2015 IL App (3d) 130893-U

Order filed July 1, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-13-0893 Circuit No. 12-CM-3329
DAVID F. BAMBIC,	)	Honorable Victoria M. Kennison,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Schmidt and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: There was a manifest necessity for the court to declare a mistrial after prejudicial testimony was elicited by the defense.

¶ 2 Defendant, David F. Bambic, was charged with two counts of domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2012)). During defendant's jury trial, the defense relied on a theory of self-defense. In support of that theory, the defense sought to present testimony establishing the propensity for violence of the victim, Terry Boys. The State objected multiple times to the testimony, and the trial court found that the defense had not presented a sufficient foundation to

introduce the propensity evidence. The State moved for a mistrial, arguing that the testimony about the victim's propensity for violence had prejudiced the jury. The court granted the motion after deciding that no other alternative would cure the prejudice. Defendant moved to dismiss the charges against him on double jeopardy grounds. The court denied that motion, finding that the mistrial was the result of a manifest necessity. We affirm the trial court's decision denying defendant's motion to dismiss.

¶ 3 FACTS

¶ 4 At trial, Boys testified that he was married to defendant's sister, Jane. On December 2, 2012, Boys and Jane were visiting Jane's parents, Bill and Mary Bambic, at their home in Will County. Defendant also resided at the home with Bill and Mary. Boys was standing outside the Bambic home, when defendant confronted him and accused him of smoking cigarettes too close to the home's entryway. Boys felt harassed and went inside to remove himself from the situation and alert Bill that defendant was being confrontational. Defendant followed Boys into the home, accusing him of failing to abide by the house rules. As Boys turned away from defendant to walk into a different room, defendant punched Boys in the face. Boys fell to the ground, and defendant began kicking him. Bill broke up the skirmish, and defendant left the home and drove away.

¶ 5 Will County sheriff's deputy James Eiden responded to the report of violence at the Bambic home. He observed a two-inch laceration on the forehead of Boys. Defendant later told Eiden that he struck Boys in self-defense after Boys pushed him.

¶ 6 The defense called Janet McMillin. McMillin was the sister of defendant and Jane. She had known Boys for 18 years and lived with him for a year in Georgia. Defense counsel asked whether McMillin knew Boys's reputation in the community. McMillin responded, "Well, he

likes to drink and he, you know, likes to fight." The State objected. A sidebar was held that does not appear in the record. After the sidebar, the court stated that the State's objection was sustained but did not explain a basis for that decision.

¶ 7 When defense counsel resumed questioning, he asked McMillin when she had lived with Boys. McMillin said she lived with him for a year about eight years ago. Counsel asked, "did you get to know the community that he lived in?" McMillin answered, "Pretty good, yes." McMillin also testified that Boys and Jane would fight "all of the time." The State's objection to that testimony was overruled.

¶ 8 Another sidebar was held. The State complained that McMillin's testimony did not describe specific acts of violence committed by Boys, and instead the defense was "fishing." The court admonished defense counsel that he would have to make his questions more specific.

¶ 9 Defense counsel asked McMillin whether she remembered any specific instances of violence committed by Boys. McMillin testified that she had observed Boys "try to punch" Jane. Defense counsel asked whether McMillin had seen Boys actually make contact with Jane. The State objected, without explanation, and the court sustained the objection. Defense counsel then asked whether McMillin had seen Boys fight with anyone else. The State again objected, and a sidebar was held off the record. After the proceedings came back on the record, the court stated that the objection was sustained and directed defense counsel to rephrase his question. Defense counsel asked McMillin when she had last seen Boys engaged in violence. McMillin answered that she last saw Boys act violently just before she entered a battered women's shelter, but did not explain when she had entered the shelter.

¶ 10 After McMillin concluded testifying, the court excused the jury. The court stated:

"Just for the record, I am going to tell you I am still not happy with that last witness at all. Counsel, I am still thinking that you did not follow my instructions. I never got a clear time line of when that alleged incident occurred. I also heard a bunch of testimony about this alleged physical domestic violence issue between the named victim and his wife. That was the extent of the reputation from the community that you elicited.

So I am seriously considering striking all of that last witness' testimony, but I would like to hear some arguments and I want to hear some authority on that tomorrow."

The trial recessed until the following day.

¶ 11 When the proceedings resumed, the State moved for a mistrial. The State argued that the defense failed to lay a proper foundation for the evidence about Boys's propensity for violence. The State argued that "overall general opinions would not be allowed as character evidence of the victim," and that defendant needed to establish specific times and places where violence occurred. The State complained that defense counsel was able to imply that Boys had battered his wife, without backing up that accusation with specific occurrences. In the eyes of the State, the defense was trying to establish specific acts of violence—rather than a reputation for violence—but failed to lay a foundation for those specific acts. The State argued that the prejudice to the jury could not be cured merely by striking the testimony.

