IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 24-98

STATE OF WEST VIRGINIA,

Respondent,

v.

RONNIE ERIC COCHRAN,

Petitioner.

BRIEF OF RESPONDENT

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INTRODUCTION

Petitioner Ronnie Eric Cochran fails to allege any claim that entitles him to appellate relief. Petitioner contends that he is entitled to have a six-count indictment dismissed, including a charge of first degree murder, because the prosecutor made a mistake in opening arguments. Contrary to his arguments, the record reveals that the circuit court correctly concluded that the prosecutor's statement during opening remarks reflected a misstatement or a mistake. The statement was not blatantly made to harm Petitioner or to put evidence before the jury that should not have been. Though the effect of the statement was a mistrial, the statement does not reflect any intention on behalf of the prosecutor to thwart a trial. Petitioner has not met his burden of demonstrating that the State intended to provoke or goad Petitioner into moving for a mistrial. In the absence of such intent, the circumstances do not bar retrial on double jeopardy principles. This Court should reject Petitioner's claims on appeal and affirm the order of the Circuit Court of Raleigh County.

ASSIGNMENT OF ERROR

Petitioner raises a single assignment of error in his brief: "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 [Petitioner] into moving for its issuance." Pet'r's Br. 4.

STATEMENT OF THE CASE

In September 2020, a Raleigh County grand jury indicted Petitioner in case number 20-F-426 on one count of first degree murder (Count 1); three counts of use of a firearm while engaged in the commission of a felony (Counts 2, 4, and 6); and two counts of wanton endangerment (Counts 3 and 5). App. 29. Prior to trial, the State filed multiple motions in limine, including one seeking an order "barring the defense in opening statements from referring to possible trial testimony of the defendant, or to matters which only could be introduced into evidence by such

testimony." App. 33. Following a hearing on the motions, the court entered an order granting all the State's motions. App. 37-38.

The case proceeded to trial in June 2023, and during opening statements, the prosecutor told the jury that Petitioner "premeditatedly killed his son in the first degree," App. 81:11, "with the use of a firearm," App. 81:15-16. The prosecutor stated, however, that Petitioner "had every opportunity in the world to not have this happen on that night," and that he "will likely" tell the jury "that it was self defense." App. 81:17-19. Petitioner objected to the prosecutor's last statement, arguing that the State "put Mr. Cochran in a position where the jury expects to hear from him. He has lost his right not to testify." App. 83:14-16. Petitioner sought either a directed verdict or a mistrial. App. 83:21-23.

In response, the State initially told defense counsel, "You've put me on notice." App. 82:3. The prosecutor then stated that he used the word "argued" instead of "testify," because he thought "his entire legal team w[ould] be arguing that (referring to the theory of self-defense), if not him specifically." App. 84:4-6. The prosecutor further argued the opening statement "was just fine and satisfactory and does not warrant a mistrial or a directed verdict." App. 84:9-11. The State reasoned that it did not use the word "testify," but instead said that Petitioner's legal team would be arguing self-defense. App. 84:2-6. The court confirmed the prosecutor's actual wording was that Petitioner "will likely come up here and tell you that it was self defense." App. 84:12-19; 87:2-3. Based on this language, the court ultimately declared a mistrial. App. 84:12-19; 87:2-3. The court reasoned that the State's motion in limine was granted barring reference by the defense to Petitioner's possible testimony because it was Petitioner's decision "as to whether or not to testify" "and it is unknown whether or not the Defendant will do so, until he either begins testifying or announces a decision that he will not testify." App. 85:16-21. If Petitioner "elected not to testify, at all, then the

jury is in a position to wonder why, and there would be no reasonable explanation that could be provided to the jury as to why [Petitioner] did not so testify." App. 86:14-18.

In December 2023, Petitioner moved to dismiss all charges against him on the grounds of double jeopardy. App. 94-101. Relying on *Oregon v. Kennedy*, 456 U.S. 667 (1982), Petitioner argued that the State intended "to provoke [Petitioner] into moving for a mistrial" and, therefore, retrial is barred by double jeopardy. App. 98-100. Despite any known motivation to provoke or goad Petitioner into moving for a mistrial when trial had scarcely begun, Petitioner argues that the prosecutor's actions in violating the court's order barring reference to Petitioner's testimony, telling the jury Petitioner would testify, and later attempting to tell the court he did imply Petitioner should testify demonstrates that he provoked Petitioner. App. 99.

