defense counsel, retrial is generally permitted on the premise that, by engaging in conduct which results in a mistrial, defendant waives a double jeopardy claim. *Dawson, supra,* 431 Mich 253.

Denial of a double jeopardy claim is particularly appropriate in this case, where all of the jurors managed the inconvenience of reappearing in court after the seven-month delay. Because Johnson was defense counsel of record for all hearings and conferences held prior to the declaration of the mistrial, it is reasonable to assume that he was well aware of the progress of the case, and knew on what date the trial was to resume. Johnson therefore should have been able to avoid this scheduling conflict. The fact that he was present in another courtroom participating in another trial indicates that he was not precluded from appearing because of sudden illness, or other unexpected and unavoidable circumstance. Thus, defense counsel's failure to appear for the resumption of a trial that had already been postponed for seven months not only precluded its continuation but further extended an already lengthy delay, resulting in the court's declaration of a mistrial.

Denial of defendant's double jeopardy claim also comports with the purpose for the double jeopardy prohibition. "Defendant's interest in finality and in having his guilt or innocence decided in one proceeding must be balanced against society's interest in affording the prosecutor one full and fair opportunity to present his evidence to the jury." *Hicks, supra*, 447 Mich 846 (Cavanagh, CJ, concurring in part and dissenting in part), citing *Dawson, supra,* 431 Mich 252. Here, defendant was apparently willing to forego his "interest in finality and in having his guilt or innocence decided in one proceeding," because defendant himself failed to appear for his initial trial on February 28, 1995. His trial counsel then failed to appear for resumption of the trial on September 14, 1995. Moreover, defendant's and his counsel's conduct denied the prosecutor "one full and fair opportunity to present his evidence to the jury." *Id.* Therefore, balancing these interests militates against defendant's double jeopardy claim. Were we to rule otherwise, we would provide defendants with a simple mechanism to avoid trial by failing to appear, or engaging in conduct to delay the proceedings and cause logistical impediments such as the unavailability of counsel, judges, jurors and witnesses which would render trial on the merits impossible. Accordingly, because it was defendant's and defense counsel's volitional failure to cooperate in the continuation of the trial, we find that defendant's trial before Judge Townsend did not violate defendant's double jeopardy protection.

II

Defendant also contends that the complainant had no independent basis for his identification of defendant, and that the police line-up which resulted in the complainant's identification of defendant as the gunman was unduly suggestive. He claims that neither the line-up nor in-court identification testimony should have been admitted, and that admission of the identification testimony was not harmless error as to defendant's felony-firearm conviction. We disagree.

On review, the trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993), citing *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983), and *People v Franklin Anderson*, 389 Mich 155, 169; 205 NW2d 461 (1973). Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made. *Kurylczyk, supra,* 443 Mich 303, citing *Burrell, supra,* 417 Mich 449.

The trial court's decision to admit the identification evidence was not clearly erroneous. Regarding the corporeal line up identification, "in order to sustain a due process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *Kurylczyk, supra,* 443 Mich 302.

Defendant says that the corporeal line up was unduly suggestive in that he was significantly larger and taller than the other line up participants, so that he stood out from among the others and was identified as a result of these differences, rather than from the complainant's recollection of the robbery. Our courts have addressed the issue plaintiff raises:

> As a general rule, "physical differences between a suspect and other lineup participants do not, in and of themselves, constitute impermissible suggestiveness . . ." Differences among participants in a lineup "are significant only to the extent they are apparent to the witness and substantially distinguish defendant from the other participants in the line-up . . . . It is then that there exists a substantial likelihood that the differences among line-up participants, rather than recognition of defendant, was the basis of the witness' identification." [*Kurylczyk, supra,* 443 Mich 312, citing *People v Benson,* 180 Mich App 433, 438; 447 NW2d 755 (1989), rev'd in part on other grounds 434 Mich 903; 453 NW2d 681 (1990), and *People v James*, 184 Mich App 457, 466; 458 NW2d 911 (1990), vacated on other grounds 437 Mich 988; 469 NW2d 294 (1991) (omissions in original).]

A *Wade*[1] hearing was held to determine whether the identification testimony should be suppressed. At the *Wade* hearing, the complainant testified that a gunman approached his car as he was sitting in the driver's seat attempting to start it, pointed a gun at his face through the window, and ordered him out of the car. The complainant saw both the gun and the gunman's face. The complainant got out of the car and began to take off his jewelry after being ordered to do so by the gunman. During this time, the complainant tried not to look at the gunman, but he did see him. After he obtained the complainant's jewelry and car keys, the gunman ordered the complainant to run and not look back. Nonetheless, while he was running, the complainant did turn to look behind him.

Complainant subsequently identified defendant in a corporeal line up as the man who robbed him. Complainant conceded that defendant was the largest man in the line up, but stated that he was not looking for just a big man. Rather, he was "looking for big plus what I had saw [sic] the night before. . . . I didn't go in there just looking for that one thing." Complainant testified that defendant's nose, hair,

and face were distinctive, that he was looking for a man with nappy hair, and that defendant's nose was significant in his identification of him as the perpetrator.

We therefore find that complainant recognized defendant as the gunman for reasons other than the fact that defendant was the largest man in the line up. Accordingly, there was not a substantial likelihood that it was the differences among the line up participants that caused the complainant to identify defendant as the gunman and, therefore, the trial court did not err in admitting the evidence of the complainant's identification of defendant during the corporeal line up. *Kurylczyk, supra,* 443 Mich 312.

Defendant also alleges that there existed no independent basis for complainant's identification of him as the perpetrator of the offense so that the in-court identification testimony should also have been suppressed. Whether a witness has an independent basis for the in-court identification of the accused is relevant only when the court has determined that the pretrial identification procedures were unduly suggestive and has suppressed the pretrial identification testimony. *People v Kachar*, 400 Mich 78, 91-92; 252 NW2d 807 (1977). The pretrial corporeal line up was not unduly suggestive. Therefore, no independent basis for complainant's in-court identification of defendant need be shown, and we decline to address this issue. *Id.*

Finally, defendant complains that the only substantial evidence presented in support of the felony-firearm charge was the erroneously admitted identification testimony and, without this evidence, it is likely that defendant would not have been convicted of felony-firearm. We have already determined that the trial court did not err in permitting the admission of the identification testimony, so that this issue is moot and we therefore decline to address it. *People v Fortson*, 202 Mich App 13, 21; 507 NW2d 763 (1993).

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen

[1] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).