STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAUN ROBERT MILLER,

Defendant-Appellant.

UNPUBLISHED
December 17, 2020

No. 352992
Wexford Circuit Court
LC No. 18-012339-FC

Before: FORT HOOD, P.J., and SAWYER and SERVITTO, JJ.

PER CURIAM.

Defendant, Shaun Robert Miller, was charged with one count of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a) and MCL 750.520b(2)(b), and one count of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a) and MCL 750.520c(2)(b). He appeals by delayed leave granted, *People v Miller*, unpublished order of the Court of Appeals, entered July 21, 2020 (Docket No. 352992), the trial court's order denying his motion to dismiss on double-jeopardy grounds following a mistrial. For the reasons set forth below, we affirm and remand for retrial.

I. BACKGROUND

The charges against defendant were based on allegations that he sexually assaulted his stepdaughter several times when she was as young as nine years old. The prosecution sought to present expert testimony from Amelia B. Siders, Ph.D., indicating that Dr. Siders would testify regarding victim and offender behavior, victim reporting, common abuse symptoms, delayed disclosure, and parent-offender behavior. In response, the defense filed a motion seeking an expert in the field of child and adolescent forensic psychology "to prepare for an evidentiary hearing and rebut the testimony to be offered by the Prosecutor's expert witness(es) if allowed . . . at trial." The defense also filed a motion for a hearing under *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), challenging Dr. Siders' qualifications to testify as an expert. Specifically, defendant asserted that the prosecution had failed to comply with MCR 6.201(A), that Dr. Siders' theories had not been verified by testing, that her opinions were generally unreliable and inadmissible under *Daubert* and MRE 702, and that her testimony would also be irrelevant.

The trial court ultimately granted defendant's motion for a court-appointed expert, and David W. Thompson, Ph.D., ABPP, began working with the defense. The trial court also scheduled the matter for a *Daubert* hearing, after which it ruled that Dr. Siders would be permitted to offer expert testimony with respect to delayed disclosure at trial. Although several months passed between Dr. Thompson's appointment and trial, defendant did not move to amend his witness list to identify Dr. Thompson as an expert who would be called at trial, nor did he provide the prosecution with an offer of proof, summarizing Dr. Thompson's anticipated testimony, despite the prosecution's request for this information. It was not until Friday, July 5, 2019, that defendant moved to amend his witness list and provided the prosecution an offer of proof, essentially leaving the prosecution just one full business day, Monday, July 8, 2019, to consider Dr. Thompson's expected testimony before the scheduled start of trial on Tuesday, July 9, 2019. Although the trial court and the prosecution both acknowledged that they expected Dr. Thompson would likely testify, defendant's offer of proof did not provide the prosecution with an adequate summary of his expected testimony. To the contrary, it merely listed general topics and offered no insight at all into his actual opinions.

Despite the last-minute and vague disclosure, the parties and trial court commenced with trial on July 9, 2019, as scheduled. At the outset, however, the trial court indicated that it would require the defense to provide the prosecution with an adequate offer of proof by 8:00 a.m. the following morning. After that, the parties and court completed jury selection and the parties' opening statements. Later that night, defendant provided the prosecution an amended offer of proof with respect to Dr. Thompson's testimony. However, according to the prosecution, Dr. Thompson's expected testimony would touch on areas of inadmissible evidence like statements made by the complainant during "previous interviews . . . that came out before the allegations that make the substance of these charges." The prosecution also asserted that the amended offer of proof made it clear that the scope of Dr. Thompson's expected testimony went far beyond the scope of Dr. Siders' expected testimony, touching on topics like child development, memory, forensic interviewing, and more. In fact, the prosecution contended, these additional topics would require it to retain an additional expert because Dr. Siders was not qualified to testify as to topics like forensic interviewing.

The parties and the trial court recognized that the late and significant disclosure would be problematic for the already-started trial. In the trial court's view, it had several different options: (1) limit Dr. Thompson's testimony to only the topics discussed by Dr. Siders, which could create the risk of him touching on something impermissible; (2) exclude Dr. Thompson's testimony all together, which could drastically impair defendant's case and prevent him from presenting a viable defense; (3) continue the trial, resuming in several weeks, which could result in the jurors "be[ing] inappropriately influenced by the outside world" and potentially unavailable when trial resumed; or (4) declare a mistrial. Ultimately, the trial court declared a mistrial.

Shortly thereafter, defendant moved to dismiss the charges on double-jeopardy grounds. In response, the prosecution contended that a mistrial was the only way to preserve both a fair trial for the defense and a fair trial for the prosecution and the victim. Although the trial court recognized that it was sort of retroactively issuing a "more expansive" mistrial decision than it had at the time, it indicated that it had "examined" the same things before that it was examining again. After again considering the alternatives described above, the trial court ultimately decided that declaring a mistrial was the best opinion in the interest of justice, stating: "I believe the alternatives

that existed were not viable, including the continuance; and as a result of that, I believe that the double jeopardy rule does not preclude retrial; and, therefore, I deny the defense's motion."