¶ 12 The court questioned what remedy would be appropriate. The State reiterated that striking the testimony would be insufficient because "the jury now has been poisoned" into thinking that Boys was a domestic batterer. The court found that Boys's character was damaged "in ways that cannot be remedied by simply just striking her testimony." The court questioned whether there was any alternative remedy—rather than a mistrial—that could cure the error and suggested a rebuttal witness. The State responded that there were no feasible rebuttal witnesses.

The State explained that calling Boys in rebuttal would not sufficiently cure the error because the jury might not believe his testimony.

¶ 13 Defense counsel argued that he was permitted to establish Boys's character for violence with either specific acts or reputation testimony. Counsel argued that he had laid a sufficient foundation to introduce McMillin's testimony about Boys's reputation in the community. However, counsel admitted that the foundation establishing the specific act of violence that occurred in Georgia in 2007 may have been weak. The defense argued that no remedy was necessary because there was no error.

¶ 14 The court recessed to review the transcript of the testimony. When the proceedings resumed, the court stated that the defense had not laid a sufficient foundation to admit reputation testimony. The only foundation the defense had established was that McMillin lived with Boys for one year around eight years ago. The court chastised the defense for failing to establish a more specific foundation after the State's objections. The court found it impossible to cure the prejudice resulting from defendant's error. The court declared a mistrial, finding it to be the only sufficient remedy.

¶ 15 Defendant filed a motion to dismiss the charges on double jeopardy grounds. The court denied the motion, finding that the declaration of a mistrial was justified by a manifest necessity.

¶ 16 ANALYSIS

¶ 17 Defendant argues that the court erred by denying his motion to dismiss the charges against him. We disagree and conclude that the declaration of a mistrial was justified by manifest necessity.

¶ 18 The double jeopardy clauses of the United States and Illinois Constitutions protect criminal defendants from multiple prosecutions for the same offense. U.S. Const., amend. V; Ill.

Const. 1970, art. I, § 10. In a jury trial, the protection attaches when the jury is selected and sworn. *People v. Camden*, 115 Ill. 2d 369, 376 (1987). At that point, the defendant has a constitutional right to have that particular jury decide his fate. *Arizona v. Washington*, 434 U.S. 497, 503 (1978). When the court subsequently grants a mistrial without the defendant's consent, the court deprives the defendant of his right to have that particular jury decide the case. *United States v. Jorn*, 400 U.S. 470, 485 (1971). The State is then prohibited from retrying the defendant for the same offense, unless the State demonstrates that the mistrial was a "manifest necessity." *Arizona*, 434 U.S. at 505.

¶ 19 When determining whether a manifest necessity existed, several factors may be considered, including: (1) whose actions caused the mistrial; (2) whether there was an alternative to a mistrial that might have cured the error; (3) whether the trial court considered such alternatives; and (4) whether a conviction from the first trial would have been subject to reversal on appeal. *People v. LaFond*, 343 Ill. App. 3d 981, 985 (2003). The most troublesome situation—one in which a manifest necessity should not be found—is that in which the prosecutor requested the mistrial because the evidence was weak, and the prosecution desired another opportunity to better present evidence. *Arizona*, 434 U.S. at 507-08. The determination whether manifest necessity justified a mistrial is left to the sound discretion of the trial court. *People v. Edwards*, 388 Ill. App. 3d 615, 624 (2009).

¶ 20 Here, we find that the trial court did not abuse its discretion by finding that a manifest necessity justified the mistrial. The mistrial resulted from defendant's actions in attempting to elicit testimony about the victim's propensity for violence. This was not a situation in which the State sought a mistrial in order to achieve a new chance to present a stronger case. Rather, the State consistently objected to testimony that it considered prejudicial and lacking in foundation.

The court repeatedly sustained those objections and instructed defense counsel to be more specific, but counsel failed to adjust his questioning. Even if defense counsel was seeking to elicit reputation evidence, the foundation needed to be specific. Proper foundation for reputation evidence includes: (1) adequate knowledge of the person; and (2) evidence of contact with the person's neighbors and associates, rather than the personal opinion of the witness. *People v. Bowman*, 2012 IL App (1st) 102010, ¶ 40. The State repeatedly questioned the sufficiency of that foundation. Only after multiple sustained objections did the State move for a mistrial, concluding that the testimony that had been elicited about Boys's violent character was prejudicial and incapable of otherwise being cured.

¶ 21 In addition, the court carefully considered alternatives to a mistrial, eventually concluding that none would sufficiently cure the prejudicial statements heard by the jury. The court determined that neither a limiting jury instruction nor further testimony could cure the prejudice. Had the court given a limiting instruction, rather than declare a mistrial, defendant's conviction may have been subject to reversal on appeal. Considering the particular facts of this case, we conclude that the trial court did not abuse its discretion in finding a manifest necessity. As a result, the denial of defendant's motion to dismiss was proper.

¶ 22 CONCLUSION

¶ 23 The judgment of the circuit court of Will County is affirmed.

¶ 24 Affirmed.