Affirmed and Majority and Dissenting Opinions filed November 16, 2021.

In The

Fourteenth Court of Appeals

NO. 14-20-00397-CR

EX PARTE MARCO ANTONIO CONTRERAS

On Appeal from the County Criminal Court at Law No. 8
Harris County, Texas
Trial Court Cause No. 2285006

M A J O R I T Y O P I N I O N

Appellant Marco Antonio Contreras was charged with assault on a family member and proceeded to a jury trial. *See* Tex. Penal Code Ann. § 22.01. During trial, the trial court *sua sponte* declared a mistrial.

Afterwards, Appellant filed a motion for a writ of habeas corpus and asserted that further prosecution against him was barred by the Fifth Amendment's Double Jeopardy clause. *See* U.S. Const. amend. V. The trial court denied the motion and Appellant appealed. For the reasons below, we affirm.

BACKGROUND

Appellant proceeded to a jury trial in July 2019. On the second day of trial, the trial court declared a mistrial on grounds that defense counsel was "not prepared for trial" and was "not able to provide effective assistance of counsel to complete this matter at this time." After the jury was released, defense counsel objected to the trial court's *sua sponte* declaration of a mistrial.

Appellant filed a motion for a writ of habeas corpus and the trial court held a hearing on the motion. The trial court denied Appellant's motion in an order signed March 25, 2020. Appellant appealed.

ANALYSIS

In his sole issue, Appellant challenges the trial court's denial of his motion for a writ of habeas corpus and asserts that "no manifest necessity existed for the trial court to declare a mistrial on its own motion." Accordingly, Appellant argues, further prosecution of the pending charge is barred by the Fifth Amendment's Double Jeopardy clause.

I. Standard of Review and Governing Law

We generally review a trial court's decision on an application for a writ of habeas corpus for an abuse of discretion. *Ex parte Perez*, 525 S.W.3d 325, 333 (Tex. App.—Houston [14th Dist.] 2017, no pet.). A trial court abuses its discretion if it acts arbitrarily or unreasonably or without reference to any guiding rules or principles. *Ex parte Allen*, 619 S.W.3d 813, 816 (Tex. App.—Houston [14th Dist.] 2020, pet. ref'd). In making this determination, we view the evidence in the light most favorable to the trial court's ruling and accord great deference to the trial court's findings and conclusions. *Parrish v. State*, 38 S.W.3d 831, 834 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). "Absent a clear abuse of discretion,

we accept the trial court's decision whether to grant the relief requested in a habeas corpus application." *Id*.

Under the Fifth Amendment, a criminal defendant may not be put in jeopardy twice for the same offense. *See* U.S. Const. amend. V; *Ex parte Little*, 887 S.W.2d 62, 64 (Tex. Crim. App. 1994) (en banc); *Ex parte Perez*, 525 S.W.3d at 333. Jeopardy attaches when a jury is impaneled and sworn. *Parrish*, 38 S.W.3d at 834. Because jeopardy attaches at this point, the Constitution "confers upon a criminal defendant a 'valued right to have his trial completed by a particular tribunal.'" *Ex parte Garza*, 337 S.W.3d 903, 909 (Tex. Crim. App. 2011) (quoting *Wade v. Hunter*, 336 U.S. 684, 688 (1949)). Accordingly, the premature termination of a criminal prosecution via the declaration of a mistrial — if it is against the defendant's wishes — ordinarily bars further prosecution for the same offense. *Id*.; *see also Parrish*, 38 S.W.3d at 834.

But as an exception to this general rule, further prosecution is not barred if there was a "manifest necessity" to grant the mistrial. *Ex parte Garza*, 337 S.W.3d at 909; *Ex parte Perez*, 525 S.W.3d at 334. The trial court's discretion to declare a mistrial based on manifest necessity is limited to and must be justified by extraordinary circumstances. *Ex parte Perez*, 525 S.W.3d at 334. "As a general rule, manifest necessity exists where the circumstances render it impossible to reach a fair verdict, where it is impossible to proceed with trial, or where the verdict would be automatically reversed on appeal because of trial error." *Parrish*, 38 S.W.3d at 834.