The State argued in response that Petitioner cannot meet the narrow exception attaching jeopardy because the State "did not intentionally provoke the Defense to move for a mistrial." App. 149. The prosecutor justified his comment as being responsive to defense counsel's comment during voir dire that "there are other reasons to shoot someone." App. 149. The State had no motivation or benefit in provoking Petitioner to seek a mistrial and finding that this was anything more than "a slip of the tongue and a mistake goes against common sense." App. 150.

The court held a hearing on Petitioner's motion wherein defense counsel noted that if the prosecutor was responding to a statement counsel made during voir dire, the statement at issue was then planned for twenty-four hours. App. 161:7-19. Because the statement was planned, Petitioner argued that it fell within the narrow exception set forth in *Oregon v. Kennedy*. App.161:20-22. Thus, Petitioner argued that the prosecutor's comment "was intended to provoke [the] defense into moving for a mistrial and he was successful. Because it was prosecutorial overreach or misconduct, I think it applies under the *Kennedy/Oregon* case doctrine." App. 164:15-19. Petitioner also

referenced a video on a thumb drive that was made part of the record exhibiting the prosecutor pointing to Petitioner during his opening statement. App. 162:1-23; 163:19-24. In response, the prosecutor stated, "[T]his is the most embarrassing thing I've ever done in a courtroom, and I recognize that the mistrial had to be granted, but in no way did I intend to provoke a mistrial." App. 168:1-4. The prosecutor also stated that neither the State, nor the prosecutor, personally gained any benefit in the court granting a mistrial. App. 168: 4-6.

The court, ruling from the bench, acknowledged that "[t]here's no question that the remark of the prosecutor caused this mistrial. It did destroy the defense opportunity to go forward." App. 169:18-21. In determining intent, the court observed that "the State would have had no motive to create a mistrial in this instance at the outset of the trial at opening statements. The State was ready to go. The defense was ready to go." App. 170:4-8. Thus, it would not be "a benefit for the prosecution to do something intentionally, to goad the defense into moving for a mistrial." App. 170:11-13. Based on the prosecutor's comments that he was "very embarrassed" by what occurred and based on the fact he is an officer of the court, the court could not "attribute any malicious intention on his part for any intentional misconduct designed to scuttle the trial." App. 170:21-24; 171:1-2. The court concluded that the circumstances created by the prosecutor do not fall "within the very narrow holding of the *Kennedy* case." App. 171:4-6.

By order entered January 18, 2024, the circuit court denied Petitioner's motion to dismiss, finding that the prosecutor's statement "was uttered inadvertently and not with any intent to cause a mistrial." App. 183. Thus, the court concluded that the prosecutor did not intent to goad Petitioner into moving for a mistrial. App. 183.

SUMMARY OF ARGUMENT

The circuit court's finding of fact that the State did not intend to provoke or goad Petitioner into moving for a mistrial is entitled to deference and that finding is not clearly erroneous. Though

the prosecutor referred to Petitioner's possible testimony, his contemporaneous statements upon Petitioner's objection reflect that he made a simple mistake. Based on comments by defense counsel during voir dire, the prosecutor intended to refer to defense counsel arguing a self-defense theory of the case to the jury. The State was not intending to diminish Petitioner's right to not testify at trial and there is no evidence of that. The prosecutor simply misspoke during opening statement and such mistake does not bar retrial on double jeopardy principles. The Court should therefore affirm.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary, and this case is suitable for disposition by memorandum decision because the record is fully developed and the arguments of both parties are adequately presented in the briefs. W. Va. R. App. P. 18(a)(3), (4).

STANDARD OF REVIEW

"This Court's standard of review concerning a motion to dismiss an indictment is, generally, *de novo*." Syl. pt. 1, *State v. Holden*, 243 W. Va. 275, 843 S.E.2d 527 (2020) (quoting syl. pt. 1, *State v. Grimes*, 226 W. Va. 411, 701 S.E.2d 449 (2009)). When the circuit court was tasked with determining whether a petitioner was provoked into moving for a mistrial due to the State provoking or goading the petitioner, "[t]he determination of 'intention' in the test for the application of double jeopardy . . . 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." *State v. Michael J.*, No. 21-0112, 2022 WL 577673, at *8 (W. Va. Supreme Court, Feb. 25, 2022) (memorandum decision) (quoting syl. pt. 2, *State ex rel. Bass v. Abbott*, 180 W. Va. 119, 375 S.E.2d 590 (1988)).

