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31.9 Double Jeopardy and Mistrials

A. In General

The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution precludes retrial of defendants in some instances where the proceedings are terminated before judgment. *State v. Cooley*, 47 N.C. App. 376, 384 (1980); *see also United States v. Dinitz*, 424 U.S. 600 (1976). This clause is applicable to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784 (1969). The Law of the Land Clause, in article I, section 19 of the N.C. Constitution, may also prohibit a defendant from being tried again after an order of mistrial is declared. *See State v. Cameron*, 283 N.C. 191 (1973).

A defendant’s right to have his or her trial completed before a particular tribunal has long been considered a “valued right” guaranteed by the constitutional prohibition of double jeopardy. *See, e.g., Wade v. Hunter*, 336 U.S. 684 (1949); *see also Cooley*, 47 N.C. App. 376, 384 (“The interest of the accused which is protected in such cases is his right to retain a given tribunal.”).

The reasons why this “valued right” merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

Arizona v. Washington, 434 U.S. 497, 503–05 (1978) (footnotes omitted).

Whether a defendant's motion to dismiss based on double jeopardy should be granted depends on the validity of the order for mistrial. If the order for mistrial was valid, then a defendant's motion to dismiss will be denied. If the order for mistrial was improperly granted, then the defendant is entitled to dismissal based on former jeopardy. *See State v. Battle*, 267 N.C. 513 (1966).

B. When Jeopardy Attaches

In order for a defendant to move to dismiss a charge on double jeopardy grounds based on the declaration of a mistrial, jeopardy must have attached at the time the mistrial was ordered.

Superior court. Jeopardy attaches in superior court "when a defendant in a criminal prosecution is placed on trial: (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn." *State v. Cutshall*, 278 N.C. 334, 344 (1971). Thus, the critical time for jeopardy purposes in a jury trial is the empanelment and swearing of the jury.

District court. In nonjury trials in district court, jeopardy attaches when the trial judge begins to hear evidence or testimony. *State v. Brunson*, 327 N.C. 244 (1990); *see also State v. Fowler*, 197 N.C. App. 1, 17 (2009) ("until a defendant is "put to trial *before the trier of the facts*, whether the trier be a jury or a judge," jeopardy does not attach" (emphasis in original) (citations omitted)). The rationale behind this rule is that the potential for conviction exists only when evidence or testimony against a defendant is presented to and accepted by the court. *See State v. Ward*, 127 N.C. App. 115, 121 (1997).

C. Mistrial Declared for a Manifest Necessity

Under the common law, a defendant's right to be free from double jeopardy will not be violated where a defendant's trial or sentencing hearing "ends with a mistrial declared for a manifest necessity or to serve the ends of public justice." *State v. Sanders*, 347 N.C. 587, 599 (1998). A manifest necessity only exists when some event occurs at trial that creates "a situation where the defendant's right to have the trial continue to termination in a judgment is outweighed 'by the public's interest in fair trials designed to end in just judgments.'" *Id.* at 595 (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)); *see also Illinois v. Somerville*, 410 U.S. 458 (1973) (finding no abuse of discretion by trial judge in declaring mistrial based on a manifest necessity where the bill of indictment was fatally flawed and failed to confer jurisdiction); *State v. Lachat*, 317 N.C. 73, 82 (1986) (stating that the failure of a jury to reach a verdict due to deadlock is a manifest necessity justifying the declaration of a mistrial). *But see Yeager v. United States*, 557 U.S. 110 (2009) (in cases where a jury acquits on one count while failing to reach a verdict on another count concerning the same issue of ultimate fact, the issue-preclusive component of the Double Jeopardy Clause bars reprosecution of defendant on the hung count).

What constitutes a “manifest necessity” depends on the circumstances of each case. The U.S. Supreme Court, in *Arizona v. Washington*, 434 U.S. 497, 506 (1978), explained that the “manifest necessity” standard is not one that “can be applied mechanically or without attention to the particular problem confronting the trial judge.” In discussing “manifest necessity,” the N.C. Supreme Court has stated:

We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office.

State v. Shuler, 293 N.C. 34, 43 (1977) (quoting *United States v. Perez*, 22 U.S. 579, 580 (1824)).

The Fourth Circuit Court of Appeals has addressed the “manifest necessity” standard as follows:

While manifest necessity for a mistrial does not require that a mistrial be “necessary” in the strictest sense of the word, it does require a high degree of necessity. *See Arizona v. Washington*, 434 U.S. at 506. Perhaps the clearest example of a situation in which manifest necessity exists for a mistrial is when a jury is unable to reach a verdict. *See id.* at 509. At the other extreme are situations in which the prosecution seeks a mistrial in order to have additional time to marshal evidence to strengthen the case against the defendant. *See id.* at 508. Between these two extremes exists a spectrum of trial errors and other difficulties, some creating manifest necessity for a mistrial and others falling short of justifying a mistrial. In all cases, the determination of a trial court that a mistrial is manifestly necessary is entitled to great deference. *See id.* at 510. Nevertheless, “reviewing courts have an obligation to satisfy themselves that, in the words of Mr. Justice Story, the trial judge exercised ‘sound discretion’ in declaring a mistrial.” *Id.* at 514. If the grant of a mistrial by the trial judge amounts to an irrational or irresponsible act, he must be found to have abused his discretion in finding that manifest necessity for the mistrial existed, for a trial judge

““must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate.”” *Id.* (quoting *United States v. Jorn*, 400 U.S. 470 (1971) (Harlan, J.) (plurality opinion)).