Under this framework, the defendant and the State have shifting burdens. "Once the defendant shows he is being tried for the same offense after declaration of a mistrial to which he objected, a heavy burden shifts to the State to justify the trial court's declaration of a mistrial." *Ex parte Garza*, 337 S.W.3d at 909.

Accordingly, it is the State's burden to demonstrate the manifest necessity for a mistrial. *Ex parte Perez*, 525 S.W.3d at 334.

In addition, before it grants a mistrial on grounds of manifest necessity, the trial court first must determine whether alternative courses of action are available and, if so, choose one less drastic than a mistrial. *Parrish*, 38 S.W.3d at 835. Specifically, the trial court must "carefully and deliberately consider which of all the alternatives best balances the defendant's interest in having his trial concluded in a single proceeding with society's interest in fair trials designated to end in just judgments." *Ex parte Fierro*, 79 S.W.3d 54, 56 (Tex. Crim. App. 2002) (en banc) (internal quotation omitted). But the trial court is not required to expressly articulate the basis for the mistrial in order to justify it to a reviewing court, so long as manifest necessity is apparent from the record. *Ex parte Perez*, 525 S.W.3d at 334.

As the reviewing court, we determine (1) whether the trial court acted irrationally or irresponsibly, and (2) whether the mistrial order reflects the sound exercise of discretion. *Parrish*, 38 S.W.3d at 835. "[I]f the record shows that the trial judge exercised sound discretion in finding a manifest necessity for a retrial, the judge's *sua sponte* declaration of a mistrial is not incorrect just because the reviewing court might have ruled differently." *Id*.

II. Evidence

For the purposes of our analysis, we describe the events that occurred during voir dire and at the first two days of Appellant's jury trial. We then turn to the hearing on Appellant's motion for a writ of habeas corpus.

A. Trial

Voir dire began on July 1, 2019. The trial court welcomed the panel and

spent a few minutes discussing what the jury selection process would entail. After the trial court spoke to the panel for approximately ten minutes, defense counsel informed the court he "ha[d] some information for the Court that is very important" and asked if he could tell the court "what it is." After defense counsel told the trial court he had a motion "on an interpreter", the following exchange occurred at the bench:

> DEFENSE COUNSEL: My client does not speak English. I asked him if he could do it without an interpreter. He stated no problem.
>
> I said do you understand what the Judge said? In Spanish he told me, I don't understand the legal terms that they are using and I think I can only understand 50 percent, so it's a shock to me. I knew the interpreter was here. I just released her.
>
> * * *
>
> TRIAL COURT: We need someone to translate the proceedings. I mean, let me tell you how unhappy I am about this. I can't believe it.
>
> DEFENSE COUNSEL: Judge, I understand.
>
> TRIAL COURT: I don't care if you understand or not.
>
> * * *
>
> TRIAL COURT: Before we bring [the jury] in, we need to address how we are going to cure this. From what I can tell we started about ten minutes of the jury selection or so, that they weren't properly interpreted. It seems to me having any part of the proceedings not interpreted, it seems like I would just have to instruct them to disregard and take it from the top. What do y'all think about that?

The parties agreed with the trial court's suggestion and the trial court began voir

dire again. The trial court instructed the panel to "disregard everything you've heard from me so far and we are going to take it from the top."

After the jury was impaneled and sworn, the State began its case with testimony from Complainant. Complainant said she previously had a dating relationship with Appellant and, on September 15, 2018, he arrived at her apartment late in the evening and proceeded to drag her into his car and hit her in the face "many times." During Complainant's testimony, defense counsel asked the trial court if he "could . . . get a chance to correct the interpreter?" At the bench, the trial court instructed defense counsel as follows:

> If that's something you want to go into on cross, that's fine. We are not going to correct the interpreter. That's not permissible. If you want to correct the interpreter, there is a process for doing that. But you know, we are not going to second guess the interpreter.

