NO. 12-11-00114-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

PRENTISS HAWKINS, APPELLANT	*§*	***APPEAL FROM THE 241ST***
V.	*§*	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	*§*	***SMITH COUNTY, TEXAS***

MEMORANDUM OPINION

Prentiss Hawkins appeals his conviction for engaging in organized criminal activity. In two issues, Appellant argues that the trial court erred in denying a motion for mistrial made by his trial counsel and joined by the State. The State did not file a brief. We affirm.

BACKGROUND

A Smith County grand jury indicted Appellant for the felony offense of engaging in organized criminal activity.[1] The grand jury alleged that he shot two people and that he did so as a member of a criminal street gang. The grand jury also alleged that he used a deadly weapon in the commission of the offense and that he had a prior felony conviction.

Appellant pleaded not guilty, and a jury trial was held. At some point on the day of jury selection, the court reporter communicated by text message with a prospective juror. There is scant evidence in the record about the communication. The defense attorney, in what he termed a "bill," said that he had two conversations with a constable on the day of jury selection. He related to the court that the constable told him the juror, a woman, told the constable that the court

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[1] *See* TEX. PENAL CODE ANN. § 71.02 (West Supp. 2011).

reporter, a man, sent her text messages the day of jury selection and that there was an "inappropriate theme on [sic] the text message." It appears that counsel did not have any additional information about the communication. The trial court judge indicated that he had met with the district attorney personally the previous afternoon and that the district attorney and the sheriff's department were conducting an investigation into the matter.

Based on the information available to him, Appellant's counsel requested a mistrial, stating that a mistrial was a manifest necessity. The State joined the motion. The trial court asked if Appellant joined the motion and whether he was "in favor of [counsel] filing this motion on the basis of manifest necessity." Appellant stated that he was not in favor of the motion, that he opposed it, and that he wished to be tried by the jury that had been selected. When engaged further by the trial court, Appellant pointed out that the affected potential juror was well beyond the range of jurors likely to serve and was physically separated from the jurors who were selected by, he said, "approximately 20 feet." He also stated that he was "willing to put [himself] on the line," that he wished to "invoke [his right] for a speedy trial." He also stated the he did not "believe it'll be a convict [sic] with the current jury members" and that he did not "believe that the motion [for mistrial] is really relevant or essential to the fact that the court proceedings should proceed."

The trial court explained to Appellant that if he wished to proceed, the court would inquire of the selected jurors if they had been contacted by text message or if they had heard of a potential juror being contacted by text message. Appellant consented to that procedure, stating that he did not believe that to be "unfair." The trial court explained that if he granted the mistrial, a new jury could be selected the following Monday, resulting in only a two or three day delay. Appellant stated that the shortness of the delay did not change his position and that he wished to proceed to trial.

The trial court examined all twelve jurors. Each stated that he or she had not been contacted by text message and had not heard of any prospective juror being contacted by text message. Following that examination, the trial court overruled the joint motion for a mistrial, and the case proceeded to trial. The jury found Appellant guilty as charged and imposed a sentence of imprisonment for life and a fine of $10,000. This appeal followed.

MISTRIAL

In his first issue, Appellant argues that the trial court erred in denying the joint motion for mistrial. In his second issue, Appellant argues that the trial court constructively abrogated his right to counsel because the court entertained Appellant's opinion as to whether a mistrial should be granted.

Applicable Law

A trial court's denial of a motion for mistrial is reviewed for an abuse of discretion. *See* ***Coble v. State***, 330 S.W.3d 253, 292 (Tex. Crim. App. 2010). A mistrial is used to end a trial when an error has occurred that is so prejudicial that expenditure of further time and expense would be wasteful and futile. *See* ***Ladd v. State***, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999). The Supreme Court has written that the reasons for a mistrial "turn on the particular facts and thus escape meaningful categorization." ***Illinois v. Somerville***, 410 U.S. 458, 464–71, 93 S. Ct. 1066, 1071, 35 L. Ed. 2d 425 (1973). In general, however, the Court held that a "trial judge 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." ***Id***. The Court also noted that "it would not serve 'the ends of public justice'" to continue with a trial after an error that "would make reversal on appeal a certainty." ***Id***. In the exercise of sound discretion, a trial court must normally consider less drastic alternatives to a mistrial and also give adequate consideration to the defendant's right not to be tried twice for the same offense. *See* ***Torres v. State***, 614 S.W.2d 436, 442 (Tex. Crim. App. 1981).

