IN THE COURT OF APPEALS OF IOWA

No. 4-414 / 93-1168

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

MELVIN JORDAN III,

Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Larry J. Conmey, Judge.

Melvin Jordan III appeals from his conviction, following a jury trial, of first-degree robbery. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Annette L. Hitchcock, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Thomas D. McGrane, Assistant Attorney General, Denver D. Dillard, County Attorney, and Todd Tripp, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Habhab and Huitink, JJ.

HABHAB, J.

On December 8, 1992, the State charged Melvin Jordan III with robbery in the first degree, in violation of Iowa Code sections 711.1 and 711.2. The charges arose from a robbery at the Coopa Cabana bar in Cedar Rapids, Iowa, on October 29, 1992.

The case was initially tried before a jury on May 10, 1993. At the trial, Sam Perry, a bartender at the Coopa Cabana, testified two men wearing clown masks had come into the bar on October 29, 1992. One of the men produced a sawed-off shotgun and asked Perry to empty the cash register into a bag. Perry testified he could not identify the individuals, other than to say they were both black and that one was about six feet two inches tall and the other was about five feet three inches.

Patti Webber, a patron at the bar, testified to the same events. She testified the two men were wearing half-masks. On cross-examination, the defense questioned whether police officers had asked her to identify anyone outside the bar. Webber responded in the negative. On redirect, the following exchange occurred:

> Q. Mrs. Webber, when you spoke with the police that night, did you feel that you would be able to make a positive identification of an individual that was not wearing a mask?
> A. If I heard the voice, yes, I would have.
> Q. In terms of physical description, however--
> A. Yeah.
> Q. --of the face, would you have had difficulty making a positive identification?

MR. LEFF: I am going to object, your Honor. It's leading.

THE COURT: The objection is overruled. Please answer.

A. That night, yes, I probably would have.

Q. Obviously that happened some months ago. Do you think you could make such an identification now?

A. Yeah, I probably could.

Q. Is there someone seated here in this room that you feel fits the physical description of the person that you--the tall person that night?

A. Yes.

Q. Would you point him out, please?

A. That man sitting over there (indicating).

Defendant then objected[1] and requested a conference with the court. Defendant sought and obtained a ruling that his objection precede the witness's last answer. He requested a mistrial alleging there was nothing in the minutes of testimony to indicate Webber would be making an in-court identification and further that the redirect examination was beyond the scope of cross-examination. The prosecutor stated he had been unaware until she answered the question that Webber would state she could identify the defendant as one of the robbers. He stated he had been trying to follow up on the defense's cross-examination questions regarding whether Webber had identified anyone soon after the robbery.

The district court granted the motion for mistrial, and declared the mistrial was without prejudice. The court

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1. The defendant waited for the answer to come in before voicing an objection. He then merely asked that his objection precede the answer. He did not move to strike the answer. He opted to declare a mistrial. His first argument was that the question and answer were prejudicial. He did not feel that "any instruction can cure it."

found the State had not attempted to elicit evidence beyond that in the minutes of testimony, but rather, the witness's answers were made without advance notice to either the State or the defense. In addition, the court stated the questions by the State on redirect examination focused on the issues raised by the defense by way of cross-examination.

Defendant was retried in June 1993 before a different jury. At the second trial Webber did not make an in-court identification, but testified defendant's general physical attributes matched that of one of the robbers. The jury found defendant guilty of robbery in the first degree. The district court denied defendant's motions in arrest of judgment and for a new trial. Defendant was sentenced to a term of imprisonment not to exceed twenty-five years. Defendant appeals.

Defendant contends the district court should have granted a mistrial with prejudice after the first trial in May 1993. He claims the prosecutor intentionally provoked a mistrial by seeking information which went beyond the minutes of testimony. He believes this was done in order to allow the State to amend the minutes of testimony to include the in-court identification. Defendant further claims the second trial violated his right not to be subjected to double jeopardy.

