IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v. **No.: 24-98**

RONNIE COCHRAN,

Defendant Below, Petitioner.

Brief of Petitioner Ronnie Cochran

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ISSUE ON APPEAL

Whether the Circuit Court erred by not dismissing all criminal charges on double jeopardy grounds when the evidence established the State acted intentionally to cause a mistrial and to goad Mr. Cochran into moving for its issuance.

STATEMENT OF THE CASE

The State of West Virginia indicted Defendant Ronnie Cochran ("Mr. Cochran"), on one (1) count of First-Degree Murder (W.Va. Code § 61-2-1), three (3) counts of Use of a Firearm (W.Va. Code § 62-12-2) and two (2) counts of Wanton Endangerment (W.Va. Code § 61-7-12). (JA 000029.)

Prior to the trial, the State, through the Assistant Prosecuting Attorney, moved the Court for entry of an Order prohibiting Mr. Cochran from implying in his opening statement whether he would testify. (JA 000033.) The Court heard the Motion and ultimately granted it. (JA 000037.) Accordingly, all parties understood the topic of whether Mr. Cochran would testify was not to be mentioned whatsoever.

At the June 5, 2023 trial, the parties selected and impaneled a jury which was subsequently sworn in, triggering the attachment of jeopardy under the law. (JA 000073-77.) The Assistant Prosecuting Attorney then began his opening statement. (JA 000077.) In his opening, the Assistant Prosecuting Attorney, with full knowledge of the Order he requested, stated that Mr. Cochran would testify at trial that he acted in self-defense. (JA 000081.) That statement was a blatant violation of Mr. Cochran's constitutional rights and such an egregious violation of the Order entered by the Circuit Court that it forced Mr. Cochran's counsel to immediately move for a mistrial. (JA 000083.)

At first, the Assistant Prosecuting Attorney, when addressing this Motion for Mistrial, interrupted defense counsel and claimed "you've put me on notice." (JA 000031.) The Assistant Prosecuting Attorney then requested permission to finish his closing, which the Circuit Court allowed. (Id.)

After dismissing the jury, the Circuit Court acknowledged the gravity of the State's actions and conceded it had no other option but to grant Mr. Cochran's Motion for Mistrial. (JA 000086.) According to the Circuit Court, "this is a crucial issue. It is a critical matter. The Court perceives there is no way to rehabilitate the situation. It is of great prejudice to the Defendant[.]" (Id.)

On December 1, 2023 Mr. Cochran filed a Motion to Dismiss All Charges, requesting the Court to enter an Order precluding the retrial of Mr. Cochran based on the actions of the State, which created jeopardy upon Mr. Cochran, barring a retrial under the Double Jeopardy Clause. (JA 000094-100.)

In response to Mr. Cochran's Motion for Dismissal, the Assistant Prosecuting Attorney. in his brief, admitted to the Circuit Court that he intentionally made the statement. (JA 000149-150.) Indeed, he conceded that he did so after contemplating the matter over the course of twenty-four (24) hours. (Id.) Specifically, he admitted he made the statement in response to what he thought defense counsel had said the day before in *voir dire*. (Id.) Thus, he made the statement *premeditatively*.

The Circuit Court noted at the hearing that this was "a very unusual situation." (JA 000171.) Nonetheless, the Circuit Court shied away from taking the legally proper course of action and instead denied Mr. Cochran's Motion to Dismiss, necessitating the filing of this appeal. (JA 000182-184.)

SUMMARY OF THE ARGUMENT

In Oregon v. Kennedy, 456 U.S. 667 (1982), the Supreme Court carved out a significant exception to the general rule that the Double Jeopardy Clause does not bar the re-prosecution of a defendant in cases in which prosecutorial misconduct causes the defendant to move for a mistrial. Specifically, the Supreme Court established that if the prosecutor's misconduct was intended to provoke a defendant into moving for a mistrial, then the Double Jeopardy Clause bars the retrial of that defendant.

Here, the Assistant Prosecuting Attorney's intent is clear. He did not like the way *voir dire* had proceeded the day before and the resulting jury that it impaneled. Consequently, thinking he was "playing with house money" and would get a second bite of the trial apple against Mr. Cochran if a mistrial were declared, the Assistant Prosecuting Attorney endeavored to gain the upper hand. He thought about this overnight and hatched his plan to tell the jury that Mr. Cochran would be testifying that he acted in self-defense. This is plain from the circumstances. Indeed, as the Assistant Prosecuting Attorney conceded at the hearing on the Motion to Dismiss, he knew that a mistrial had to be granted because of his actions.