II. ANALYSIS

"A constitutional double jeopardy challenge presents a question of law that we review de novo." *People v Lett*, 466 Mich 206, 212; 644 NW2d 743 (2002). A "judge's findings [relative to a double-jeopardy determination] are subject to appellate review under the 'clearly erroneous' standard." *People v Dawson*, 431 Mich 234, 258; 427 NW2d 886 (1988). "A trial court's factual finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *People v Wiley*, 324 Mich App 130, 165; 919 NW2d 802 (2018).

"Under both the Double Jeopardy Clause of the Michigan Constitution and its federal counterpart, an accused may not be 'twice put in jeopardy' for the same offense." *Lett*, 466 Mich at 213. The clauses "originated from the common-law notion that a person who has been convicted, acquitted, or pardoned should not be retried for the same offense." *Id*. at 213-214.

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. [*Id*. at 214, quoting *Green v United States*, 355 US 184, 187-188; 78 S Ct 221; 2 L Ed 2d 199 (1957).]

"From this fundamental idea, the United States Supreme Court has over the years developed a body of double jeopardy jurisprudence that recognizes, among other related rights, an accused's 'valued right to have his trial completed by a particular tribunal . . . .' " *Lett*, 466 Mich at 214, quoting *Wade v Hunter*, 336 US 684, 689; 69 S Ct 834; 93 L Ed 974 (1949). Jeopardy "attaches" in a proceeding once "a jury is selected and sworn . . . ." *Id*. at 215. "[T]he Double Jeopardy Clause therefore protects an accused's interest in avoiding multiple prosecutions even where no determination of guilt or innocence has been made." *Id*. Accordingly, "[i]t is this interest that is implicated when the trial judge declares a mistrial, thereby putting an end to the proceedings before a verdict is reached." *Id*.

Here, even though a verdict was never reached, it is undisputed that jeopardy attached because a jury was empaneled and sworn. As a result, both the federal and the state constitutional double-jeopardy clauses are implicated. That does not mean, however, that a retrial is automatically precluded. Indeed, "it is axiomatic that retrial is not automatically barred whenever circumstances compel the discharge of a factfinder before a verdict has been rendered." *Lett*, 466 Mich at 215 (citation, internal quotation, and alteration omitted). Rather, "the general rule permitting the prosecution only one opportunity to obtain a conviction must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." *Lett*, 466 Mich at 215 (citations and internal quotation marks omitted). One example of a situation where a retrial would not be barred is "where a defendant requests or consents to a mistrial." *Id*. In that circumstance, a "retrial is not barred unless the prosecutor has engaged in conduct intended to provoke or 'goad' the mistrial request." *Id*. (citations omitted). The parties agree that, in this case,

defendant neither requested nor consented to the trial court's decision to declare a mistrial. Therefore, this circumstance does not apply.

The closer question is whether the mistrial in this case was manifestly necessary. A "retrial is always permitted when the mistrial is occasioned by 'manifest necessity.' " *Lett*, 466 Mich at 215 (citations omitted). "The concept of 'manifest necessity' was introduced in *United States v Perez*, 22 US (9 Wheat) 579; 6 L Ed 165 (1824), in which the Court addressed the propriety of the retrial of an accused following the discharge of a deadlocked jury without the accused's consent." *Lett*, 466 Mich at 216. Even though "the accused has not been convicted or acquitted," that Court explained, "the declaration of a mistrial under these circumstances poses no bar to a future trial." *Id*., citing *Perez*, 22 US (9 Wheat) at 580. Nevertheless, the Court was careful to "indicate[] that trial courts are to exercise caution in discharging the jury before a verdict is reached . . . ." *Id*. Specifically, the *Perez* Court explained as follows:

> We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests in this, as in other cases, upon the responsibility of the Judges, under their oaths of office. We are aware that there is some diversity of opinion and practice on this subject, in the American Courts; but, after weighing the question with due deliberation, we are of opinion, that such a discharge constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon trial. [*Perez*, 22 US (9 Wheat) at 580, quoted in *Lett*, 466 Mich at 216-217.]