The Double Jeopardy Clause protects a defendant from multiple prosecutions. State v. Chase, 335 N.W.2d 630, 632

(Iowa 1983) (citing Oregon v. Kennedy, 456 U.S. 667, 671, 102 S. Ct. 2083, 2087, 72 L. Ed. 2d 416, 422 (1982)). The principles governing double jeopardy under the federal constitution are reviewed in the United States Supreme Court case of Oregon v. Kennedy, Id. The plurality opinion in the Oregon case provides:

> The Double Jeopardy Clause of the Fifth Amendment protects a criminal defendant from repeated prosecutions for the same offense. United States v. Dinitz, 424 U.S. 600, 606, 47 L. Ed. 2d 267, 96 S. Ct. 1075 (1976). As a part of this protection against multiple prosecutions, the Double Jeopardy Clause affords a criminal defendant a "valued right to have his trial completed by a particular tribunal." Wade v. Hunter, 336 U.S. 684, 689, 93 L. Ed. 974, 69 S. Ct. 834 (1949). The Double Jeopardy Clause, however, does not offer a guaranty to the defendant that the State will vindicate its societal interest in the enforcement of the criminal laws in one proceeding. United States v. Jorn, 400 U.S. 470, 483-484, 27 L. Ed. 2d 543, 91 S. Ct. 547 (1971)(plurality opinion); Wade v. Hunter, 336 U.S., at 689, 93 L. Ed. 974, 69 S. Ct. 834. If the law were otherwise, "the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again." Ibid.
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> Where the trial is terminated over the objection of the defendant, the classical test for lifting the double jeopardy bar to a second trial is the "manifest necessity" standard first enunciated in Justice Story's opinion for the Court in United States v. Perez, 9 Wheat 579, 580, 6 L. Ed. 165 (1824). Perez dealt with the most common form of "manifest necessity": a mistrial declared by the judge following the jury's declaration that it was unable to reach a verdict. While other situations have been recognized by our cases as meeting the "manifest necessity" standard, the hung jury remains the prototypical example. See e.g. Arizona v. Washington, 434 U.S. 497, 509, 54 L. Ed. 2d 717, 98 S. Ct. 824 (1978); Illinois v. Somerville, 410 U.S. 458, 463, 35 L. Ed. 2d 425, 93 S. Ct. 1066 (1973). The "manifest necessity" standard provides sufficient protection to the

> defendant's interests in having his case finally decided by the jury first selected while at the same time maintaining" the public's interest in fair trials designed to end in just judgments." Wade v. Hunter, supra, at 689, 93 L. Ed. 974, 69 S. Ct. 834.
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> But in the case of a mistrial declared at the behest of the defendant, quite different principles come into play. Here the defendant himself has elected to terminate the proceedings against him, and the "manifest necessity" standard has no place in the application of the Double Jeopardy Clause. United States v. Dinitz, supra, at 607-610, 47 L. Ed. 2d 267, 96 S. Ct. 1075.

Our supreme court has held that the principles as enunciated in Oregon v. Kennedy apply under the Iowa Constitution as well. State v. Bell, 322 N.W.2d 93 (1982); State v. Chase, 335 N.W.2d 630 (Iowa 1983). We apply those principles to the case at bar.

As revealed in Oregon v. Kennedy, when a defendant requests a mistrial, different principles come into play and the Double Jeopardy Clause generally does not stand in the way of reprosecution. 456 U.S. 667, 671, 102 S. Ct. 2083, 2087, 72 L. Ed. 2d 416, 422 (1982). This is true even if the mistrial motion is necessitated by prosecutorial or judicial error. State v. Hurd, 496 N.W.2d 274, 277 (Iowa App. 1992).

The only bar to reprosecution following a mistrial motion successfully urged by a defendant is when the underlying error was motivated by bad faith or undertaken to harass or prejudice. Id. The Double Jeopardy Clause will bar reprosecution where a prosecutor deliberately attempts to sabotage the trial in order to force the

defendant into requesting a mistrial. Chase, 335 N.W.2d at 632. A finding of an intentional provoking of a mistrial is a finding of subjective intent, which must be made in the first instance by the trial court. State v. Rademacher, 433 N.W.2d 754, 757 (Iowa 1988).

In considering constitutional questions, we must make our own evaluation of the totality of the circumstances under which the rulings on constitutional rights were made. Id. at 759. Notwithstanding this scope of review, the dispositive factual determination concerning subjective intent is one which the district court is in a far better position to resolve. Id.

We determine defendant has failed to show the prosecutor intentionally provoked him into requesting a mistrial. The prosecutor stated he was unaware of what Webber's testimony would be until she answered the question. Furthermore, defendant has not shown any reason the prosecutor would have wanted a mistrial. The case against defendant was very strong for defendant's accomplice was prepared to testify against him. In addition, the minutes of testimony reveal that two witnesses were to testify that defendant and co-defendant both admitted the robbery. Also, proceeds of the crime were connected to defendant.

We affirm the district court's decision granting a mistrial without prejudice and allowing defendant to be

retried. Defendant's conviction is affirmed. We affirm the district court's decision.

AFFIRMED.