

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2003-KA-00768-COA

MARLON C. KNOX

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

DATE OF TRIAL COURT JUDGMENT: 3/5/2003
TRIAL JUDGE: HON. DALE HARKEY
COURT FROM WHICH APPEALED: JACKSON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT: ROSS PARKER SIMONS
ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL
BY: JOHN R. HENRY
DISTRICT ATTORNEY: ANTHONY N. LAWRENCE, III
NATURE OF THE CASE: CRIMINAL - FELONY
TRIAL COURT DISPOSITION: CONVICTION OF MURDER, SENTENCED TO
LIFE IMPRISONMENT
DISPOSITION: AFFIRMED - 3/22/2005
MOTION FOR REHEARING FILED:
CERTIORARI FILED:
MANDATE ISSUED:

BEFORE LEE, P.J., MYERS AND CHANDLER, JJ.

MYERS, J., FOR THE COURT:

¶1. This case originated in the Circuit Court of Jackson County where Marlon Knox was convicted of murder and sentenced to life imprisonment.

¶2. Knox and his roommate, Jermaine Williams, traveled to the “504 Club” where Williams became involved in an altercation with a man named Charles Witherspoon concerning a defective stereo Witherspoon had recently sold to Williams. Knox joined in the altercation and was struck on the shoulder by a beer bottle thrown by Willie McGill. Two days after the altercation at the “504 Club”, Knox,

Williams, and Charles McKinney were riding in McKinney's vehicle to obtain some marijuana. The three decided to try to make their purchase on 26th Street. While on 26th Street, the three approached a vehicle on the side of the road, and noticed a man leaning into the trunk of this vehicle working on the car's stereo. Upon seeing the vehicle, Knox told McKinney to stop the car. Knox then got out of the car and shot the man working on the stereo four times with a .22 caliber pistol. The man he shot was McGill, the individual who struck him with a beer bottle two days prior during the "504 Club" altercation.

¶3. After being shot, McGill possibly, though it is not clear from the record, obtained a pistol from Witherspoon, but collapsed on his way back to confront Knox. An ambulance soon arrived but McGill was pronounced dead upon arrival at the local hospital.

¶4. Knox was subsequently arrested for the murder of McGill and tried in the Circuit Court of Jackson County, Mississippi. Knox was convicted of murder and sentenced to life imprisonment.

¶5. On appeal, Knox raises four assignments of error:

I. WHETHER A MISTRIAL AND SUBSEQUENT RETRIAL CONSTITUTE DOUBLE JEOPARDY.

II. WHETHER THE JURY WAS NOT PROPERLY SWORN.

III. WHETHER THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

IV. WHETHER KNOX'S SENTENCE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

¶6. Finding no error, we affirm.

LEGAL ANALYSIS

I. WHETHER A MISTRIAL AND SUBSEQUENT RETRIAL CONSTITUTE DOUBLE JEOPARDY.

¶7. Knox’s first assignment of error is that after his first trial ended in a mistrial, his subsequent retrial was a violation of the Double Jeopardy Clause under the Fifth Amendment of the U.S. Constitution and Article 3, Section 22 of the Mississippi Constitution.

STANDARD OF REVIEW

“A reviewing court examines the entire record to determine if a manifest necessity exists for a mistrial.” *Jenkins v. State*, 759 So. 2d 1229, 1232 (¶8) (Miss. 2000) (citing *United States v. Bauman*, 887 F.2d 546, 550 (5th Cir. 1989)).

DISCUSSION

¶8. On November 13, 2001, Knox was tried for the murder of McGill. It was during the prosecution’s direct examination of Williams that the prosecutor determined that Williams, charged as an accessory after the fact, was no longer represented by counsel. The prosecutor became aware of this fact after Williams made several incriminating statements. After this determination was made, the prosecutor asked the judge to excuse the jury. Outside of the presence of the jury, the State made a motion for a mistrial, as a fundamental right of Williams, not Knox, had been violated. Both the State, and defense counsel, felt that a mistrial should be granted. On appeal, the State argues that by failing to object, and actually agreeing to the mistrial, Knox has not properly preserved this issue for appeal. In support of this contention, the State refers us to the Virginia case of *Commonwealth v. Washington*, 559 S.E.2d 636 (Va. 2002), which held that when a defendant expressly states that there is no objection to the motion for a mistrial, this express statement acts as a waiver of the issue. This is not the proper test in Mississippi. Rather, the Mississippi Supreme Court has held that double jeopardy is a basic constitutional right that can not be waived. *Johnson v. State*, 753 So. 2d 449, 454 (¶13) (Miss. Ct. App. 1999).