Defense counsel proceeded to cross-examine Complainant. Defense counsel asked Complainant whether she "ha[d] a Texas ID" which, as defense counsel later explained, was relevant regarding whether Complainant had used another person's name or social security number to secure employment. The trial court granted the State's objection to the question and instructed the jury to disregard the Complainant's answer. At the bench, the trial court told defense counsel:

> You know, I was pretty clear when ruling on the limine motion that any inquiry that's made into a particular witness' wrong doing or past wrong doing or anything like that, we would have to approach the bench before we got into it. And you know, and what was proffered at the time that there was somehow a fraudulent identity and right out the gate we went for the [jugular] on identity. Okay.
>
> If you want to talk about identity or a specific incident that you feel this witness has committed in the past or some type of conduct, then you can try to lay a foundation but you have to ask me first. All right. Do you understand?

On the second day of trial, the trial court began by addressing with defense counsel an "issue with discovery." The trial court and defense counsel had the following exchange:

> DEFENSE COUNSEL: When I get on the Defense portal [on the computer] and I was able to — I came here before 8:00 this morning. I was able to get to one offense report. And there is ten other items, and I get rejected and it says that the program is not set up to open this one. When I click open, it doesn't open. It says I have to do something, install the program to open the document and I can't get to it.
>
> TRIAL COURT: Okay. And so let me be clear that you are saying you're attempting to access discovery on the courtroom computer that is for accessing the clerk's website and electronic signature features; is that correct?
>
> DEFENSE COUNSEL: The District Attorney's portal.
>
> TRIAL COURT: But the computer you are using is the Court's computer on the table.
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> DEFENSE COUNSEL: Yes.
>
> TRIAL COURT: For defense counsel? Do you have your own copy of the discovery in this case?
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> DEFENSE COUNSEL: I have them in the computer. That's how I get access to them.
>
> TRIAL COURT: What computer?
>
> DEFENSE COUNSEL: In the Defense portal.
>
> TRIAL COURT: Do you have your own — do you maintain — do you have copies for yourself?
>
> DEFENSE COUNSEL: Paper copies, I do not have.
>
> TRIAL COURT: That wasn't the question. The question was do you have copies, the discovery that has

been provided to you in your possession?

DEFENSE COUNSEL: By copies, do you mean paper or computer?

TRIAL COURT: Article 39.14 contemplates many types of copies including paper and electronic copies. This is the world we live in. So copy refers to any duplicate for your use. So do you have copies of the discovery?

DEFENSE COUNSEL: No.

TRIAL COURT: . . . . Counsel, have you accessed and have you reviewed the discovery in this case before this morning?

DEFENSE COUNSEL: Some of it.

TRIAL COURT: How much of it?

DEFENSE COUNSEL: Like I said, there is ten discovery items and I was able to open one and I went through all the other ten and it wouldn't let me go in.

TRIAL COURT: Have you reviewed those ten items previously?

DEFENSE COUNSEL: Yes, sir. Way before, before the trial date.

TRIAL COURT: What are the items?

DEFENSE COUNSEL: I have looked at them on the screen, on the D.A. portal.

TRIAL COURT: What — there are ten items. Can you characterize them for me? Are they reports, are they videos, are they photos? What are they?

DEFENSE COUNSEL: They are not photos, I'm sure of, but on the actual screen when I see the ten items, I don't know what it is. I mean the offense report maybe says eight pages, but the other items I don't know what they are.

TRIAL COURT: And yet you said you reviewed them

previously?

DEFENSE COUNSEL: Yes.

TRIAL COURT: But you can't tell me what they are?

DEFENSE COUNSEL: No, sir. I do not recall. It's been so long. This case was set for trial, like three months ago.

After this exchange, defense counsel requested that Complainant be recalled so he could "cross-examine her on her written statement that I cannot access." Defense counsel said he had not previously seen the witness statement but had learned of it earlier that morning when he was reviewing the offense report on the computer.[1] The State informed the trial court and defense counsel that there was not a written statement from Complainant. The trial court again asked defense counsel when he previously had reviewed the discovery in the case. Defense counsel responded: "Before yesterday, I couldn't tell you, but I would be guessing it would be months when I reviewed all the evidence that was available to me."

