IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CHRISTOPHER SHANE LEE FUENTEZ,	)	
	)	
Appellant,	)	**Not For Publication**
	)	**No. F-2016-626**
v.	)	
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.		

SUMMARY OPINION

HUDSON, JUDGE:

Appellant, Christopher Shane Lee Fuentez, was tried and convicted by a jury in the District Court of Muskogee County, Case No. CF-2014-178, for the crimes of Count 1: Conjoint Robbery, in violation of 21 O.S.2011, § 800, and Count 2: Possession of a Firearm in violation of 21 O.S.Supp.2012, § 1283, both After Former Conviction of a Felony. The jury recommended the following sentences—Count 1: twenty (20) years imprisonment and Count 2: three (3) years imprisonment. The Honorable Thomas H. Alford, District Judge, sentenced Fuentez in accordance with the jury's verdicts and ordered the terms of confinement to run

concurrently. Judge Alford further imposed a one (1) year term of post-imprisonment supervision.[1] Fuentez now appeals, raising eight (8) propositions of error before this Court.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we find Fuentez's first proposition of error has merit, which for reasons set forth below mandates that his convictions and sentences be **REVERSED** and the matter **REMANDED** with instructions to **DISMISS**.

In his first proposition of error, Appellant contends the trial of this case was barred by double jeopardy after his first trial ended in a mistrial without his consent. Appellant argues the trial court lacked the manifest necessity required to justify a mistrial. Thus, he contends his retrial violated his rights under Article II, section 21 of the Oklahoma Constitution and the Fifth Amendment to the United States Constitution.

The protection against double jeopardy embraces a defendant's "valued right" to have his trial completed by a particular

[1] Under 21 O.S.2011, § 13.1, Fuentez must serve 85% of the sentence imposed on Count 1 before he is eligible for parole.

tribunal. *Arizona v. Washington*, 434 U.S. 497, 503, 98 S. Ct. 824, 829, 54 L. Ed. 2d 717 (1978). For this reason, as a general rule, the prosecution is entitled to only one opportunity to try a defendant. *Washington*, 434 U.S. at 505, 98 S. Ct. at 830. Thus, before declaring a mistrial, 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." *United States v. Jorn*, 400 U.S. 470, 486, 91 S. Ct. 547, 558, 27 L. Ed. 2d 543 (1971); *see also Oregon v. Kennedy*, 456 U.S. 667, 673, 102 S. Ct. 2083, 2088, 72 L. Ed. 2d 416 (1982); *Washington*, 434 U.S. at 514; 98 S. Ct. at 835. A defendant who requests or consents to a mistrial is presumed to have waived his or her "valued right" to have the trial completed by the jury that was originally seated. *State v. Mosley*, 2011 OK CR 20, ¶ 13, 257 P.3d 409, 413. However, where the defendant does not consent to such an action, trial courts should utilize great caution being reluctant to declare a mistrial. *See Jorn*, 400 U.S. at 484-85, 91 S. Ct. at 557 ("manifest necessity stands as a command to trial judges . . . [to]

scrupulous[ly] exercise judicial discretion" before aborting the trial proceedings and as a consequence, depriving the defendant of his "valued right").

Mindful of the defendant's "valued right" to have his trial completed by a particular tribunal, this Court employs five essential factors to determine whether a discharge of the trial jury operates as an acquittal:

> First. The defendant must be put upon trial before a court of competent jurisdiction. Second. The information or indictment against the defendant must be sufficient to sustain a conviction. Third. The jury must have been impaneled and sworn to try the case. Fourth. After having been so impaneled and sworn to try the case the jury must have been unnecessarily discharged. Fifth. That such discharge of the jury must have been without the consent of the defendant. When those things all occur, then the discharge of a jury operates as an acquittal of the defendant.

Baird v. State, 2017 OK CR 16, ¶ 18, 400 P.3d 875, 881 (quoting *Randolph v. State*, 2010 OK CR 2, ¶ 8, 231 P.3d 672, 675).

In the present case, four of the requirements for acquittal by discharge of the jury are undisputed. The only question that remains at issue is whether the jury was "unnecessarily discharged," *i.e.*, whether there was a "manifest necessity" warranting the mistrial. *Baird*, 2017 OK CR 16, ¶ 18, 400 P.3d at

881; *Randolph*, 2010 OK CR 2, ¶ 9, 231 P.3d at 675. The "manifest necessity" standard dates back to 1824, when the United States Supreme Court stated that a trial judge may declare a mistrial only when, "taking all the circumstances into consideration, there is a *manifest necessity* for the act, or the ends of public justice would otherwise be defeated." *United States v. Perez*, 22 U.S. 579, 9 Wheat 579, 580, 6 L. Ed. 165 (1824) (emphasis added). Hence, sometimes a defendant's valued right to have his trial completed by the jury that was originally seated must be subordinated to the *necessity* of doing justice. *Wade v. Hunter*, 336 U.S. 684, 689, 69 S. Ct. 834, 837, 93 L. Ed. 974, 978 (1949).