ARGUMENT

The circuit court's findings of fact that the State did not intend to provoke or goad Petitioner into moving for a mistrial are entitled deference and not clearly wrong based on the record. As such, the court properly denied Petitioner's motion to dismiss.

Petitioner's sole assignment of error alleges that retrial is barred by double jeopardy principles after a mistrial was declared due to the prosecutor's comments during opening statements regarding Petitioner testifying about self-defense. Pet'r's Br. 4, 9-15. He asserts that the prosecutor intentionally provoked and goaded him into moving for a mistrial. Pet'r's Br. 4, 9-15. Petitioner is wrong. Though the mistrial was declared due to the State's comments during opening statements, the record demonstrates that the prosecutor lacked the requisite intent to preclude the retrial of the charges against Petitioner.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Article III, § 5 of the West Virginia Constitution protect "a defendant in a criminal proceeding against multiple punishments or repeated prosecutions for the same offense." *United States v. Dinitz*, 424 U.S. 600, 606 (1976); *see also Flack v. Ballard*, 239 W. Va. 566, 585, 803 S.E.2d 536, 554 (2017). "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." *Kennedy*, 456 U.S. at 671-72 (internal quotation marks and citations omitted). Generally, the Double Jeopardy Clause does not bar a retrial upon the request of a defendant. *Id.* at 673. In *Kennedy*, however, the United States Supreme Court crafted a very narrow exception to this general bar: "[T]he 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 a mistrial was intended to provoke the defendant into moving for a mistrial." 456 U.S. at 679. This Court adopted the *Kennedy* standard in *State v. Pennington*, 179

W. Va. 139, 151-52, 365 S.E.2d 803, 815-16 (1987), holding that "when a mistrial is granted on [the] motion of the defendant, unless the defendant was provoked into moving for the mistrial because of prosecutorial or judicial conduct, a retrial may not be barred on the basis of double jeopardy principles." *See also* syl. pt. 3, *State v. Elswick*, 225 W. Va. 285, 693 S.E.2d 38 (2010).

In *Kennedy*, the United States Supreme Court explained that the intent of the prosecutor is vital to a defendant's bar to being retried: "Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, . . . does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause." 456 U.S. at 675-76. Importantly, "[t]he determination of 'intention' in the test for the application of double jeopardy . . . is a question of fact." Syl. pt. 2, *State ex rel. Bass v. Abbot*, 180 W. Va. 119, 375 S.E.2d 590 (1988). This "intent of the prosecutor" standard "merely calls for the court to make a finding of fact. Inferring the existence or nonexistence of intent from objective facts and circumstances is a familiar process in our criminal justice system." *Kennedy*, 456 U.S. at 675. The defendant bears "the burden of proving specific intent to provoke a mistrial." *United States v. Mathis*, 636 F. App'x 162, 165 (4th Cir. 2016) (citing *United States v. Smith*, 441 F.3d 254 265 (4th Cir. 2006)).

Here, the prosecutor told the jury that Petitioner "will likely come up here and tell you that it was self defense." App. 81:18-19. Following Petitioner's objection to this comment, however, the prosecutor thought he used the word "argue" instead of "testify," as he explained that he thought the "entire legal team w[ould] be arguing" self-defense. App. 84:2-6. This premise was based upon the proposed self-defense theory as counsel had expressed this defense to the jury during voir dire. App. 149. The prosecutor subsequently characterized his misstatement in written response to Petitioner's motion to dismiss as "reckless, uncalled for, and a mistake." App. 149. At

the hearing on the motion, the prosecutor stated that it was "the most embarrassing" thing he had "ever done in a courtroom." App. 168:1-3. Based on this evidence, and notwithstanding the granting of the State's motion in limine, the circuit court concluded that Petitioner failed to demonstrate the prosecutor intended to provoke or goad Petitioner into moving for a mistrial. App. 183. Rather, the prosecutor's statement "was uttered inadvertently and not with any intent to cause a mistrial." App. 183.