The trial court recalled the jury and ordered a mistrial, stating as follows:

> I am, on my own motion, finding a mistrial in this case. [Defense counsel], I'm finding that you are not prepared for trial. That you are not able to assist the defendant in trying his case. That you are not able to provide effective assistance of counsel to complete this matter at this time.
>
> The reasons for the finding, for the ruling are the following: That yesterday, you demonstrated unfamiliarity with the bare minimum human traits of your client and that is his English proficiency requiring the Court to stop jury selection, issue a limiting instruction and begin again causing your client prejudice, not withstanding the limiting instruction and demonstrating your lack of familiarity with

[1] Specifically, defense counsel referenced the offense report completed by Investigator Villareal which stated that he "provided [Complainant] with the Victim's Assistance Pamphlet, completed a written statement, and completed the MOEP form."

him in this case.

Furthermore, you have repeatedly demonstrated lack of familiarity with the discovery in this case. You represented to the Court previously that you did not maintain your own copies of the discovery in this case, which I find to be not adequate. You represented that you had not reviewed the discovery in the case in any reasonable time before trial and the most that you could ever say is that you had done some months ago and couldn't say when you did it since and I find that that is, that is performance that falls below a reasonable measure of performance by Defense counsel.

I find that you could not tell me, so the Court is taking notice of the discovery log filed earlier at 9:55 a.m. and entered into the records of the Court. You have repeatedly this morning referred to a written statement you were not able to open on the Defense portal [. . .] on the Court provided computer. The Court finds reviewing a list of discovery provided in this case that there's one PDF file provided to the Defense and the rest are PNG, that's PNG image files.

I ask you to characterize or summarize or tell me anything to demonstrate any proficiency on what the discovery is in this case and you were unable to tell me. More over, you said that there was a written statement in the discovery that didn't exist, that you hadn't seen or hadn't heard before yesterday. And that doesn't appear in the discovery log. The part of the offense that the prosecutor provided you that you believe said that, said nothing close to that.

And so understanding that a mistrial is an extraordinary remedy, it has to be reserved for the rarest, most compelling circumstances, and I need to find that all options short of granting a mistrial are not sufficient to result in a fair trial. And so I will find that based on the character and the kind of testimony that occurred yesterday, that a continuance, that is having this jury leave for the period of time it would take for you to prepare adequately for trial, however long that may be, would result in further prejudice to your client and would not result in a fair trial and so I am left with no other option but then to declare a mistrial on those findings.

After the jury was released, defense counsel objected to the trial court's declaration of a mistrial.

B. Hearing on Appellant's Motion for a Writ of Habeas Corpus

The trial court held a hearing on Appellant's motion for a writ of habeas corpus on March 5, 2020. At the hearing, counsel for Appellant argued that the trial court's reasoning for ordering a mistrial did not rise to a level of "manifest necessity."

When discussing the issue regarding defense counsel's request for an interpreter during voir dire, the trial court stated that, based on its observation, "the jury panel was upset." The trial court also noted that the mistrial was ordered based on "a constellation of conduct" by defense counsel. The trial court adjourned the hearing and, on March 25, 2020, signed an order denying Appellant's motion.

III. Application

Under the applicable standards of review, we conclude the trial court's denial of Appellant's motion for a writ of habeas corpus does not constitute an abuse of discretion.

The Sixth Amendment guarantees an accused effective assistance of counsel. *See* U.S. Const. amend. VI; *Ex parte Bryant*, 448 S.W.3d 29, 39 (Tex. Crim. App. 2014). To support a claim of ineffective assistance, a criminal defendant must show that (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Ex parte Andrus*, 622 S.W.3d 892, 899 (Tex. Crim. App. 2021).

An objective standard of reasonableness is defined by the prevailing professional norms at the time of trial. *Ex parte Bryant*, 448 S.W.3d at 39. Under

these norms, counsel has a duty to conduct a reasonably substantial and independent examination of facts, circumstances, pleadings, and laws. *Strickland*, 466 U.S. at 680. "[A] criminal defense lawyer must have a firm command of the facts as well as the governing law before he can render reasonably effective assistance of counsel." *Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990) (en banc). "It may not be argued that a given course of conduct was within the realm of trial strategy unless and until the trial attorney has conducted the necessary legal and factual investigation which would enable him to make an informed rational decision." *Id*. (citing *Ex parte Duffy*, 607 S.W.2d 507, 526 (Tex. Crim. App. 1980) (en banc), *overruled on other grounds by Hernandez v. State*, 988 S.W.2d 770 (Tex. Crim. App. 1999) (en banc)).

