SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5221-15T3

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

DAVID CHENEY, SR.,

Defendant-Respondent.

Argued January 11, 2017 – Decided March 1, 2017

Before Judges Accurso and Manahan.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 13-04-0713.

Monica do Outeiro, Assistant Prosecutor, argued the cause for appellant (Christopher J. Gramiccioni, Monmouth County Prosecutor, attorney; Ms. do Outeiro, of counsel and on the brief).

Michele E. Friedman, Assistant Deputy Public Defender, argued the cause for respondent (Joseph E. Krakora, Public Defender, attorney; Ms. Friedman, of counsel and on the brief).

PER CURIAM

This is the State's appeal of the June 24, 2016, order dismissing an indictment against defendant David Cheney, Sr. following the trial court's declaration of a mistrial based on prosecutorial misconduct. Because despite finding the prosecutor's missteps justified the mistrial, the trial court did not find the prosecutor intended to subvert the protections afforded defendant by the Double Jeopardy Clause, and such a finding is not possible on this record, we reverse and remand for a new trial.

Defendant was indicted on charges of second-degree aggravated assault, N.J.S.A. 2C:12-1b(1); third-degree terroristic threats, N.J.S.A. 2C:12-3a and/or b; fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5d; and third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4d; arising out the alleged assault of his long-time companion. The incident had already resulted in the entry of a final restraining order against defendant following a hearing on October 9, 2013 at which he testified.

Prior to trial, the court granted defendant's in limine motion barring "any remarks as to the title or type of hearing" resulting in the final restraining order and forbidding "any references [to] any prior bad acts by David Cheney, Sr., past domestic violence by David Cheney, Sr. and/or the F.R.O. Judge's

opinions concerning David Cheney, Sr.'s veracity or candor." With those restrictions, however, the State was permitted to make use of the transcript of the hearing on the final restraining order in cross-examining defendant.

The alleged assault occurred on January 9, 2013. The hearing leading to entry of the final restraining order took place on October 9, 2013. In the course of cross-examining defendant at trial on the indictment, the assistant prosecutor asked defendant if he remembered testifying "in a prior hearing on October 9th of 2013." When defendant responded that he did testify on that date and that he remembered his testimony, the prosecutor launched an attack directed at demolishing defendant's credibility by demonstrating the discrepancies between that prior testimony and his testimony at trial.

Several minutes into that effort, the prosecutor referred to defendant's "prior testimony from October 2010." Defendant's counsel did not object and the misstatement went uncorrected on the record. A few moments later, when the prosecutor asked whether defendant agreed his "memory was probably better back on October 9th, 2013," defendant disputed the date, contending the transcript was from "October 9th, 2015 maybe." The prosecutor showed defendant the transcript, saying "Heard on October 9th,

2013," leading defendant to say, "October 9th, 2013. Oh. Oh, okay."

Following a lunch break, the prosecutor continued his assault on defendant's credibility using the transcript of his prior testimony about the same incident. In addressing defendant in an exchange on a peripheral point, the prosecutor said, "[y]ou talk in the FRO transcripts that you — ." Defense counsel objected before the prosecutor could finish his question. The two went to sidebar, leading to the following exchange:

> Defense Counsel: That's the second time he brought it up.[1] I'm trying not to bring attention to it, but it's —
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> Assistant Prosecutor: I misspoke. I apologize.
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> Defense Counsel: Twice. You know? I mean[,] it's like how are we supposed to get a fair trial? I'm asking for a mistrial.
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> Court: What is it you want me to do?
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> Defense Counsel: What's that?
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> Court: What is it that you want me to do?
> Defense Counsel: I don't know if there's anything I can do. That's the problem. Every time he brings it up am I supposed to draw attention to it?

[1] In a prior exchange over the extent of the victim's injuries, the prosecutor had asked, "Because in fact in your testimony at that FRO hearing you said there was no blood. This was a pressure wound, correct?" Defense counsel had not objected.

Court: Brings what up?

Defense Counsel: FRO, final restraining order. That's twice now that it's been said. The first time I just sat through it because I didn't' want to bring attention to it.

Court: What do you want me to do?

Defense Counsel: Just say disregard his last question.

Assistant Prosecutor: I will withdraw the question.

Defense Counsel: And I don't know what else he can do without withdrawing.

[Sidebar ends.]

Assistant Prosecutor: Sir, I'll withdraw my last question.

Court: The last question is withdrawn. The jury will disregard it.

