



Mistrial Leads to Double Jeopardy Violation in *State v. Schalow*

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In [State v. Schalow](#) (Dec. 20, 2016), the trial court's error in declaring a mistrial led to a successful claim of double jeopardy by the defendant and allowed him to avoid further prosecution for attempted murder. *Schalow* sheds light on the relatively obscure (at least to me) law of mistrials and double jeopardy.

Facts. The case involved allegations of serious domestic abuse by the defendant against his wife over the course of several months. The State charged attempted first-degree murder, and the defendant went to trial. After the jury was impaneled and the first day of evidence, the trial judge alerted the parties that the indictment failed to allege "malice aforethought," as required by G.S. 15-144 (the short-form indictment statute for homicides). "Malice" is an essential element of both murder and attempted murder. If an indictment fails to allege malice, a charge of murder is interpreted as charging voluntary manslaughter, which does not require malice. A charge of attempted murder failing to allege malice is likewise interpreted as charging attempted voluntary manslaughter. See *State v. Bullock*, 154 N.C. App. 234 (2002); accord *State v. Wilson*, 236 N.C. App. 472 (2014).

The State moved for a mistrial in order to seek a corrected indictment and charge attempted murder. The defense objected to the mistrial and argued that the case should proceed before that jury on attempted voluntary manslaughter, which is a lesser-included offense of attempted murder and which was adequately alleged in the indictment. See *State v. Rainey*, 154 N.C. App. 282 (2002). The trial court ruled that the indictment was fatally flawed and failed to confer jurisdiction to proceed on any charge. It then found that a manifest necessity for a mistrial existed and that the defendant could be retried. At the subsequent trial, the trial court denied the defendant's motion to dismiss for double jeopardy and he was convicted of attempted first-degree murder.

Holding. The court of appeals unanimously vacated the conviction based on a double jeopardy violation. The court found *Bullock* and *Wilson* controlling. Because the original indictment effectively charged attempted manslaughter, it was not fatally flawed and the first trial court had jurisdiction to proceed on that lesser-included offense. There was therefore no manifest necessity to declare a mistrial over the defendant's objection, and double jeopardy precluded another trial.

Double Jeopardy and Mistrials. The Double Jeopardy clause generally protects against being tried or punished twice for the same offense. U.S. Const. amend. V. The rule on mistrials for double jeopardy purposes is that if a manifest necessity existed to declare the mistrial, there is no double jeopardy violation. If there was no manifest necessity and jeopardy has attached, double jeopardy bars a retrial. *Arizona v. Washington*, 434 U.S. 497 (1978). This rule is grounded in the principle that a defendant has a right to have his matter tried to completion after jeopardy attaches. *Wade v. Hunter*, 336 U.S. 684 (1949). Jeopardy attaches in a jury trial when there is a valid indictment and the jury is impaneled. *State v. Cutshall*, 278 N.C. 334 (1971).

Manifest Necessity. So what counts as a manifest necessity? There is no bright-line rule. The classic example is a hung jury. *U.S. v. Perez*, 22 U.S. 579 (1824) (no double jeopardy violation with mistrial after hung jury). Physical impossibility to proceed also supports a finding of manifest necessity, such as when the judge or a juror dies or becomes disabled during the trial. See generally G.S. 15A-1063; 15A-1224. A fatally flawed indictment that fails to confer jurisdiction is another example of manifest necessity. *Illinois v. Somerville*, 410 U.S. 458 (1973).

Waiver. Where a defendant requests or joins the request for a mistrial, there is generally no double jeopardy problem. *State v. White*, 322 N.C. 506 (1988) (but recognizing an exception for prosecutorial misconduct intended to cause a mistrial). North Carolina courts have indicated that the failure to object to a mistrial in a noncapital case is implicit consent and waives any double jeopardy claim. See generally *State v. Odom*, 316 N.C. 306 (1986); *State v. Lachat*, 317 N.C. 73 (1986). Had the defendant in *Schalow* joined in the request for a mistrial or failed to object, his double jeopardy claim would likely have failed.

Comments. These exceptions, among others, limit the principle that the defendant is entitled to have his case tried to completion once jeopardy attaches. In *Schalow*, however, no recognized “necessity” existed. Therefore, it was error to terminate the initial prosecution of attempted voluntary manslaughter. Further, because greater and lesser-included offenses are considered the same for purposes of Double Jeopardy under *Brown v. Texas*, 432 U.S. 1616 (1977), the State was prohibited from retrying the defendant on either attempted murder or voluntary manslaughter.

While not directly on point, this outcome is reminiscent of *State v. Birckhead*, 256 N.C. 494 (1962). There, in a prosecution for assault with intent to commit rape, surprise testimony from the prosecuting witness during trial led the State to seek a mistrial to indict on the greater offense of rape, which the trial judge allowed over the defendant’s objection. On appeal from his eventual conviction, the Supreme Court reversed, vacating the conviction for a double jeopardy violation. The Court found that the assault charge was adequately alleged and no manifest necessity existed to declare a mistrial over the defendant’s objection. Just as in *Schalow*, the Court barred the State from prosecuting the defendant on either the original assault charge or the greater offense.

The takeaway for practitioners is to be aware of the grounds that will support a finding of manifest necessity and what won’t. The trial judge has broad discretion to declare a mistrial for any number of valid reasons, and the defendant can fairly easily waive a claim for double jeopardy. However, a mistrial unsupported by a manifest necessity and entered over the defendant’s objection will bar future prosecution under double jeopardy principles.

The decision from the court of appeals was stayed shortly after it was issued, and the Supreme Court granted the State’s petition for review last week. If there are further developments in the case, you can read all about it back here.