An accused also is guaranteed the right to be confronted with the witnesses against him. *See* U.S. Const. amend. VI; *Garcia v. State*, 149 S.W.3d 135, 140 (Tex. Crim. App. 2004). Specifically, an accused has the right to be present in the courtroom during his trial and "[t]he right to be present includes the right to understand the testimony of the witnesses." *Garcia*, 149 S.W.3d at 140. Accordingly, an accused who does not understand English is entitled to an interpreter. *Id*. (citing *Baltierra v. State*, 586 S.W.2d 553, 556 (Tex. Crim. App. 1979) (en banc)).

Here, the trial court concluded that manifest necessity warranted a mistrial because defense counsel was "not prepared for trial" and "not able to assist the [Appellant] in trying his case." The findings underlying this conclusion, considered in light of the record and the ineffective-assistance standards discussed above, support the trial court's *sua sponte* declaration of a mistrial.

First, when it ordered a mistrial, the trial court concluded that defense counsel was "unfamiliar[] with the bare minimum human traits of [Appellant] and

that is his English proficiency". Later at the hearing on Appellant's motion for a writ of habeas corpus, the trial court further noted than "the jury panel was upset" when the issue regarding the need for interpreter came up and necessitated restarting voir dire.

Defense counsel was required to provide Appellant effective assistance of counsel and here, because of Appellant's limited proficiency in English, that assistance required securing an interpreter to understand the witnesses' testimony. *See* U.S. Const. amend. VI; *Garcia*, 149 S.W.3d at 140. But defense counsel was not aware of this need until part way through voir dire which, as the trial court noted, demonstrated his "lack of familiarity with [Appellant]". The trial court also noted that this delayed recognition of Appellant's need for an interpreter "caus[ed] [Appellant] prejudice, not withstanding [sic] the limiting instruction" and "upset" the jury panel. We defer to these findings, particularly those regarding the effect this issue had on the jury panel — a reaction that cannot be discerned solely from a review of the appellate record. *See*, *e.g.*, *Young v. State*, 591 S.W.3d 579, 597 (Tex. App.—Austin 2019, pet. ref'd) ("[g]iven that the district court was able to observe the jury's reaction . . . , we defer to the district court's determination that the instruction was effective"); *Ex parte Bruce*, 112 S.W.3d 635, 640 (Tex. App.—Fort Worth 2003, pet. dism'd) ("The trial judge was in the best position to determine if the jury would be biased by the statement because he listened to the delivery of the argument and observed the apparent reaction of the jurors.").

Second, the trial court's declaration of a mistrial also was premised on its finding that defense counsel "lack[ed] [] familiarity with the discovery in this case." The record supports this conclusion. According to defense counsel, he did not maintain his own copies of the discovery in the case and, on the morning of the second day of trial, was attempting to review the discovery. Defense counsel told

the trial court he previously had reviewed "some" of the discovery in the case "[w]ay before" the trial date, but could not tell the court what the discovery was comprised of or exactly when he had reviewed it.

Based on this pre-trial attempted review of the discovery in the case, defense counsel also asked to recall a witness concerning a written statement she previously had given to a responding officer. But the trial court found this written statement did not exist, further underscoring defense counsel's unfamiliarity with the facts of this case. Based on these events, the trial court was well within its discretion to conclude that defense counsel did not possess "a firm command of the facts" in the case as necessary to render effective assistance. *See Strickland*, 466 U.S. at 680; *Ex parte Welborn*, 785 S.W.2d at 393; *see also Ex parte Lilly*, 656 S.W.2d 490, 493 (Tex. Crim. App. 1983) (en banc) (concluding that the defendant was denied effective assistance, the court found that "[t]he record in this case shows that at the time of the trial, [defense counsel] knew nothing of the facts of the case, had not consulted with [the defendant] about the case, did not review the prosecuting attorney's file, and had done no independent investigation nor preparation for trial"). Combined with the incident regarding the interpreter, these facts show the trial court acted within its discretion in concluding that extraordinary circumstances justified declaring a mistrial. *See Ex parte Perez*, 525 S.W.3d at 334.