Several minutes later, the prosecutor, in the course of asking defendant why he had not called the police after the victim allegedly struck him with a cookie tin before she incurred the injury giving rise to the charges, asked, "So you thought [the situation] was going to dissipate after the tin can incident. But then you couldn't call 911 there. The incident though, according to your testimony here, not the October 2010 incident, here you said that it continued after that with her

hitting you with the purse, correct?" That exchange led to the second sidebar conference.

> Defense Counsel: Now we're up to three incidents FRO, FRO and now the 2010 incident.
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> Assistant Prosecutor: It's the transcript —
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> Court: No, you said the wrong date.
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> Defense Counsel: No, you said 2000 — let's play it back.
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> Assistant Prosecutor: Judge, —
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> Court: Wait a second, we can't all talk at once. [Defense counsel] has a point. You indicated the incident of 2010. What I think you meant to say was that the transcript was in October of 2013. [Defense counsel] has a point. You misspoke as to the date which implied to the jury that there was some other incident. That's what's wrong with your question.
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> Assistant Prosecutor: I can clarify it. Because we all know I meant the transcript because we're talking about you didn't say in that, and I was talking about what he testified to.
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> Court: No, but that's not what you said. And that's the problem.
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> Defense Counsel: Three times the bell got rung.
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> Court: Do you have an application?
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> Defense Counsel: For a mistrial.
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> Court: Granted.

[Sidebar ended.]

After the judge discharged the jury, the assistant prosecutor attempted to put on the record that when he referenced "the incident from 2010," he was referring to the transcript he was using to cross-examine the witness and only misstated the date. The court responded:

> [I]t doesn't matter what you intended. What [defense counsel] brought up was absolutely correct. You suggested it after I told you before at sidebar there were two references to an FRO hearing which indicated to the jury that there were prior incidents. Okay? We went to sidebar, [defense counsel] did not move for a mistrial at that point, he asked that the references that you made to the FRO —
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> Whatever it was that you intended, it came out to the jury that there were two prior incidents of domestic violence which was one of the pretrial rulings that I made that you would not be permitted to bring up the domestic violence history to prove or [imply] to the jury that because the defendant had committed other instances of domestic violence that he also must be guilty of this. That's the prejudice in having the reference to the FROs.
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> And [defense counsel] correctly made an application prior to trial that you would not be permitted to raise those. In fact, even if you intended to refer to the transcript, that's not what you said. It doesn't matter what you intended in your head. The way that it came out to the jury, and they heard it, was that there were two prior incidents. [Defense counsel] rightfully made an objection, I sustained

> the objection. I told you not to make any reference to the FRO at sidebar.
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> Then you got up and said prior incident of October 2010. That's what you said. I know that you intended to refer to the transcript of October 2013. But that's not what the jury heard and it doesn't matter what was in your head. . . . I understand what you intended. It did not come out that way. . . . Now the issue is whether or not there's going to be a retrial.
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> [Emphasis added.]

After hearing argument some months later on defendant's motion to dismiss the indictment on double jeopardy grounds, the court, applying the test of State v. Torres, 328 N.J. Super. 77, 88 (App. Div. 2000) and Oregon v. Kennedy, 456 U.S. 667, 680, 102 S. Ct. 2083, 2092, 72 L. Ed. 2d 416, 427 (1982) (Powell, J., concurring), dismissed the indictment, precluding retrial. The Torres test requires analysis of four factors:

> (1) whether there was a sequence of overreaching or error prior to the error resulting in the mistrial, (2) whether the prosecutor resisted the motion for a mistrial, (3) whether the prosecutor testified, and the court below found, that there was no intent to cause a mistrial, and (4) the timing of the error.
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> [Torres, supra, 328 N.J. Super. at 88.]

Because the statement that prompted the mistrial was the third in a series, the court found a pattern of overreaching on the part of the prosecutor satisfying the first Torres factor.

Although noting the prosecutor did not resist the motion for mistrial, the second Torres factor, the court acknowledged the prosecutor did not do so "because [the court] did not give him the opportunity." As to the third factor, the court stated:

> The difficulty that I had then, and have now is, whatever the intent of the prosecutor . . . , that's not what the jury heard. They clearly in the face of an explicit order heard three times about a prior incident of domestic violence. And the intent of the limiting order . . . was to prevent the trial from degenerating into a focus on the defendant's conduct on some dates other than January 9th 2013.