"Carelessness or mistake on the part of the prosecution, as opposed to a calculated move aimed at forcing the defendant to request a mistrial, is not sufficient to bar retrial under the Double Jeopardy Clause." *United States v. Powell*, 982 F.2d 1422, 1429 (10th Cir. 1992). In *Powell*, the Government's first witness testified to observing the petitioner's co-defendant pay for large amounts of marijuana and then repackage and sell it. *Id.* at 1428. After determining the witness knew of the marijuana business, the co-defendant told the witness he could not let her leave alive. *Id.* The government elicited such testimony to demonstrate the co-defendant's state of mind. *Id.* Nevertheless, in the process the government revealed that the co-defendant had a contract on the witness's life. *Id.* On cross-examination, the witness testified that the co-defendant had a contract out on her life. *Id.* The Tenth Circuit Court of Appeals concluded the district court did not err in denying the petitioner's motion to dismiss as the government had reason for the inquiry and that the inadvertent mistake in eliciting improper evidence on the part of the government was not sufficient to bar retrial under double jeopardy principles. *Id.* at 1429. "The fact that the government blunders at trial and the blunder precipitates a successful motion for a mistrial does not bar a retrial." *United States v. Oseni*, 996 F.2d 186, 188 (7th Cir. 1993). The prosecutor's mistaken statement during opening was precisely the type of mistake that *Kennedy*, *Powell*, and *Oseni* do not bar from retrial.

Petitioner relies upon the holdings in *Beck v. State*, 412 S.E.2d 530 (Ga. 1992), and *State v. Houk*, 153 N.E.3d 556 (Ohio Ct. App. 2020), to support his argument that the prosecutor's direct violation of the court's pretrial order demonstrated intent. Pet'r's Br. 11. Petitioner's reliance upon these cases, however, is misplaced. In *Houk*, despite assuring the court that the State would not refer to the petitioner's prior convictions in opening statements, the State nevertheless did. 153 N.E.3d at 562. In response to the State's mistake, the prosecutor asserted: "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.* at 558. The State also argued that the petitioner was not prejudiced by the statement. *Id.* Regardless, the court concluded that the State's violation of the order reflected intent to provoke a mistrial. *Id.*

The circumstances in *Beck* were essentially the same. 412 S.E.2d at 530-31. The *Beck* Court, however, concluded that the "prosecutorial error, . . . in violation of the Court's order . . . was intentional," and that "such intentional conduct on the part of the prosecution is sufficient to bar retrial." *Id.* In contrast to *Houk* and *Beck*, the record here demonstrates that immediately following Petitioner's objection to the opening statement, the prosecutor did not even realize he had referred to Petitioner's own potential testimony. Rather, the prosecutor believed he had used the term "argue" to reflect that defense counsel would be arguing the theory of self-defense, which theory may be presented to the jury without Petitioner's testimony. Unlike the circumstances in *Beck*, the prosecutor here made a mistake. These statements were essentially contemporaneous with the prosecutor's opening statement and are viewed more objectively than his post-motion statements to the court. Moreover, as the circuit court noted, the State had no motive or reason to provoke Petitioner into moving for a mistrial at such an early stage in the proceedings.

Petitioner's unsupported contention that voir dire had gone poorly does not support a finding of intent. Pet'r's Br. 7. Neither does Petitioner's unsupported accusation that the prosecutor deliberately delayed the trial in the past to gain an advantage or because he was not ready for trial. Pet'r's Br. 14. These unfounded arguments are simply red herrings to distract the Court from the fact that the record is devoid of any evidence that the prosecutor intended to provoke or goad a mistrial.

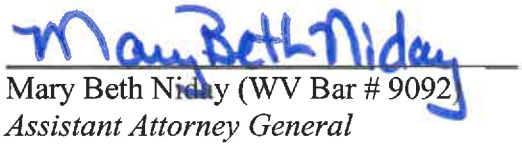
In *Beck* and *Houk*, it was presumed the State wanted evidence of prior convictions presented to the jury. Here, the State was not trying to admit any evidence. The prosecutor merely mistakenly referred to Petitioner when he attempted to assert that counsel would argue their theory of the case of self-defense. There is no evidence that the State was trying to admit evidence through backdoor tactics or in bad faith as was the case in *Beck* and *Houk*. The court assessed the prosecutor's statement given the record, the arguments, and the law, and found the comment was unintentional. Petitioner has not demonstrated that this finding of fact was clearly erroneous. For these reasons, the circuit court's findings of fact are entitled deference and are not clearly erroneous and the court correctly denied Petitioner's motion to dismiss.

CONCLUSION

For the foregoing reasons, Respondent requests that this Court affirm the order of the Circuit Court of Raleigh County.

Respectfully submitted,

PATRICK MORRISEY
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I, Mary Beth Niday, do hereby certify that on the 26th day of June 2024, I served a true and accurate copy of the foregoing **Respondent's Brief** upon the below-listed individual via the West Virginia Supreme Court of Appeals E-filing System pursuant to Rule 38A of the West Virginia Rules of Appellate Procedure:

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