For these reasons, as set forth in greater detail below, the Court should reverse the Circuit Court's Order denying the Motion to Dismiss, dismiss all charges against Mr. Cochran, and award any other relief the Court may deem just and appropriate.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner Ronnie Cochran respectfully requests oral argument as he believes it will aid the Court in deciding the issues on appeal. This case is appropriate for oral argument under Rule 19 of the West Virginia Rules of Appellate Procedure since it involves an assignment of error as to the application of settled law. A memorandum decision is likely inappropriate under the circumstances.

ARGUMENT

I. STANDARD OF REVIEW

As this Court has held, "[t]his Court's standard of review concerning a motion to dismiss an indictment is, generally, *de novo*." Syl. Pt. 1, in part, State v. Grimes, 226 W. Va. 411, 701 S.E.2d 449 (2009). However, in conducting the required analysis called for in this case under Oregon v. Kennedy, 456 U.S. 667, 671 (1982) and determining whether the prosecutor intended to provoke a motion for a mistrial, this Court has held that "[t]he determination of 'intention' in the test for the application of double jeopardy when a defendant successfully moves for a mistrial is a question of fact, and the trial court's finding on this factual issue will not be set aside unless it is clearly wrong." Syl. Pt. 2, State ex rel. Bass v. Abbot, 180 W. Va. 119, 375 S.E.2d 590 (1988); *accord* State v. Michael J., No. 21-0112, 2022 W. Va. LEXIS 148, at *20-21 (Feb. 25, 2022).

II. THE CIRCUIT COURT ERRED BY NOT DISMISSING ALL CRIMINAL CHARGES ON DOUBLE JEOPARDY GROUNDS WHEN THE EVIDENCE ESTABLISHED THE STATE ACTED INTENTIONALLY – INDEED, PREMEDITATIVELY – TO CAUSE A MISTRIAL AND TO GOAD MR. COCHRAN INTO MOVING FOR ITS ISSUANCE.

The Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, and Article III, Section 5 of the West Virginia Constitution, protect a criminal defendant against repeated prosecutions for the same offense. *See, e.g.,* Oregon v. Kennedy, 456 U.S. 667, 671 (1982). The policy underlying this protection is the assurance that the State, with all its resources and power, is not allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment and financial expense, compelling him to live in a continuing state of anxiety and insecurity, all the while enhancing the possibility that, even though innocent, he may be found

guilty. *See* U.S. v. Jorn, 400 U.S. 470, 479 (1971), citing Green v. U.S., 355 U.S. 184, 187-188 (1957).

In Oregon v. Kennedy, 456 U.S. 667 (1982), the Supreme Court carved out a significant exception to the general rule that the Double Jeopardy Clause does not bar the re-prosecution of a defendant in cases in which prosecutorial misconduct causes the defendant to move for a mistrial. Specifically, Chief Justice William Rehnquist, writing for the Court, established that if the prosecutor's misconduct was intended to provoke a defendant into moving for a mistrial, then the Double Jeopardy Clause bars the retrial of that defendant. As Chief Justice Rehnquist wrote, "we do hold the circumstances under which a Defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for mistrial was intended to provoke the Defendant into moving for a mistrial." Oregon v. Kennedy, 456 U.S. 667 (1982).

As has been held by subsequent courts on the matter, "where the defendant's mistrial motion is the necessary response to judicial or prosecutorial misconduct which has for its intended purpose the denial of the defendant's constitutional right to a fair trial, reprosecution will be barred." (Citations omitted). State v. Pulawa, 569 P.2d 900 (1977), *cert. denied*, 436 U.S. 925, 98 S. Ct. 2818, 56 L. Ed. 2d 768 (1978).

Under West Virginia law, "it is well settled [that] . . . intent may be inferred . . . from the facts and circumstances[.]" State v. Wendling, 112 W. Va. 58, 164 S.E. 179 (1932). Indeed, "[i]ntent is the purpose formed in a person's mind which may, and often must, be inferred from the facts and circumstances in a particular case. The state of mind of an alleged offender may be shown by his acts and conduct." Ridley v. Commonwealth, 219 Va. 834, 252 S.E.2d 313 (1979). According to Judge Kenna, intent is a state of mind which of necessity must be proved by

deduction or inference from established extraneous facts. *See* Collins v. Dravo Contracting Co., 114 W. Va. 229, 171 S.E. 757 (1933).

