Missing Witnesses, Mistrials, and Manifest Necessity

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The Fourth Circuit recently issued a decision prohibiting retrial of a defendant charged with murder following a mistrial. The government obtained the mistrial over the defendant's objection when a key witness could not be located during the trial. On appeal, the Fourth Circuit found that no manifest necessity justified the mistrial and that double jeopardy prohibited another attempt by the government to convict the defendant. I previously wrote about mistrials and double jeopardy here, and I wanted to flag this case for readers for its treatment of missing witnesses in the mistrial context. The case is Seay v. Cannon, ___ F.3d ___, 2019 WL 2552953 (4th Cir., June 21, 2019).

Facts. Seay was indicted for murder in South Carolina along with two co-defendants. According to the government, the two co-defendants kidnapped the victim, a suspected informant. Seay later joined the group and the three men shot the victim ten times "execution-style", killing him. One co-defendant, Howard, was tried first. Howard's girlfriend Grant was a critical witness for the government, as she encountered the group of men shortly after the murder. Her testimony was needed to identify Seay as the person with the other two co-defendants shortly after the murder. Howard was convicted at trial with Grant's testimony. Grant herself was charged with obstruction of justice relating to the murder, but that charge was dismissed following her testimony during the Howard trial.

Around two years later, the government sent Grant a subpoena compelling her testimony at the Seay trial. The government spoke with Grant the weekend before Seay's trial, but Grant did not appear in court for the beginning of the trial the following Monday. The trial wound up being continued until the next day for other reasons, but Grant again did not appear. The jury was empaneled and sworn, and trial began Tuesday while the government continued its efforts to locate Grant. The next day, Grant was once again absent, and the government notified the court that efforts to locate her had not been successful. The court continued the trial to the next day, and a bench warrant for Grant's arrest was issued. When Grant was yet again not present the next day (Thursday), the government moved for a mistrial, raising concerns for her well-being and safety. The defendant objected. The trial court ruled that a manifest necessity existed based on the government's genuine surprise about the missing witness and granted the government's motion for mistrial. [As it turned out, Grant was alive and well; police located her Friday, the day after the mistrial was declared.] When a new indictment against Seay issued, he moved to dismiss for a double jeopardy violation. The state court denied the motion, and Seay filed for habeas relief in federal court. The district court denied the motion, but the Fourth Circuit reversed and remanded with instructions to grant Seay's petition.

Double Jeopardy and Mistrial. "In a jury trial, jeopardy attaches when the jury is empaneled, after which the defendant has a constitutional right, subject to limited exceptions, to have his case decided by that particular jury." Slip op. at 7 (internal citations omitted). A mistrial is one of the limited exceptions, but the mistrial must be supported by manifest necessity when the defendant objects. *Arizona v. Washington*, 434 U.S. 497, 505 (1978). In my earlier post, I reviewed some common grounds that support a finding of manifest necessity. A hung jury, a flawed pleading that fails to confer jurisdiction, and death or disability of the judge or a juror all support a finding of manifest necessity. Other considerations that make completing the trial a physical impossibility also support a manifest necessity. For a dramatic example of this ground, see *Wade v. Hunter*, 336 U.S. 684 (1949) (mistrial in court-martial proceedings due to advancing German army constituted manifest necessity).

Unlike these more neutral reasons, where "the basis for the mistrial is the unavailability of critical prosecution evidence, we apply the strictest scrutiny to the question of manifest necessity." *Seay,* slip op. at 8 (internal quotation omitted). The government bears a "heavy" burden to justify a mistrial sought on the basis of missing or weak evidence. Under *Downum v. U.S.*, 372 U.S. 734 (1963), if the government starts a trial without knowing whether its witnesses are coming to court, the government "takes a chance" that the evidence will be insufficient to convict the defendant and that jeopardy will attach. The *Downum* court indicated that a missing witness might justify a mistrial in some circumstances, but where the government starts a trial without all of its evidence in place, it gambles. *Id.* at 737.

Here, the court found that the government took that gamble and lost. Grant was under subpoena to be present at trial on Monday but failed to appear on Monday or Tuesday. The government started the trial on Tuesday, instead of seeking an additional continuance. It failed to alert the trial judge to the problem until Wednesday, when it was becoming clear that efforts to locate Grant were fruitless. In the court's words:

> [T]he government knew its crucial witness had failed to appear as required by subpoena for two consecutive days before the jury was empaneled. The government nonetheless allowed jeopardy to attach, risking the foreseeable possibility that Grant would not appear in time to testify. . . The government knew its star witness was being asked to testify against a defendant charged with murdering a "snitch." The government also knew it had relinquished its leverage over Grant by dismissing the obstruction charges that had induced Grant to testify in the earlier trial. *Seay*, Slip op. at 10.

Under these circumstances, a finding of unfair surprise was unsupported by the record and did not constitute a manifest necessity. As a result, the government was prohibited from trying the defendant again as a matter of double jeopardy, and Seay goes free. The court noted that the "clear loser in this scenario is the public, which had a strong interest in having Seay tried under the murder indictment." *Id.* at 15-16. A dissenting judge would have affirmed the district court and denied the petition.

Compelling witnesses in North Carolina state court. How might this problem be handled in North Carolina? It's a common trial issue, and as *Seay* illustrates, there can be a steep price for a misstep. While I haven't found any state cases directly on point, North Carolina statutes provides for several ways to compel a witness to attend court. A subpoena is usually the first way of compelling a witness to testify at trial. N.C. R. Civ. P. 45. When a witness ignores a subpoena, a show cause order and order for arrest may issue. If either party is concerned that a witness might not obey a subpoena voluntarily, a material witness order can be sought in some circumstances under G.S. 15A-803(a). That order requires the witness to be detained or placed under what we would normally think of as pretrial conditions of release—the witness might be required post a secured bond, for instance (among other options).

If locking up your material witness seems a bit harsh (and potentially counterproductive), one might consider having the witness seek voluntary protective custody under G.S. 15A-804. This type of order places the witness in custody at a safe place other than a detention center or prison and may only be issued by a superior court judge. Under G.S. 15A-804(c), a material witness order does not prevent the court from also entering a voluntary protective custody order or vice versa, when appropriate.

Another option might include using remote testimony. There is express statutory authorization for remote testimony of child witnesses, people with intellectual disabilities, and forensic analysts *See* G.S. 15A-1225.1 through 15A-1225.3. Where a witness is under serious risk of intimidation (as may have been the case in *Seay*), some courts have allowed remote testimony. *See State v. Johnson*, 958 N.E.2d 977 (Ohio Ct. App. 2011). However, such remote testimony procedures raise Confrontation Clause concerns. *See* Jessica Smith, Remote Testimony and Related Procedures Impacting a Criminal Defendant's Confrontation Rights, Administration of Justice Bulletin, No. 2013/02 (UNC School of Government, Feb. 2013).

Other options include a deposition of the witness, which in limited circumstances may be obtained for later use in a

criminal case under G.S. 8-74. In cases involving co-defendants, the cases also might be joined under G.S. 15A-926, or at least tried closer in time to one another than happened in *Seay*.

Consider these options when fretting over a potential witness's cooperation and attendance. If the government fails to pursue these options when it has concerns that a witness may not appear, the government may have a more difficult time obtaining a continuance, let alone a mistrial . . . at least when the defendant objects.

Readers, have you dealt with the issue of witnesses missing during trial? How did you deal with it, and how did it turn out? Post a comment and share below.