While most mistrials come as a result of a deadlocked jury, *Lett*, 466 Mich at 217, the circumstances presented here are much more unique. "The constitutional concept of manifest necessity does not require that a mistrial be 'necessary' in the strictest sense of the word." *Id*. at 218. Instead, "what is required is a 'high degree' of necessity." *Id*. Furthermore, when reviewing a trial court's decision to declare a mistrial, the level of scrutiny applied by the appellate court "depend[s] on the nature of the circumstances leading to the mistrial declaration." *Id*. If the trial court declares a mistrial "on the basis of the unavailability of crucial prosecution evidence," for example, "[t]he judge's declaration of a mistrial . . . will be strictly scrutinized." *Id*. at 218-219.

In our view, the circumstances of this case do not reach the end of the spectrum where strict scrutiny is required. While they also are not on the other end of the spectrum, such as where there is a deadlocked jury, it is our view that, in light of the defendant's late disclosure of Dr. Thompson's expected testimony, the trial court should be afforded at least a minimum amount of deference in this case. In fact, it is at least arguable that a significant amount of deference should

be afforded to the trial court's decision for the simple fact that neither it nor the prosecution were to blame for the mistrial in this case. See, e.g., *Dawson*, 431 Mich at 252 ("The thrust of the Court's decisions is that the Double Jeopardy Clause does not bar retrial where the prosecutor or judge made an innocent error or where the cause prompting the mistrial was outside their control."). In any event, even if the trial court's decision is afforded just the minimum amount of deference, it is our view that the trial court's mistrial decision must be affirmed. After all, as the United States Supreme Court has recognized, it is the trial judge, not an appellate court, "who is best situated intelligently to make [a mistrial] decision[.]" *Gori v United States*, 367 US 364, 368; 81 S Ct 1523; 6 L Ed 2d 901 (1961). Therefore, the *Gori* Court continued, if there are "reasons deemed compelling by the trial judge," and "the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment." *Id*. We conclude that the trial court's decision adequately reflects these principles even if other reasonable judges may have reached a different outcome.

None of defendant's appellate arguments sufficiently undermine this outcome. On appeal, defendant begins his argument by characterizing his last-minute motion to amend his witness list and offer of proof as a "mere formality." The record does not support that characterization. Both the prosecution and the trial court clearly expressed surprise at the contents of defendant's offer of proof, and both were openly convinced that it went far beyond the scope of Dr. Siders' anticipated testimony as well as her areas of expertise. Perhaps most obviously, the prosecution clearly did not anticipate Dr. Thompson providing expert testimony on the topic of forensic interviewing because it did not have an expert ready to address that topic. Likewise, nothing in any of the materials relating to Dr. Siders' testimony contemplates "memory formation," "research in the area of juror knowledge and awareness," and several of the other topics identified in defendant's July 5, 2019 offer of proof. We therefore reject this argument.

We likewise reject defendant's argument that "the trial judge admitted to not thoughtfully considering all of [the] possible" alternatives to a mistrial. It is true that, in addressing defendant's motion to dismiss, the trial court acknowledged that it was issuing a "more expansive" decision on mistrial. But, even then, the trial court indicated that it had "examined" the relevant factors at the time, even though it did not evaluate them "as thoroughly as" it should have. That is not an admission that the court did "not thoughtfully consider[] all of [the] possible" alternatives to a mistrial. To the contrary, the record clearly supports the notion that the trial court did, in fact, do just that. To begin its mistrial decision at the time it was actually made, the trial court first offered a thorough factual and legal background on how the parties got in the situation of considering a mistrial. Then the court expressed concern that any sanction for defendant's failure to timely identify Dr. Thompson as a witness and his failure to timely provide a summary of his expected testimony would be problematic, stating: "I am concerned if I limit his testimony, that I'm limiting a viable defense that the defense should be allowed to present." Clearly, a decision to limit or even exclude Dr. Thompson's testimony were alternatives considered by the trial court.

The trial court then considered continuing the trial, the alternative defendant seems to advocate most for on appeal. But the trial court expressed concern that a several-week delay could lead to the jurors "be[ing] inappropriately influenced by the outside world." It also emphasized the defense's role in creating the issue. Specifically, it said that "there was a substantial period of time in which that disclosure could have been made, and it was not made until, frankly, the trial

had already started and that is unfair to the prosecution." This analysis reflects a thoughtful consideration of the serious nature of the decision.

Ultimately, the trial court concluded that a mistrial was the only viable option in "the interest [of] justice":

> As a result, I think the interest [of] justice would require that the Court declare a mistrial here, schedule the matter for a subsequent trial, instruct the prosecution to promptly schedule and notice any hearings they may have with respect to challenging the testimony of Dr. Thompson by way of a motion in limine with respect to that testimony when trial is reset.
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> Whether or not the . . . defense wishes to raise issues of double jeopardy that might apply to this case, I will leave that to counsel's discretion. I don't believe that I have to make a determination of that here today. I recognize that that is something that is a possibility. Clearly jeopardy attaches when the jury is sworn; and there are, of course, exceptions to the double jeopardy rule based upon procedural problems with trials that allow for a retrial of the case.
>
> I would note that no proofs have been taken in this matter, only opening statements have been given in this matter.