The court said the fourth factor "cut[] both ways." It found:

> The factor cuts both ways in this incident, because as the defense correctly points out, up until the point of the second error by the prosecutor, the defense was at least plausibly in a position to plausibly argue of the lack of veracity as to how the wound actually occurred. And at this point it's also clear that when you look at the entire cross examination up to the point of the mistrial, that the assistant prosecutor had done a very thorough and efficient job of using the prior statement to destroy the defendant's credibility in the eyes of the jury. So at that point in reality there was almost no need for him to ask the question, because by the time he got around to asking this one, there was very little left of the defendant's credibility. And in one sense could be viewed as piling on or an additional question that need not have been asked at all. Especially in view of the prior written order.

> So the defense properly complains that this was done at the very end of a thorough and lengthy cross-examination. And could only have the effect of intending to cause a mistrial, whether consciously he misspoke or not.

Quoting Judge Baime's comments in Torres about a court's power to fashion an appropriate remedy in accordance with the doctrine of fundamental justice,[2] the court concluded it

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[2] The quoted passage reads:

> We do not believe that the doctrine of fundamental justice bars a retrial in this case. It is arguable that whether a prosecutor deliberately pursues an improper course of conduct because he means to goad a defendant into demanding a mistrial or because he is willing to accept a mistrial and start over is a distinction without a difference. In our view, however, a bar against reprosecution must be derived from the constitutional objective to protect defendants against the harassment, embarrassment and risk of repeated criminal trials. It is not a sanction to be applied for the punishment of prosecutorial or judicial error. If the rule were otherwise, every reversal of a conviction on appeal would require a searching inquiry into the motive of the trial prosecutor or judge to see whether punishment is warranted by denying a retrial. So too, judges would be understandably reluctant to grant mistrials for fear that a vicious criminal would be set free. Justice is blind. But judges cannot appear to ignore the consequences of their decisions.

> full well understands that [defendant] would be looking at a State prison [sentence] if convicted of a second degree aggravated assault if the jury found that. On the other hand, it's clear that essentially the defense was left with no alternative but on the repeated error by the Prosecutor to ask for mistrial. And that there was almost no value in asking the question.
>
> So qualitatively weighing these, I'm satisfied that under circumstances, applying the principles of Torres, a retrial in this matter is barred by the constitutional protections against double jeopardy and will enter an order to that effect.

The State argues the trial court misapplied the Torres test, and that its failure to find the assistant prosecutor intended to provoke a mistrial precluded dismissal of the indictment. We agree.

We begin by noting the State is not appealing from the order granting the mistrial. Accordingly, we do not review it.[3]

[Torres, supra, 328 N.J. Super. at 93-94.]

[3] We note, however, that tensions were running high in the courtroom when the court declared the mistrial. The court had only a few moments before told the assistant prosecutor it was "not going to tolerate" his tone of voice and admonished him, and defendant, to "[s]top shouting, both of you." Defense counsel, likewise, in trying to protect his client from a withering cross-examination was quick to try and link the prosecutor's reference to "the October 2010 incident" to his earlier reference to the FRO, instead of to the October 2013 transcript the prosecutor was holding in his hand, and which

As Judge Baime explained in Torres, "the double jeopardy clause affords a defendant a 'valued right to have his trial completed by a particular tribunal.'"[4] 328 N.J. Super. at 85 (quoting Wade v. Hunter, 336 U.S. 684, 689, 69 S. Ct. 834, 837, 93 L. Ed. 974, 978 (1949)). There are, of course, occasions when such is not possible, as when a jury cannot agree on a verdict, resulting in the "manifest necessity" of a mistrial. See Wade, supra, 336 U.S. at 690, 69 S. Ct. at 837, 93 L. Ed. at 978 (explaining the rule of United States v. Perez, 9 Wheat. 579, 580 (1824), that "a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments"). Accordingly, when a trial is

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once before the prosecutor had erroneously referred to as defendant's "prior testimony from October 2010."

We do not suggest we would have reversed the trial court's declaration of a mistrial. That determination is committed to the trial court's sound discretion, which we do not readily second-guess. See State v. Allah, 170 N.J. 269, 280-81 (2002) (noting, however, that discretion is mistakenly exercised if the court has an appropriate alternative course of action). Having the conceded benefit of the "cold record," we note only that a brief adjournment might ordinarily permit a fuller discussion as to whether any appropriate alternatives exist to a mistrial.

[4] As the Supreme Court has observed, "[a]lthough there are language differences in the double jeopardy provisions of the federal and state constitutions, [it] consistently has interpreted those provisions harmoniously." State v. Cruz, 171 N.J. 419, 425 (2002).

terminated because of manifest necessity, double jeopardy principles do not prohibit a second proceeding. Torres, supra, 328 N.J. Super. at 86.