As a corollary to this rule of intent, a person is presumed to also intend that which is the necessary consequence of his act. *See* State v. Hertzog, 55 W.Va. 74, 46 S.E. 792 (1904); *State v. Taylor*, 57 W.Va. 228, 50 S.E. 247 (1905); State v. Kellison, 56 W.Va. 690, 47 S.E. 166 (1904). According to the Fourth Circuit in U.S. v. Arthur, 544 F.2d 730, 733 (4th Cir. 1976):

> It is reasonable to infer that a person ordinarily intends the natural and probable consequences of his knowing acts. The jury may draw the inference that the accused intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any intentional act or conscious omission.

Accord State v. Wright, 162 W. Va. 332, 337, 249 S.E.2d 519, 522 (1978).

In situations like this one, where the government directly violates a court order during the trial, other appellate courts have held that such conduct constitutes a deliberate intent to "goad" defense counsel into moving for a mistrial. *See, e.g.*, Beck v. State, 412 S.E.2d 530 (Ga. 1992) (holding that where prosecutor violated order excluding extraneous offenses, the prosecutor had "a deliberate intent to goad" defense counsel "into a mistrial").

Moreover, in a case quite similar to this one, the Ohio Court of Appeals upheld the ruling of the trial court, finding an intent to goad when the prosecutor directly violated a court order in his opening statement. *See* State v. Houk, 153 N.E.3d 556 (Ohio App. 2020). In that case, just before the start of the jury trial, the parties discussed with the court issues concerning the appellee's prior Operating a Vehicle Impaired ("OVI") convictions. Id. at 558. During that conference, the prosecutor stated he would not discuss the prior OVI evidence during his opening statement. Id. But, after the court impaneled the jury and during opening statement, the prosecutor mentioned the defendant's anticipated testimony and explicitly stated "Mr. Muntz

tells the Trooper that the woman tells him not to call the police because she cannot afford another DUI." Id. The defendant immediately requested a mistrial. Id. And, the prosecutor responded, "I did not agree not to mention the prior convictions from her statements, which are statements against interest, which may be proved by extrinsic evidence when it comes up." Id. After a lengthy discussion, the trial court listened to the parties' recorded statements about any mention of appellee's prior OVI convictions during opening statement. Id. And, after so doing, the court granted the defendant's motion for mistrial and subsequently dismissed the case with prejudice. Id. The State of Ohio appealed, and in deciding the appeal, the appellate court in affirming the decision held that "in view of the blatant and obvious nature of the transgression, especially after the assurance provided to the court, we do not believe it necessary for the trial court to hear additional evidence or argument[,]" Id. at 561.

Here, the unambiguous evidence clearly established that the Assistant Prosecuting Attorney acted intentionally to cause a mistrial and to goad Mr. Cochran into moving for its issuance. Importantly, the Assistant Prosecuting Attorney, prior to trial, set the rules and moved the Circuit Court to prohibit any discussion or inference to the jury as to whether Mr. Cochran would testify, obtaining from the Circuit Court an Order to that effect. (JA 000037-38.) Then, at the first possible opportunity – in his opening statement – the Assistant Prosecuting Attorney blatantly violated that simple Order, stating to the jury that Mr. Cochran would testify in the case that he acted in self-defense. (JA 000081.) Specifically, the Assistant Prosecuting Attorney told the jury, "Ronnie Cochran will likely come up here and say it was self-defense." (Id.)

The Assistant Prosecuting Attorney's actions were more devious than merely being intentional; they were premeditated. Indeed, the Assistant Prosecuting Attorney admitted as much, conceding that he planned this statement in his opening after believing that defense

counsel had indicated during *voir dire* the day before that Mr. Cochran would testify he acted in self-defense. (JA 000149-150.) In other words, the Assistant Prosecuting Attorney schemed over the course of twenty-four (24) hours to knowingly violate the Order to gain an advantage with the jury. (Id.) That is to say, fearing that the jury was predisposed to the claim of self-defense, the Assistant Prosecuting Attorney carefully plotted his statement for his opening to undercut Mr. Cochran's planned defense. (Id.)

The Assistant Prosecuting Attorney knew if caught that such a maneuver would lead to a mistrial. Indeed, he admitted as much to the Circuit Court at the hearing on Mr. Cochran's Motion to Dismiss. (JA 000168.) Nonetheless, in a calculated move, likely believing he was "playing with house money," the Assistant Prosecuting Attorney took the chance in order to influence the jury in his favor in his opening statement.