¶9. In making the determination of whether a criminal defendant has been subjected to double jeopardy, this Court looks to the language of the Mississippi Supreme Court, which has stated, “[i]f a mistrial is granted upon the court’s motion or upon the State’s motion, a second trial is barred because of double jeopardy, unless taking into consideration all the circumstances a ‘manifest necessity’ existed for the mistrial.” *Jenkins*, 759 So. 2d at 1234 (¶18) (citing *Watts v. State*, 492 So. 2d 1281, 1284 (Miss. 1986)). In the case *sub judice* the trial court made the determination that the “manifest necessity” present which warranted the granting of a mistrial, was the witness’s right to counsel under the Sixth Amendment of the United States Constitution and Article 3, Section 26 of the Mississippi Constitution.

¶10. The Mississippi Supreme Court has stated, “[m]anifest necessity is applied case-by-case, and a critical element is the focus of a specific situation on the ‘broad spectrum of trial problems.’” *Jenkins*, 759 So. 2d at 1236 (¶28). With this language to guide the decision of the trial court and to guide our appellate review, we find that the constitutionally protected right to counsel is one of “manifest necessity” and warrants the trial court’s grant of a mistrial, without offending Knox’s Fifth Amendment right to be free from double jeopardy.

¶11. In order to accurately make the determination that the trial court did not infringe upon Knox’s right to be protected from double jeopardy, we must further look at the prior opinions of both the Mississippi Supreme Court as well as the United States Supreme Court. The Mississippi Supreme Court has previously stated “[w]ithout proof of judicial error prejudicing the defendant, or ‘bad faith prosecutorial misconduct,’ double jeopardy does not arise.” *Id.* at 1234 (¶17) (citing *United States v. Jorn*, 400 U.S. 470, 482 (1970)). It cannot be stated that judicial error was the cause of Knox’s mistrial. It further can not be stated that by granting the mistrial, Knox was prejudiced in any way. A review of the record shows that Williams was the first witness to be examined and the prosecutor was yet to complete his direct

examination. Knox continued to be out on bond during the time between the mistrial and subsequent retrial giving further credence to the contention that he was not harmed. Also, in following the precedent set forth in *Jenkins*, we cannot make the determination that the prosecutor's actions were of the level of "bad faith prosecutorial misconduct." As the record clearly demonstrates, Williams was at one point represented by counsel. The State was under the impression that Williams was still represented by counsel. There was nothing present in the court file which gave any indication that he was no longer represented, and when the State contacted Williams's former attorney, the attorney did not inform the State that he was no longer representing Williams. As such, the actions of the State do not rise to the level of bad faith prosecutorial misconduct.

¶12. The Mississippi Supreme Court in its 1981 decision, which brought Mississippi's review of double jeopardy into line with the federal approach for the issue, gave trial judges guidance on how to effectively approach the issue so that the reviewing court could accurately make a determination of whether the trial court's decision may implicate double jeopardy concerns. The court stated:

Although it may not be necessary in each case to do so, we believe a prudent procedure for any trial court before declaring a mistrial would be to state into the record the reasons for declaring a mistrial. It is in his sound discretion to determine the necessity of declaring a mistrial, and upon any appeal his reasons as stated for the record will be accorded the greatest weight and respect by an appellate court.

Jones v. State, 398 So. 2d 1312, 1318-19 (Miss. 1981).

¶13. This protocol was followed in the present case. In determining that it was necessary to grant a mistrial, the trial court stated:

BY THE COURT: All right. The Court wasn't aware either one of these gentlemen were charged as accessories, and it came out just in the testimony without any prior knowledge by the Court so that the Court could give any type of instructions with respect to their right to testify or not testify and so forth, the warnings that should have been given. Mr. Taylor, the attorney for one of the parties and who has represented the

other witness at one time or another, was not here and should have been here, should have been here to represent his client.

So, with great reluctance – and, certainly, I understand these things, you know, do happen, but I’ll grant the motion for a mistrial. I feel like that’s the appropriate thing to do in view of what’s transpired with respect to these witnesses. So, I’ll grant the motion for a mistrial, and the case will be rescheduled for trial at the next term of court.

¶14. As the above excerpt demonstrates, the trial court outlined its reasoning for the grant of the mistrial, which was warranted. As such, we find this issue to be without merit.

II. WHETHER THE JURY WAS NOT PROPERLY SWORN.

DISCUSSION

¶15. Knox’s next assignment of error is that the jury was never sworn and, thus, a reversal is required. Knox points out that the record does not reflect that the trial judge administered the necessary oath to the jurors after they were selected and before opening statements. We find this issue to be without merit.

