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Recent Developments: *Simmons v. State*: Manifest Necessity Existed to Grant a Mistrial Where Prejudicial Statements Regarding a Lie Detector Test Could Not Be Cured with an Immediate Instruction; Double Jeopardy Did Not Bar a Retrial

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RECENT DEVELOPMENT

***SIMMONS V. STATE*: MANIFEST NECESSITY EXISTED TO GRANT A MISTRIAL WHERE PREJUDICIAL STATEMENTS REGARDING A LIE DETECTOR TEST COULD NOT BE CURED WITH AN IMMEDIATE INSTRUCTION; DOUBLE JEOPARDY DID NOT BAR A RETRIAL.**

By: Brittany N. Hampton

The Court of Appeals of Maryland held that the trial court did not abuse its discretion when granting a mistrial after defense counsel gave an improper opening statement, even though the prosecution did not move for a mistrial until two days later. *Simmons v. State*, 436 Md. 202, 81 A.3d 383 (2013). Specifically, the court noted that because defense counsel knew or should have known of the impropriety of mentioning the defendant's request to take a polygraph test, the trial court was correctly concerned about the prejudice the State would suffer as a result. *Id.* at 216, 81 A.3d at 391. Further, the improper statement created the manifest necessity for a retrial, thus avoiding double jeopardy. *Id.* at 213-14, 81 A.3d at 389-90.

On July 1, 2009, Stephen Simmons ("Simmons") was arrested and interrogated in connection with a murder. During the interrogation, Simmons offered to take a lie detector test; however, no such test was ever performed. Simmons was charged with murder and other related charges in the Circuit Court for Prince George's County. During opening statements, defense counsel referenced that Simmons offered to take a lie detector test. After the State objected, the trial judge offered a curative instruction to the jury. Two days later, after the court excluded the State's firearms expert's testimony, the State moved for a mistrial claiming that the reference to the lie detector test had prejudiced the jury so significantly that the State was deprived of a fair trial.

The trial judge granted a mistrial as a matter of manifest necessity, stating that the State's objection was timely and the court's curative instruction was only a quick blurt, in an effort to cure the transgression. Simmons filed a motion to dismiss on the grounds that double jeopardy prohibited a retrial; the trial court, however, denied this motion. On appeal, the Court of Special Appeals of Maryland affirmed the trial court, concluding that the trial court judge did not abuse his discretion. The Court of Appeals of Maryland granted certiorari to answer whether manifest necessity existed to justify declaring a mistrial.

The Court of Appeals of Maryland first determined that the appropriate standard of review was abuse of discretion. *Simmons*, 436 Md. at 211-12, 81 A.3d at 389. The court explained that when a judge's action was clearly unreasonable, or was on untenable grounds or reasons, it was an abuse of discretion. *Id.* at 212, 81 A.3d at 389 (citing *Stabb v. State*, 423 Md. 454,

465, 31 A.3d 922, 928 (2011)).

The court next addressed the Double Jeopardy clause of the United States Constitution, in accordance with Maryland common law, which states that generally no individual may be prosecuted for the same offense more than once. *Simmons*, 446 Md. at 213, 81 A.3d at 389-90 (citing *State v. Woodson*, 338 Md. 322, 328, 658 A.2d 272, 276 (1995)). In a jury trial, double jeopardy usually prohibits retrying a criminal defendant for the same offense after a jury has been empaneled and sworn; however, double jeopardy does not bar all retrials *per se*. *Simmons*, 446 Md. at 213, 81 A.3d at 389-90. The court stated that a retrial can be permitted over a defendant's objection when there is manifest necessity to prevent prejudice from depriving a party the right to a fair trial. *Id.* at 213, 219, 81 A.3d at 390, 393. Manifest necessity refers to the prosecution's heavy burden and "high degree" of necessity required in declaring a mistrial. *Id.* at 214-15, 81 A.3d at 290 (citing *Arizona v. Washington*, 434 U.S. 497, 506 (1978)). The court further explained that manifest necessity is determined based on the facts and circumstances of each case and is left to the trial judge's discretion, which is afforded the highest degree of respect. *Id.* at 214, 216, 81 A.3d at 390, 392 (citing *Washington*, 434 U.S. at 506). The court noted that to meet this high degree of necessity, the trial judge should explore all reasonable alternatives before concluding that there is no option available other than to declare a mistrial. *Simmons*, 436 Md. at 215, 81 A.3d at 391 (citing *Hubbard v. State*, 395 Md. 73, 92, 909 A.2d 270, 281 (2006)).

