

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
February 25, 2014

v

ALFRED ROBERT KHATTAR,

Defendant-Appellant.

No. 311752
Wayne Circuit Court
LC No. 11-007966-FH

Before: MURPHY, C.J., and M.J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

A jury convicted defendant of unlawful imprisonment, MCL 750.349b, conspiracy to commit unlawful imprisonment, MCL 750.157a, and third-degree vulnerable adult abuse, MCL 750.145n(3). The trial court sentenced defendant to concurrent prison terms of 4 to 15 years each for the unlawful imprisonment and conspiracy convictions and one to two years for the abuse conviction. Defendant appeals as of right. We affirm.

Defendant's convictions arise from the abduction of 90-year-old Floyd Pickrell from the Regency Healthcare Centre in Taylor, Michigan, on July 19, 2011. At the time, defendant had been removed as Pickrell's legal guardian and he was expressly ordered not to remove Pickrell from the nursing home. Darrell Howard testified that he and defendant spent time planning the abduction and, after one failed attempt, Howard and another man removed Pickrell from the nursing home by lifting him over a fence on the facility's grounds. In exchange for his efforts, defendant agreed to pay Howard \$1,500 and give him an automobile. After Howard successfully abducted Pickrell, he drove him to defendant's donut shop and met defendant. Defendant instructed Howard to drive Pickrell to Howard's house, where "two guys" would meet them and take Pickrell. At Howard's home, two unidentified Arabic males in their mid-50s transferred Pickrell to their car and drove away. Defendant's son, codefendant Ted Tomes, testified that on July 21, 2011, defendant asked him to pick up Pickrell from a residence in Detroit and house him for a few days. Following his father's instructions, Tomes picked up Pickrell from an unfamiliar house and thereafter housed Pickrell at two different hotels until the police showed up on July 22. At a joint trial, Tomes's defense was that he innocently followed his father's instructions with respect to his father's longtime friend. Defendant's defense was that he had no role in the removal of Pickrell from the nursing home, and had no intent to unlawfully imprison Pickrell.

On appeal, defendant does not challenge his convictions on any evidentiary grounds, but argues only that his double jeopardy rights were violated when he was retried and convicted after the trial court previously declared a mistrial at an earlier trial. In fact, there were two mistrials before defendant was convicted in the third trial. Defendant's double jeopardy argument on appeal is predicated on the first mistrial, not the second mistrial in which the jury was hopelessly deadlocked.

I. DOUBLE JEOPARDY

Defendant argues that his retrial was barred by double jeopardy principles because he did not consent to a mistrial at his first trial and there was no manifest necessity to declare a mistrial. Defendant raises this double jeopardy challenge for the first time on appeal. Defendant did not object to twice being retried, nor move to dismiss his convictions on the basis of double jeopardy. Therefore, we review this unpreserved claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008).

The United States and Michigan Constitutions both protect against double jeopardy. US Const, Am V; Const 1963, art 1, § 15. Double jeopardy protection attaches when a jury is selected and sworn and is thus applicable before the conclusion of a trial. *People v Dawson*, 431 Mich 234, 251; 427 NW2d 886 (1988). If a trial ends before a verdict is rendered, such as where a mistrial is declared, the Double Jeopardy Clause may bar a retrial. *Id.* Retrial is permitted, however, if a defendant moves for or consents to a mistrial, unless the prosecution engaged in conduct intended to goad or provoke the mistrial request, or when the mistrial was required because of manifest necessity. *People v Lett*, 466 Mich 206, 215; 644 NW2d 743 (2002). "Necessarily intertwined with the constitutional [double jeopardy] issue . . . is the threshold issue whether the trial court properly declared a mistrial." *Id.* at 213. The grant or denial of a mistrial is within the sound discretion of the trial court. *People v Gonzales*, 193 Mich App 263, 265; 483 NW2d 458 (1992). "A trial court abuses its discretion when its decision falls 'outside the range of principled outcomes.'" *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010) (citation omitted).