Sanders v. Easley, 230 F.3d 679, 685–87 (4th Cir. 2000) (finding that while none of the “numerous instances indicating that the jury deliberations had devolved into something much less than a reasoned, good faith attempt to reach a verdict . . . may have justified a mistrial if presented in isolation,” the court could not say that the N.C. Supreme Court acted unreasonably in concluding that the incidents, taken together, created a manifest necessity for granting a mistrial).

D. Mistrial Granted on Defendant’s Motion or with Consent

Generally. If a motion for mistrial is granted on a defendant’s request or with his or her consent, the prohibition against double jeopardy will generally not bar reprosecution. *State v. White*, 322 N.C. 506 (1988); *see also Oregon v. Kennedy*, 456 U.S. 667 (1982); *United States v. Jorn*, 400 U.S. 470 (1971). “If a defendant moves for a mistrial, he or she normally should be held to have waived the right not to be tried a second time for the same offense.” *White*, 322 N.C. 506, 511.

Motion based on prosecutorial misconduct. A narrow exception exists to the above general rule allowing retrial following the granting of a defendant’s mistrial request. If the defendant’s motion for mistrial is prompted by serious misconduct by the prosecutor *and* he or she can show that the prosecutor was motivated by the intent to provoke a mistrial, then double jeopardy will bar reprosecution. *State v. White*, 322 N.C. 506, 510–11 (1988). The test is the same under the federal and state constitutions. *Id.* (adopting the test under the Fifth Amendment set out by the U.S. Supreme Court in *Oregon v. Kennedy*, 456 U.S. 667 (1982), as the appropriate standard under article I, section 19 of the N.C. Constitution). The U.S. Supreme Court has also stated that “the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused.” *Arizona v. Washington*, 434 U.S. 497, 508 (1978) (footnote omitted).

Motion based on judicial misconduct. Like prosecutors, judges also are prohibited from taking action intended to provoke requests for mistrial. *See Divans v. California*, 434 U.S. 1303, 1303 (1977) (to be entitled to relief under the Double Jeopardy Clause, the defendant must show error by the prosecution or by the court for the purpose of forcing the defendant to move for a mistrial). If the defendant can show that his or her motion for mistrial was prompted by bad-faith conduct by the judge that “threatens the ‘(h)arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict’ the defendant[,]” double jeopardy will bar a retrial. *United States v. Dinitz*, 424 U.S. 600, 611 (1976) (citation omitted). *But*

cf. Oregon v. Kennedy, 456 U.S. 667, 679 (1982) (reviewing case involving *prosecutorial* misconduct and noting that notwithstanding possibly broader language of *Dinitz* that applied to both prosecutorial and judicial misconduct, double jeopardy will only bar a retrial where “the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial”).

E. Preservation of Double Jeopardy Issue for Appellate Review When Mistrial is Granted on State’s Motion or by Trial Judge Ex Mero Motu

Capital cases. The failure of the defendant in a capital case to object to the trial judge’s declaration of mistrial will not bar the defendant from pleading former jeopardy and moving for a dismissal of the charge against him or her. *See State v. Lachat*, 317 N.C. 73 (1986). “To strictly require such objections to mistrials in capital cases would require payment of a price too high even for the commendable result of improved judicial efficiency.” *Id.* at 85; *see also supra* § 31.8E, Necessity for Objection (defendant’s failure to object to lack of findings of fact by trial court in declaring mistrial in capital case does not waive appellate review of issue).

Noncapital cases. Generally, to preserve a double jeopardy issue for review in noncapital cases, the defendant must lodge an objection to the declaration of mistrial at the time it is declared. *See, e.g., State v. Schalow*, ___ N.C. App. ___, 795 S.E.2d 567, 579 (2016) (finding no manifest necessity for declaration of a mistrial over defendant’s “persistent objections”; although defendant recognized the error in the bill of indictment, he actively argued against the mistrial and requested that the trial proceed on the sufficiently alleged lesser included offense). If he or she fails to do so, the appellate court will find that the defendant waived the objection on appeal. *State v. Odom*, 316 N.C. 306 (1986). This rule is “a court made rule designed to prevent avoidable errors and the resulting unnecessary appeals.” *State v. Lachat*, 317 N.C. 73, 85 (1986). *But see supra* § 31.9D, Mistrial Granted on Defendant’s Motion or with Consent (retrial following mistrial based on prosecutorial or judicial misconduct may not be permissible notwithstanding defendant’s motion for or consent to mistrial).

F. No Set Limit on Number of Retrials

“[A]s a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.” *Arizona v. Washington*, 434 U.S. 497, 505 (1978). This principle notwithstanding, there is no specific state or federal constitutional limit on how many times a defendant can be retried after a mistrial is granted. Instead, each double jeopardy claim must be examined individually and “considered in light of the particular facts of the case.” *State v. Simpson*, 303 N.C. 439, 447 (1981) (no double jeopardy violation found in defendant’s third trial for the same charges since there was no indication of harassment by the State or bad faith conduct by the trial judges in the prior trials, and it appeared that the previous juries were genuinely deadlocked and given every reasonable opportunity to reach a verdict); *State v. Williams*, 51 N.C. App. 613, 619 (1981) (finding that double jeopardy did not preclude a fourth retrial where the previous mistrials were properly ordered based on juror misconduct and juror deadlock with no

objection by defendant, the State acted “expeditiously and fairly to achieve a final resolution, and all four trials took place in less than a year”).

G. Other Double Jeopardy Issues

The above discussion has focused on the application of double jeopardy to mistrials. For a discussion of other double jeopardy issues, see 1 NORTH CAROLINA DEFENDER MANUAL § 13.4B, Motion to Dismiss on Double Jeopardy Grounds (2d ed. 2013); *see also* Robert L. Farb, [*Double Jeopardy, Ex Post Facto, and Related Issues*](#) (UNC School of Government, Jan. 2007).