Finally, the trial court also concluded that alternative courses of action were unavailable to cure the circumstances that necessitated a mistrial. *See Parrish*, 38 S.W.3d at 835. With respect to a continuance, the trial court noted that it was unclear how much time defense counsel would need to "prepare adequately for trial" and that additional delays "would result in further prejudice to your client." This finding is supported by the record. As discussed above, defense counsel did

not maintain separate copies of the discovery in this case and was attempting to review the discovery on a court computer before the second day of trial began. In response to questions from the trial court, defense counsel could not tell the court what the discovery was comprised of or exactly when he previously had reviewed it. Defense counsel's actions also suggest he was still in the process of formulating a defensive strategy, as evidenced by his attempt to recall a witness to testify regarding a written statement that was not in the record. This chain of events supports the trial court's finding that it was unclear how long defense counsel would need to prepare for trial.[2]

Moreover, the trial court took the relatively unusual step of disrupting and restarting proceedings after defense counsel informed the trial court that Appellant required an interpreter. As discussed above, the trial court stated that this issue "caus[ed] [Appellant] prejudice, not withstanding [sic] the limiting instruction" and "upset" the jury panel. The trial court also had to twice stop the trial proceedings to admonish defense counsel at the bench after counsel requested to "correct the interpreter" and attempted to initiate a line of questioning the trial court previously had excluded in a limine ruling. Therefore, the record reveals the trial court had both considered and implemented a less drastic alternative. It was reasonable for the trial court to conclude that further interruptions and delays in trial necessitated by defense counsel would impair Appellant's ability to secure a fair and just judgment. *See, e.g.*, *Saucedo-Zavala v. State*, No. 03-13-00477-CR, 2014 WL 2738532, at *1 (Tex. App.—Austin June 11, 2014, no pet.) (mem. op., not designated for publication) (sustaining the appellant's ineffective assistance claim where "counsel's ineffective assistance permeated the trial proceeding below, beginning with jury selection, continuing through the presentation of

[2] This finding lays to rest our dissenting colleague's opinion that a short continuance would have been a reasonable cure under the circumstances.

evidence, enduring through the punishment phase, and culminating at the hearing on the motion for new trial"). The trial court properly considered less drastic alternatives and the record supports the trial court's rejection of those alternatives.

Based on this record, we conclude (1) the trial court's declaration of a mistrial was neither irrational nor irresponsible, and (2) the mistrial order reflects the sound exercise of discretion. *See Parrish*, 38 S.W.3d at 835. Accordingly, the State is not jeopardy-barred from retrying Appellant, and the trial court did not err in refusing habeas corpus relief. Appellant's sole point on appeal is overruled.

IV. Response to the Dissent

Our dissenting colleague opines that the foregoing analysis concludes "that the trial court could have reasonably determined from the circumstances of this case that there was a manifest necessity to declare a mistrial." We disagree with this mischaracterization of our opinion, particularly given that it is not the province of appellate courts to reach such conclusions. Instead, our role is to (1) review the trial court's decision concerning habeas relief based on its declaration of a mistrial, (2) determine whether it clearly abused its discretion when it did so, and (3) determine whether it acted irrationally or irresponsibly. *See Ex parte Perez*, 525 S.W.3d at 333; *Parrish*, 38 S.W.3d at 834, 835. The trial court concluded that manifest necessity warranted a mistrial because defense counsel's "constellation of conduct" left him neither "prepared for trial" nor "able to assist the [Appellant] in trying his case." We have not been presented with any evidence tending to show that the trial court abused (much less clearly abused) its discretion when it did so. *Cf. Arizona v. Washington*, 434 U.S. 497, 502 (1978) ("[T]he overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment.").

Therefore, we conclude the trial court did not abuse its discretion when it denied habeas relief based on its declaration of a mistrial due to manifest necessity.

CONCLUSION

We affirm the trial court's order.

/s/ Meagan Hassan
Justice

Panel consists of Chief Justice Christopher and Justices Hassan and Poissant (Christopher, C.J., dissenting).

Publish — Tex. R. App. P. 47.2(b).