The court pointed out that in some instances where inadmissible evidence was presented or a prejudicial statement was made, the judge may issue a curative instruction; a curative instruction, however, would be only appropriate where it may cure the prejudice, rather than simply highlight the prejudicial evidence or remark. *Simmons*, 436 Md. at 216, 219, 81 A.3d at 392-393 (citing *Carter v. State*, 366 Md. 574, 592, 785 A.2d 348, 358 (2001)). The court noted that trial judges must weigh prejudice caused by an improper statement against a curative instruction's effectiveness to determine whether the prejudice was significant enough to deprive a party of the right to a fair trial, such that a curative instruction would not be a reasonable alternative and a mistrial would not necessary. *Simmons*, 436 Md. at 219, 81 A.3d at 393 (citing *Washington*, 434 U.S. at 513).

When evaluating the severity of bias caused by an improper reference to a lie detector test, the court explained that several factors were considered, including how many times the reference was made, who solicited the statement, whether credibility was an essential issue, the amount of other evidence available, and whether an inference as to the result of the test could be drawn. *Simmons*, 436 Md. at 220-21, 81 A.3d at 394 (citing *Guesfeird*, 300 Md. at 659, 480 A.2d at 803). Taken together, the factors determine whether prejudice caused by an improper statement regarding a lie detector test was substantial enough to deny a party a fair trial. *Simmons*, 436 Md. at 221, 81 A.3d at 394 (citing *Kosmas v. State*, 316 Md. 587, 594, 560 A.2d 1137, 1141 (1989)).

The court noted that in Simmons' case, the trial judge had determined that the degree of prejudice incurred by the opening statement was so significant that there was no reasonable alternative available other than to declare a mistrial. *Simmons*, 436 Md. at 221-22, 81 A.3d at 394-95. The court highlighted that the trial judge discussed the powerful setting of an opening statement and acknowledged that the statement was made by defense counsel, effectively reinforcing the defendant's testimony and credibility. *Id.* The court also found that the trial judge evaluated the efficiency of the curative instruction given to the jury and determined that it was not enough to cure the significant prejudice caused by the defense counsel's opening statement. *Id.* at 223, 81 A.3d at 395. The court concluded that as there was no reasonable alternative available, the trial judge found a manifest necessity in declaring a mistrial; thus, the principle of double jeopardy was not applicable. *Id.* at 216, 223, 81 A.3d at 392, 395.

The court concluded that there was no obligation for a trial judge to declare a mistrial *sua sponte*, even though there was a two-day delay between the improper remark during defense counsel's opening statement and the State's request for a mistrial. *Simmons*, 436 Md. at 223, 81 A.3d at 396. Further, the State's delay in not requesting a mistrial, until after its expert witness testimony was excluded, was not evidence of an improper motive on behalf of the prosecution. *Id.*

In *Simmons*, the Court of Appeals of Maryland held that there was no abuse of discretion in granting a mistrial as manifest necessity was present, even after the court gave a curative instruction. Moreover, the grant of the mistrial did not violate the principles of double jeopardy. It is important for Maryland practitioners to understand that improper statements, including comments made by counsel that are known or should be known to be inadmissible, can lead to a mistrial if such statements jeopardize a party's right to a fair trial. Further, even after a curative instruction is given, a mistrial can still be granted if the effectiveness of the cure is deemed to be inadequate in the face of substantial bias.