But he was caught. His gamble failed. And, as he knew and conceded to the Circuit Court, such a maneuver, as he knew it would, required counsel for Mr. Cochran to immediately move for a mistrial. (JA 000168.) Indeed, to do otherwise for defense counsel, would be sure malpractice.

Moreover, the Assistant Prosecuting Attorney's subsequent actions were just as egregious. When defense counsel first confronted the Assistant Prosecuting Attorney regarding his breach of the Order and constitutional violation, the Assistant Prosecuting Attorney advised counsel, "okay, I've been put on notice." (JA 000081.) But the Assistant Prosecuting Attorney already knew from the Order he sought that he could not mention that Mr. Cochran would or would not testify; yet he did so anyway. Making matters worse, when the Court excused the jury and came back to take up the Motion for Mistrial, the Assistant Prosecuting Attorney tried to convince the Court he had not said Mr. Cochran would testify but claimed, "I believe I said

argue and I didn't say testify because I've been put on notice of that." (JA 000084.) But that alleged semantical distinction fell on deaf ears as the Circuit Court reviewed the transcript and listened to the actual audio recording. (Id.) Both transcriptions revealed the Assistant Prosecuting Attorney told the jury during his opening that "Ronnie Cochran had every opportunity in the world to not have this happen on that night. He will likely come up here and tell you it was self-defense." (Id.) The Assistant Prosecuting Attorney next claimed that he was referring to defense counsel and not to Mr. Cochran and had pointed to defense counsel when making the statement. (JA 000149.) But this too was proven to be a blatant falsehood as news video shows otherwise. (JA 000162-163.)

Further, the Assistant Prosecuting Attorney's dilatory tactics of forcing continuances in this case to gain an advantage or because he was not really ready for trial predate this latest example. Indeed, on the eve of the first scheduled trial – the very day before trial – the Assistant Prosecuting Attorney, dumped a voluminous number of documents responsive to discovery on the Petitioner, requiring the continuance of that trial. (JA 000042-43.) Specifically, on April 24, 2022, at 1:30 in the afternoon, before the trial was to start the next day, the Assistant Prosecuting Attorney produced for the first time what he plainly admitted on the record to be "voluminous" constituting "thousands of pages." (Id.) Moreover, he further admitted, "I understand why the defense doesn't believe we can go to trial right now. It is voluminous." (Id.) And, he conceded, "I believe the Defense – they will probably Motion to Dismiss, but also Motion to Continue the Trial. I will of course object to the Motion to Dismiss. But, if it has to be continued, we will hopefully pick a date today." (JA 000043.) Consequently, this latest, most egregious example of forcing a delay and continuance of the trial through a forced mistrial is part of a pattern in this case.

Given the above factual history of the Assistant Prosecutor's actions, no other example of prosecutorial misconduct could more clearly fall within the confines of the Oregon v. Kennedy exception for jeopardy to attach than this case here. The Assistant Prosecuting Attorney violated a court Order, which he himself had sought. He did so intentionally and premeditatively, after plotting the statement for twenty-four (24) hours, after defense counsel's *voir dire*, so as to gain an advantage in the trial. When caught, he tried to skirt liability, claiming he said "argue" and not "testify." When the Circuit Court uncovered that as a falsehood, he next claimed he was referring to defense counsel and not to Mr. Cochran, alleging he pointed to defense counsel when making the statement. But this too was proven to be untrue through a news video recording of the event. And, on top of it all, this was not the first time the Assistant Prosecuting Attorney had intentionally delayed and forced a continuance of the trial. Accordingly, in this case, to hold anything other than a finding that double jeopardy attached is an affront to the administration of justice. Indeed, the Circuit Court immediately recognized the gravity of the situation, as did defense counsel. It was clearly said in violation of a court Order and clearly designed to provoke defense counsel into moving for a mistrial, as the Assistant Prosecuting Attorney conceded would likely occur if he were caught. Thus, for these reasons, this must reverse the denial of Mr. Cochran's Motion to Dismiss and dismiss all charges against Mr. Cochran with prejudice.

CONCLUSION

For the reasons set forth above, the Court should reverse the Circuit Court's Order denying the Motion to Dismiss, dismiss all charges against Mr. Cochran, and award any other relief the Court may deem just and appropriate.

Signed: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of May, 2024, true and accurate copies of the foregoing **Brief of Petitioner Ronnie Cochran** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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