Likewise, "[a] defendant's successful motion for mistrial . . . typically will 'remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error.'"[5] State v. Kelly, 201 N.J. 471, 485 (2010) (quoting United States v. Dinitz, 424 U.S. 600, 607, 96 S. Ct. 1075, 1079-80, 47 L. Ed. 2d 267, 274 (1976)). A defendant's decision to terminate the proceedings is "viewed as a renunciation of his right to have the trial completed before the first jury empaneled," Torres, supra, 328 N.J. Super. at 86, except "where the prosecutor's actions giving rise to the motion for mistrial were done 'in order to goad the [defendant] into requesting a mistrial,'" Kennedy, supra, 456 U.S. at 673, 102 S. Ct. at 2088, 72 L. Ed. 2d at 423 (quoting Dinitz, supra, 424 U.S. at 611, 96 S. Ct. at 1081, 47 L. Ed. 2d at 276).

The reason for the caveat is clear. If the prosecutor by his overreach intended to provoke the mistrial motion, "the defendant's valued right to complete his trial before the first

[5] The Court, however, also noted the "prominent exception" provided for a prosecutor, who in the hopes of winning "some tactical trial advantage, provokes a defendant to move for a mistrial." Kelly, supra, 201 N.J. at 485 n.13.

jury would be a hollow shell if the inevitable motion for mistrial were held to prevent a later invocation of the bar of double jeopardy in all circumstances." Ibid. As Judge Baime noted in Torres, "surely, a prosecutor who has deliberately provoked a mistrial in order to avoid an acquittal has had his day in court and cannot complain." 328 N.J. Super. at 87.

The Court in Kennedy took pains to make clear that "[p]rosecutorial 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." Id. at 675-76, 102 S. Ct. at 2089, 72 L. Ed. 2d at 424 (emphasis added). It is "[o]nly where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." Id. at 676, 102 S. Ct. at 2089, 72 L. Ed. 2d at 425.

Application of those principles makes clear the Double Jeopardy Clause does not bar defendant's retrial here. The trial court found repeatedly that the prosecutor simply misspoke, albeit for the third time. It understood the prosecutor had not intended to refer to some unidentified 2010

domestic violence incident, but to the October 2013 transcript the prosecutor held in his hand, which he was using appropriately to cross-examine defendant.

Nevertheless, the trial court appears to have concluded that because "the defense was left with no alternative but on the repeated error by the prosecutor to ask for a mistrial" at a point in the cross-examination where "there was almost no value in asking the question," the State "goaded" defendant into moving for a mistrial. That represents a misapprehension of settled law.

The exception to the rule that a defendant moving for mistrial waives his right to have the trial completed before the jury already empaneled is a narrow one. See Kennedy, supra, 456 U.S. at 673, 102 S. Ct. at 2088, 72 L. Ed. 2d at 423. The rule of Kennedy could not be clearer, "[p]rosecutorial 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." Id. at 675-76, 102 S. Ct. at 2089, 72 L. Ed. 2d at 424. As Judge Baime explained in Torres, the double jeopardy bar "is not a sanction to be applied for the punishment of prosecutorial . . . error." 328 N.J. Super. at 93. It is not

enough that the prosecutor's conduct leaves a competent lawyer with no choice but to move for a mistrial, there must be a finding of fact that the prosecutor intended to provoke the mistrial motion so as to avoid an acquittal and get another chance to convict defendant before a different jury. See Kennedy, supra, 456 U.S. at 674-76, 102 S. Ct. at 2089-90, 72 L. Ed. 2d at 424-25.

Having reviewed the record, we agree with the trial judge's assessment that the assistant prosecutor had demolished defendant's credibility on cross-examination. The State's case was strong and had gone in smoothly. As in Torres, "[w]e can discern no earthly reason why the assistant prosecutor would want to abort the proceedings" given the state of the proofs at the time of the mistrial motion. 328 N.J. Super. at 89. The trial judge made no finding that the assistant prosecutor intended by his reference to the 2010 incident to provoke a mistrial motion in an attempt to "save" a foundering prosecution by allowing for a new trial before a different jury. Moreover, no such finding would be possible on this record.

Because the record is clear that whatever caused the assistant prosecutor to persist in "piling on" by continuing his cross-examination after there "was very little left of . . . defendant's credibility," it was not an intent to provoke a

mistrial in order to avoid an acquittal, the Double Jeopardy Clause poses no bar to a second trial.

Reversed and remanded for a new trial. We do not retain jurisdiction.