A. CONSENT

As defendant correctly notes, our Supreme Court has held that a defendant's consent to a mistrial cannot be given by "[m]ere silence or failure to object to the jury's discharge[.]" *People v Johnson*, 396 Mich 424, 432; 240 NW2d 729 (1976), repudiated on other grounds in *People v New*, 427 Mich 482; 398 NW2d 358 (1986). In *People v McGee*, 469 Mich 956; 670 NW2d 665 (2003), however, our Supreme Court recognized that there are circumstances in which a defendant's consent to a trial court's declaration of a mistrial can be inferred. In that case, when the trial court indicated that it thought a mistrial was in order, defense counsel neither objected nor agreed. See *People v McGee*, 247 Mich App 325, 332-333; 636 NW2d 531 (2001), rev'd 469 Mich 956 (2003). This Court, citing *Johnson*, 396 Mich 424, held that the defendant had not consented because "a criminal defendant's silence in the face of the court's declaration of a mistrial cannot be construed as consent," and "there was no evidence on the record that defendant or his counsel explicitly indicated consent to the mistrial[.]" *Id.* at 333. In reversing this Court's decision, our Supreme Court held that the "record in this case reveals circumstances

from which consent to the circuit court's declaration of a mistrial can be inferred. Therefore, retrial is not barred by the constitutional protection against double jeopardy." *McGee*, 469 Mich at 956.

Similarly, the United States Court of Appeals for the Sixth Circuit has recognized that a defendant's consent to a mistrial can be implied "if the sum of the surrounding circumstances positively indicates [that] silence was tantamount to consent." *United States v Gantley*, 172 F3d 422, 429 (CA 6, 1999). To determine whether a defendant impliedly consented, the Court must examine the "totality of the circumstances." *Id.* at 428. The Sixth Circuit noted that the trial court had not dismissed the jury immediately, but had discussed the possibility of a mistrial and "invited an objection by asking counsel if there was 'anything else' to address." *Id.* at 429.

Likewise, in this case, it can be inferred from the totality of the circumstances that defendant consented to a mistrial. The record demonstrates that the necessity of a mistrial was thoroughly discussed by the court. During the discussions, the court twice gave defendant and his counsel viable opportunities to object before the jury was brought into the courtroom and discharged. In particular, after reiterating several problems with the jury deliberations, the trial court stated, "Does anybody object to a mistrial? I need a response." Both the prosecutor and codefendant Tomes's attorney spoke, but defendant and his counsel did not. The court again invited objection by asking, "Anybody have anything else to say?" Codefendant Tomes's counsel indicated that he would "defer to the court." As the prosecutor was pondering his decision, the court stated, "I'm asking if you object. Do you object? If you don't object, I just—you don't have to say anything." Only after hearing no objection did the trial court call the jury back and declare a mistrial. Given this record, defendant's consent to the declaration of a mistrial can be inferred from the totality of the circumstances. *McGee*, 469 Mich at 956. Consequently, defendant's retrial, following the declaration of a mistrial, did not violate the double jeopardy protections against successive prosecutions.

B. MANIFEST NECESSITY

Notwithstanding defendant's consent to the mistrial, we also conclude that the trial court did not err in finding that manifest necessity for a mistrial existed. Manifest necessity refers to "the existence of sufficiently compelling circumstances that would otherwise deprive the defendant of a fair trial or make its completion impossible." *People v Rutherford*, 208 Mich App 198, 202; 526 NW2d 620 (1994). "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 (citation omitted). Whether manifest necessity exists depends on the facts of each particular case and requires the trial court to balance "the strength of the justification for a mistrial" against "the defendant's interest in completing his trial in a single proceeding before a particular tribunal." *People v Hicks*, 447 Mich 819, 829; 528 NW2d 136 (1994). A trial court "'properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial.'" *People v Echavarría*, 233 Mich App 356, 363; 592 NW2d 737 (1999), quoting *Illinois v Somerville*, 410 US 458, 464; 93 S Ct 1066; 35 L Ed 2d 425 (1973).