There can be important consequences when a mistrial is declared. If jeopardy has attached, which occurs when a jury is empanelled and sworn in a jury trial, a trial ended by mistrial is a bar to further prosecution unless the defendant consented to the mistrial or there was a manifest necessity for the mistrial. *See* ***Ex parte Fierro***, 79 S.W.3d 54, 56 (Tex. Crim. App. 2002) (citing ***Arizona v. Washington***, 434 U.S. 497, 505, 98 S. Ct. 824, 830, 54 L. Ed. 2d 717 (1978)). Therefore, the court of criminal appeals has held that a trial court does not abuse its discretion when it grants a mistrial because "manifest necessity for the mistrial exists." ***Ex parte Garza***, 337 S.W.3d 903, 909–10 (Tex. Crim. App. 2011). It is an abuse of discretion, the court held, for a trial court to declare a mistrial "without first considering the availability of less drastic alternatives and reasonably ruling them out." ***Id***. at 909.

Analysis

Trial counsel, the assistant district attorney, and the trial court judge were all concerned that the court reporter's contact with a potential juror had contaminated the jury pool or the trial process more generally. Appellant[2] notes that the trial court indicated a willingness to find a manifest necessity for a mistrial and considered polling the jurors on the subject of the text messages. The trial court was wary of that procedure and voiced concern that it could raise questions in the jurors' minds. The court suggested that the "risk is not worth running" because the option of a mistrial was available.

This does not establish that there was a manifest necessity for a mistrial. Indeed, as the Court in ***Washington*** pointed out, a "mistrial was not 'necessary'" in that case because "some trial judges might have proceeded with the trial after giving the jury appropriate cautionary instructions." ***Washington***, 434 U.S. at 511, 98 S. Ct. at 833. In other words, a mistrial may be a manifest necessity in the judgment of a reasonable jurist, but it is not necessarily the only course of action. In that case, despite the mistrial not being "necessary," the Court concluded that the mistrial was reasonable because of the deference a reviewing court must give to a trial court's determination in this kind of situation. ***Id***.

In this case, the trial court ultimately decided not to grant the motion for mistrial. At the time the court made that decision, it had heard from all twelve jurors that they had not received text messages and that they were unaware of any jurors receiving text messages. The trial court's concern prior to the questioning of the jurors related to the court's goal of ensuring "the due administration of justice and to protect the defendant's rights to a fair trial." The trial court had also been concerned that questioning the jurors about the incident would "raise questions" in the juror's minds and wanted to ensure that there would be no appearance of impropriety.

After the questioning, the trial court denied the motion for a mistrial. The trial court found that no juror had been contacted or "in any way tainted" by the court reporter's actions. This finding is supported by the record and is not contested by Appellant. Accordingly, there is no showing of bias or tampering with the jury, and the trial court did not err in overruling the motion for mistrial.

This conclusion does not address directly Appellant's argument on appeal. Put simply,

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[2] Appellant forthrightly concedes that his personal and strenuous objection to the mistrial may serve to waive appellate consideration of this issue. We appreciate appellate counsel's candor, but because we hold there was no error, we need not consider whether a complaint was preserved for appellate review.

his argument is that the trial court should not have listened to him. In this way, the trial court was in a quandary entirely not of the making of the court or the parties. Because of misconduct by a court reporter, the trial court was willing to give the parties the opportunity to select a new jury. However, when considering whether to grant a mistrial, a trial court judge must balance the interests in a fair trial while still taking "care to assure himself that the situation warrants action on his part foreclosing the defendant from a potentially favorable judgment by the tribunal." *See* ***United States v. Jorn***, 400 U.S. 470, 486, 91 S. Ct. 547, 557, 27 L. Ed. 2d 543 (1971).