According to defendant, this discussion was also accompanied by "a 15-minute conference in chambers." While, with the benefit of hindsight, it is certainly possible to come up with ways that this analysis could have been better—including an express mention of the term "manifest necessity"—defendant's argument that the trial court's decision did not include "thoughtful[] consider[ation of] all of those possible cures" is not supported by the record.

Furthermore, the caselaw relied on by defendant on appeal does not undermine this conclusion. For example, defendant cites *People v Wilson*, 397 Mich 76; 243 NW2d 257 (1976), for the proposition that "[t]he Michigan Supreme Court has held a continuance was proper in a somewhat similar situation, yet one that was arguably more prejudicial to the opposing party." In that case, the Supreme Court granted the defendant a new trial based on the prosecution's endorsement of two police chemists on the day of trial. *Wilson*, 397 Mich at 77. The Supreme Court held that, although the chemists should have been allowed to testify, the trial court abused its discretion by "refusing to allow the defendant a continuance in order to prepare to cross-examine them." *Wilson*, 397 Mich at 77; see also *id*. at 81-83. Without a continuance, the Supreme Court reasoned, "the defendant might have lost a possible defense . . . by his alleged inability to adequately cross-examine the chemist." *Id*. at 83.

Defendant similarly relies on *United States v Smith*, 44 F3d 1259, 1267 (CA 4, 1995), which he claims supports "the propriety of an arguably 'lengthy' mid-trial continuance." In that case, the trial court permitted a 32-day continuance in a trial that, aside from the continuance, lasted from January 25, 1993 to April 30, 1993. *Smith*, 44 F3d at 1267. The trial was originally scheduled to "last for six to eight weeks," but, "[w]hen it appeared that the trial would extend beyond this time frame, the district judge scheduled an 11-day break" and then the judge "suffered an illness that required surgery," creating the 32-day hiatus. *Id*. Despite the lengthy delay, the trial court declined to grant the defendant's motion for a mistrial. *Smith*, 44 F3d at 1267-1268. In

doing so, "the district judge believed that his repeated instructions to the jurors, both in court and by letter, to keep the case fresh in their minds and to keep an open mind until all the evidence was in, were sufficient to cure any possible prejudice to [the defendant] resulting from the hiatus." *Id.* at 1268. The court ruled that the trial court's decision to deny the defendant's motion for a mistrial did not constitute an abuse of discretion, emphasizing that the trial "court was fully aware of the difficulties the hiatus presented and took repeated steps to mitigate the potential for prejudice." *Id.*

Defendant's reliance on *Wilson* and *Smith* seems to be premised on the idea that a continuance was a viable alternative to a mistrial. Even if that alternative was available, however, our Supreme Court has made it clear that the manifest-necessity standard does not require the complete elimination of all other alternatives: "The constitutional concept of manifest necessity does not require that a mistrial be 'necessary' in the strictest sense of the word. Rather, what is required is a 'high degree' of necessity." *Lett*, 466 Mich at 218. And here, the trial court did consider that alternative but ultimately deemed it impractical because of the possibility of jurors "be[ing] inappropriately influenced by the outside world" or unavailable for a rescheduled trial. Furthermore, had the trial court granted a continuance, which seems like it would have been lengthy given the broad nature of Dr. Thompson's expected testimony, the prosecution's apparent need to retain an additional expert, the need for a second *Daubert* hearing, and so on, it is hard to overlook the likelihood that defendant would have been arguing that a mistrial should have been granted instead of a continuance. The balancing act between these two issues is precisely where a trial court's discretion comes in, just like the Fourth Circuit recognized in *Smith*. See *Smith*, 44 F3d at 1268 ("Moreover, if [the defendant's] motion for a mistrial were granted in this case, the district court would undoubtedly have been confronted with arguments by other defendants that a new trial would subject them to double jeopardy.").

In addition, this was not a case in which the record is completely void of an explanation as to why a continuance was not practical. As indicated above, the continuance, if granted, would likely have been a lengthy one. And, as the trial court explained, this increased the likelihood of the jurors being improperly influenced or unavailable to serve on the jury at the rescheduled trial. Cf. *Dunkerley v Hogan*, 579 F2d 141, 147-148 (CA 2, 1978) (holding that a mistrial was not manifestly necessary where the record offered no indication as to why a several-day continuance was not chosen). Because the trial court thoroughly analyzed, but ultimately rejected, these alternatives to a mistrial, and the reasoning was sound, we conclude that the trial court properly exercised its discretion.

Affirmed and remanded for retrial. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Deborah A. Servitto