Contrary to defendant's argument, the declaration of a mistrial here was not based on a mere voluntary disclosure of how the jurors' voting stood. Instead, there had been a series of notes and verbal communications that revealed actual details of the division, the jury's inability to deliberate, a high level of antagonism in the jury room, and the identification of a juror who was refusing to follow the law. After the first note, which indicated that a "[j]uror is not following the law set by the Court and refuses to do so," the trial court requested the identity of the juror in order to investigate the reported issue. In addition to identifying Juror Six, the response disclosed that the jury was "at a standstill" and "unable to deliberate." The court summoned Juror Six and questioned him at length. The juror asserted that the other jurors "hate[d] [him]," "don't want [him] . . . don't like [him] . . . [he's] from a different part of town or something," and were trying to get rid of him. After the juror swore to "try" to follow the court's instructions "to the best of [his] ability," the court resumed deliberations. Subsequently, the jury sent a note that it had reached a verdict. Once assembled, however, the jury foreperson stated that they had not reached a verdict, that they had agreed on "[o]nly two [counts]: one each," and that, although they had been deliberating, "These guys are stuck. Two [of] them are stuck. That's what the argument is." The court instructed the jury to continue deliberating on the other counts, but, at the end of the day, the jury sent yet another note. This time, the jurors indicated that Juror Six was a "huge problem," did "not seem mentally competent to deliberate," was "using his wild imagination to disagree and defend defendants," and was not following the law.

As the prosecutor aptly notes, there are several circumstances that support the trial court's declaration of a mistrial. Regarding the jurors' state of deliberations, they had not only revealed their division, but why they were divided, which way they were divided, and who was causing the division.¹ In discussing the matter with the parties, the court expressed its concern about "coercion," noting that the jurors had been "yelling at each other" and sending "terrible notes about each other." It was evident from what was disclosed about the state of deliberations that the majority of the jurors wanted to convict defendant, which justified the trial court's concern about coercion against the holdout juror. Indeed, the risk of coercion might well have worked to defendant's detriment rather than his benefit. Additionally, while the court did not treat the jury's reported disagreement on reaching a verdict as a primary factor in its mistrial decision, the record demonstrates that the jury expressed that it was at a stalemate on more than one occasion.² As previously indicated, in an early note, the jury stated that it was "at a standstill," and the jury foreperson later told the court that they were "stuck." In its last communication, while not explicitly referencing a "deadlock," the jury expressed an utter inability to agree because of Juror Six. In sum, whether because of the level of antagonism between jurors and the possibility of coercion, the amount of detail the jury disclosed about their secret deliberations, or the jury's nearly certain inability to reach a verdict, there were compelling circumstances supporting the

¹ The privacy and secrecy of jury deliberations play an important role in isolating the jury from undue influence. *United States v Olano*, 507 US 725, 737-38, 113 S Ct 1770; 123 L Ed 2d 508 (1993).

² The failure of the jury to agree on a verdict is one instance of manifest necessity, "allowing the trial court to declare a mistrial, discharge the jury, and retry the defendant." *Lett*, 466 Mich at 224.

trial court's conclusion that a fair trial was not possible. Under these circumstances, which included an absence of any objection from the parties, the trial court's decision to declare a mistrial did not fall outside the range of reasonable and principled outcomes. *Feezel*, 486 Mich at 192.

II. EFFECTIVE ASSISTANCE OF COUNSEL

In a related claim, defendant argues that defense counsel was ineffective for failing to move to dismiss his re-prosecution after the improper declaration of a mistrial at his first jury trial. As previously discussed, there were sufficiently compelling circumstances to justify the trial court's declaration of a mistrial because of manifest necessity. Therefore, retrial was permitted. Accordingly, because there was no viable basis to support a motion for dismissal on double jeopardy grounds, defendant cannot establish a claim of ineffective assistance of counsel in this regard. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (counsel is not required to advocate a meritless position).

Affirmed.

/s/ William B. Murphy
/s/ Michael J. Kelly
/s/ Amy Ronayne Krause