Appellant asserted an interest in going to trial with the jury that had been selected. On appeal, he asserts that the trial court should have ignored him or not inquired as to his opinion at all. Indeed, a trial court is not required to ask a defendant "if he personally approves of the action of his trial counsel in requesting a mistrial." ***Rios v. State***, 557 S.W.2d 87, 91 (Tex. Crim. App. 1977). And Appellant was not entitled to hybrid representation, that is to be heard along with his counsel. *See*, *e.g.* ***Robinson v. State***, 240 S.W.3d 919, 922 (Tex. Crim. App. 2007).

But that does not mean that the court cannot hear from a defendant if it chooses to do so. *See* ***Phillips v. State***, 604 S.W.2d 904, 907–08 (Tex. Crim. App. 1979); *see also* ***Clark v. State***, 717 S.W.2d 910, 918 (Tex. Crim. App. 1986). In this case, something less than hybrid representation occurred. The trial court asked counsel if Appellant personally agreed with the motion for a mistrial. Appellant interjected that he did not agree and made an argument as to why the trial should go forward. Appellant did not have the right to have his trial decided by a jury that was "tainted by bias." ***Washington***, 434 U.S. at 516, 98 S. Ct. at 835–36. But as the subsequent events showed, no bias or other irregularities reached the jurors who actually served in this case.

In his second issue, Appellant argues that the trial court "needlessly allowed [him] to make objections and argue the merits of the same" without first requiring him to waive the right to counsel or admonishing him on the dangers of proceeding without representation. However, the court of criminal appeals has held that those formalities, required when a defendant wishes to proceed pro se, are not required when there is hybrid representation, that is when the defendant remains represented by counsel. ***Phillip***, 604 S.W.2d at 908; *see also* ***Clark***, 717 S.W.2d at 918.

As the trial court discovered, and as Appellant had personally asserted, no juror was affected by the misconduct. The trial court carefully and deliberately worked through a difficult and thorny set of procedural issues. It is unlikely that this trial court judge, a jurist with considerable experience, had ever encountered a situation like this one. The judge carefully

weighed the options available and generously indicated a willingness to grant a mistrial. The trial court's willingness to grant a mistrial when reasonable questions could be raised about what had occurred during the voir dire process is not a finding that a mistrial was required. Giving the parties the option of a mistrial when an irregularity occurs can be a reasonable thing to do. So, too, can it be reasonable to allow a defendant to go to trial with the jury selected for that purpose. And, as here, when there is no prejudice to either party by proceeding to trial, the trial court cannot be said to have erred by giving the defendant what he asked for.

So long as the court did not hear from Appellant personally, the court could have concluded that he consented to the mistrial. Once Appellant made it clear that he did not consent to the mistrial, the ability to try Appellant for this offense with a new jury turned on whether a manifest necessity existed. *See* ***Ex parte Fierro***, 79 S.W.3d at 56 (retrial permissible after mistrial only if parties consented or the mistrial was manifestly necessary). The best arguments against the finding of a manifest necessity were made by Appellant himself. Specifically, he is the one who pointed out that the affected juror was not in the zone of persons likely to be selected and that she was physically removed from those jurors who were ultimately selected. The fact that it was Appellant who persuaded the court not to grant a mistrial is not an abrogation of his right to counsel. Nor can we hold, in this case, that the interests of justice and fair play would have been served if the trial court had refused to hear from Appellant when he clearly wished to be heard on this issue. Nor would the interests of justice have been served by refusing to allow Appellant's case to be heard by the jury he wished to have hear the case when there was no showing that any bias or prejudice or irregularity reached the jurors who decided this case.

We overrule Appellant's first and second issues.

DISPOSITION

Having overruled Appellant's first and second issues, we ***affirm*** the judgment of the trial court.

JAMES T. WORTHEN
Chief Justice

Opinion delivered June 29, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

JUNE 29, 2012

NO. 12-11-00114-CR

PRENTISS HAWKINS,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 241st Judicial District Court of
Smith County, Texas. (Tr.Ct.No. 241-1596-10)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the trial court below for observance.

James T. Worthen, Chief Justice.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.