Manifest necessity thus exists when an 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 interest in insuring that justice is meted out to offenders." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 120–21, 123 S. Ct. 732, 744, 154 L. Ed. 2d 588 (2003) (quoting *United States v. Scott*, 437 U.S. 82, 92, 98 S. Ct. 2187, 2194, 57 L. Ed. 2d 65 (1978)). *See also Blueford v. Arkansas*, 566 U.S. 599, 609, 132 S. Ct. 2044, 2052, 182 L. Ed. 2d 937 (2012) (when the particular circumstances

manifest a necessity to declare a mistrial, subsequent retrial is not prohibited). The "manifest necessity" standard, however, is not to be interpreted too literally. *Renico v. Lett*, 559 U.S. 766, 774, 130 S. Ct. 1855, 1863, 176 L. Ed. 2d 678 (2010). The prescribed standard correlates to a "'high degree' of necessity." *Id.* (quoting *Washington*, 434 U.S. at 506, 98 S. Ct. at 831). Whether that "high degree" has been reached depends of course on the particular circumstances of the case.

We review a trial court's decision to grant a mistrial and discharge the jury for an abuse of discretion, which is shown only when the ruling "is clearly made outside the law or facts of the case." *Randolph*, 2010 OK CR 2, ¶¶ 9, 17, 231 P.3d at 675, 678-79. Taking into consideration all the circumstances, we look to see whether there was a manifest necessity—a high degree of necessity—for the mistrial, or the ends of public justice would otherwise be defeated. *Id.*, 2010 OK CR 2, ¶ 14, 231 P.3d at 677; *see also McClendon v. State*, 1988 OK CR 186, ¶ 4, 761 P.2d 895, 896 ("The trial court is vested with the discretion to discharge a jury and declare a mistrial whenever there is a manifest necessity.").

In the present case, a prompt and thorough *in camera* hearing was conducted to investigate the concern that Ashley Putman, a witness for the State, had lied during her testimony. Putman was subjected to full examination by the parties as well as the trial court. Putman steadfastly maintained that she had not lied during her testimony, but rather had merely failed to disclose that Appellant had written her a letter from jail.[2] Putman explained that although Appellant wanted her to say that he had no part in the robbery, "he was part of it [and] I didn't lie on the stand." Putman further testified that Appellant's letter to her did not contain any threats. She stated her trial testimony earlier that day was the "same" as she had testified at preliminary hearing and it would be the same "a year from now." She explained that she had only failed to tell the State that Appellant had written her a letter—although she had never been asked.

Other than Putman's acknowledgement that she had received a letter from Appellant and that she was concerned Appellant knew where she lived, nothing obtained from the Court's investigation or

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[2] The letter was sent several months after Appellant's preliminary hearing, approximately four or five months prior to Appellant's first trial.

proffered by the State indicated Putman actually lied for Appellant or significantly altered her testimony as a result of his letter. To the contrary, Putman's testimony was favorable to the State's case and for the most part was consistent with her preliminary hearing testimony.[3] At best, any inconsistencies were minor and did not undermine the reliability of Putman's trial testimony.

Moreover, the trial court failed to consider other viable and far less dramatic options such as 1) granting a recess or brief continuance during trial to provide the State with additional time to fully assess the situation, or 2) permitting the State to recall Putman to the stand to present evidence that Appellant had attempted to intimidate and influence Putman's testimony. *See Dodd v. State*, 2004 OK CR 31, ¶ 34, 100 P.3d 1017, 1031 (evidence that the defendant has intimidated a witness is admissible to show consciousness of guilt); *Broadway v. State*, 1991 OK CR 113, ¶ 11, 818 P.2d 1253, 1256 (trial court has the discretion to permit the prosecution to recall a witness to the stand); *Richmond v. State*, 1969 OK CR 178, ¶ 16, 456 P.2d 897, 901 (granting a recess is

[3] The record shows the prosecutor was fully aware of Putman's preliminary hearing testimony. Not only did the prosecutor handle Appellant's preliminary hearing, but he utilized the preliminary hearing transcript to refresh her memory at trial on at least two occasions.

within the sound legal discretion of the trial court); 12 O.S.2011, § 667 ("[trial] court may, for good cause shown, continue an action at any stage of the proceeding upon terms as may be just").

Given the facts and circumstances of this case, the trial court lacked the "high degree of necessity" needed to order a mistrial and discharge the jury. *Renico*, 559 U.S. at 774, 130 S. Ct. at 1863; *see also Randolph*, 2010 OK CR 2, ¶ 17, 231 P.3d at 678 (Court looks to see whether a "cogent and compelling reason" created the manifest necessity needed to declare a mistrial) (quoting *Ozbun v. State*, 1983 OK CR 29, ¶ 3, 659 P.2d 954, 956). Unlike *Lozano v. State*, 2013 OK CR 17, ¶ 4, 313 P.3d 272, 273, wherein we determined that the mistrial was the direct result of defendant's misconduct, the record from the first trial clearly demonstrates that Appellant's attempt to influence or intimidate Putman was unsuccessful. Defense counsel was correct in his contention that while the evidence would likely support the filing of a separate criminal charge, it did not demonstrate that Appellant's letter impacted "what we're doing today."

The record here shows the prosecutor and the trial court overreacted to the circumstances and in the fervor of the moment

failed to consider anything less drastic, such as a continuance or recalling Putman as a witness, before aborting the trial proceedings. Had the trial court used the mandated caution and scrupulously evaluated the circumstances and the potential availability of other feasible and less dramatic options (*see Jorn*, 400 U.S. at 484-85, 91 S. Ct. at 557), the trial court would have undoubtedly recognized that viable and sound alternatives were readily available and taken a less extreme course of action. While the trial court undoubtedly had the best of intentions, we cannot escape the fact that the trial court unnecessarily declared a mistrial, over Appellant's objection.[4]

Thus, based on the record before us, we find that the trial court abused its discretion when it granted the State's request for a mistrial. The court lacked the necessity required to justify a mistrial. Absent such "manifest necessity", Appellant's retrial was barred by the double jeopardy clause of both our State and federal constitutions. Accordingly, Appellant's convictions must be

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[4] Notably, the trial court failed to articulate on the record a specific finding of manifest necessity. While the trial court's "failure to explain that ruling more completely does not render it constitutionally defective" (*Washington*, 434 U.S. 497, 517, 98 S. Ct. 824, 836), trial courts are nonetheless urged to do so. As the United Sates Supreme Court observed in *Washington*, "[r]eview of any trial court decision, is of course, facilitated by findings and by an explanation of the reasons supporting the decision." *Id.*

REVERSED and **REMANDED** with instructions to **DISMISS.** Our decision renders moot the remainder of Appellant's propositions of error.

DECISION

The Judgments and Sentences of the District Court are **REVERSED** and the matter **REMANDED** with instructions to **DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2018), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

APPEAL FROM THE DISTRICT COURT OF MUSKOGEE COUNTY
THE HONORABLE NORMAN D. THYGESEN, ASSOCIATE DISTRICT JUDGE THE HONORABLE THOMAS H. ALFORD, DISTRICT JUDGE

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OPINION BY: HUDSON, J.
LUMPKIN, P.J.: DISSENT
LEWIS, V.P.J.: DISSENT
KUEHN, J.: CONCUR
ROWLAND, J.: CONCUR

LUMPKIN, PRESIDING JUDGE: DISSENTING

I dissent to the reversal of the Judgments and Sentences in this case. The mistrial in this case was the direct result of Appellant's misconduct. *See Lozano v. State,* 2013 OK CR 17, ¶ 4, 313 P.3d 272, 273. Appellant was admonished in open court at his initial appearance not to communicate with any victim or witness in the case. Yet after Preliminary Hearing and approx. 4-5 months before trial, Appellant wrote a letter to Ms. Putman telling her to lie for him and say that he was not involved. Ms. Putman testified she was afraid because having received the letter meant Appellant knew her address and she had a newborn baby. In addition to the letter, Appellant attempted to intimidate Ms. Putman by his threatening looks at trial. While Ms. Putman did not lie on the stand, she withheld evidence by failing to testify about the letter, an important piece of evidence as to Appellant's guilt, out of fear of Appellant. Her claim that her testimony would have been the same even if she had disclosed the existence of the letter, despite her fears, shows the inconsistency and questionable veracity in her testimony. Taking all the circumstances into consideration, Appellant's willful

attempts to intimidate Ms. Putman and influence her testimony was the proximate cause of the mistrial. The trial court did not abuse its discretion in finding a manifest necessity existed for the mistrial.

I am hereby authorized to state Judge Lewis joins in this writing.