¶16. Mississippi case law clearly states that even when the trial record does not indicate whether or not the jury was specially sworn, “the presumption is that the trial judge properly performed his duties. . . .” *Young v. State*, 425 So. 2d 1022, 1025 (Miss. 1983) (quoting *Bell v. State*, 360 So. 2d 1206, 1215 (Miss. 1978)). As in *Young*, the order found in the record presently before us states that the jurors were indeed properly sworn. The order reads as follows:

Thereupon came a jury composed of twelve good and lawful jurors of Jackson County who were empaneled, accepted by both the State and Defendant, *who were duly sworn according to law*, and after hearing all of the evidence, argument of counsel and received the instructions of the Court and in the charge of sworn officers of the law, retired to consider their verdict.

(emphasis added).

¶17. As the order clearly states, the jury was administered the required oath, and in light of the prior case law of the Mississippi Supreme Court, this issue is without merit.

III. WHETHER THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

STANDARD OF REVIEW

¶18. It is well-settled law in Mississippi that in order to make a determination that the jury's verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse that verdict only when it is determined that the trial court has abused its discretion in failing to grant a new trial. *Dudley v. State*, 719 So. 2d 180, 182 (¶8) (Miss. 1998) (citing *Herring v. State*, 691 So. 2d 948, 957 (Miss. 1997)). As such, if the verdict is against the overwhelming weight of the evidence, then a new trial is proper. *Id.* (citing *May v. State*, 460 So. 2d 778, 781-82 (Miss. 1984)).

DISCUSSION

¶19. Knox next argues that the jury's verdict was against the overwhelming weight of the evidence because the State did not prove that Knox did not act in self-defense and that Knox was the only individual who fired a weapon.

¶20. At trial, it was established that Knox and his friends were driving around attempting to purchase some marijuana. It was also established that upon approaching a vehicle in which McGill was peering into the trunk, Knox instructed the driver to stop the vehicle. The evidence further showed that McGill was struck by gunshots in a manner that indicated he was facing away from the person who shot him and was possibly running or bent over when struck. These gunshots struck McGill in the head, ankle, and back.

¶21. Knox had been struck by McGill with a beer bottle approximately forty-eight hours prior to McGill's death. Knox raises this issue and argues that the State failed to prove that the shooting was not motivated by Knox's fear for his safety.

¶22. As stated above, it is reasonable for the jury to make the determination that Knox was seeking revenge, as the evidence indicated McGill was trying to flee and the fact that Knox instructed the driver of the vehicle to stop. The jury could reasonably conclude that Knox did not fear for his safety as he initially approached McGill.

¶23. Mississippi law states that matters regarding the weight and credibility accorded the evidence are to be resolved by the jury. *Harvey v. State*, 875 So. 2d 1133, 1136 (¶18) (Miss. Ct. App. 2004) (citing *Deloach v. State*, 811 So. 2d 454 (¶9) (Miss. Ct. App. 2001)). It is the jury's role to determine the credibility of the witnesses and weigh their testimony. *Burge v. Spiers*, 856 So. 2d 577, 580 (¶9) (Miss. Ct. App. 2003). The jury returned a verdict which was fully supported by the record and fair-minded jurors could have arrived at the same verdict. Therefore, we find this issue to be without merit.

IV. WHETHER KNOX'S SENTENCE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

STANDARD OF REVIEW

¶24. Generally, a sentence will not be disturbed on appeal if it does not exceed the maximum term allowed by statute. *Wallace v. State*, 607 So. 2d 1184, 1188 (Miss. 1992). However, when a sentence is "grossly disproportionate" to the crime committed, the sentence is subject to attack on the grounds that it violates the Eighth Amendment prohibition of cruel and unusual punishment. *Id.*

DISCUSSION

¶25. Knox argues that due, to his young age, his due process rights have been violated by the statutory construction of Mississippi Code Annotated § 47-5-139(1)(a) (Rev. 2004). Knox argues that, because of his age, he has been subjected to greater punishment for his crime than have others sentenced to life at age fifty or older. Mississippi Code Annotated § 47-5-139(1)(a) states as follows:

(1) An inmate shall not be eligible for the earned time allowance if:

(a) The inmate was sentenced to life imprisonment; but an inmate, except an inmate sentenced to life imprisonment for capital murder, who has reached the age of sixty-five (65) or older and who has served at least fifteen (15) years may petition the sentencing court for conditional release;

Knox contends that the age distinction set forth in the statute subjects a younger individual to a longer punishment, which is cruel and unusual.

¶26. The sentence imposed upon Knox falls within the statutory limits designated by the Mississippi Legislature. As this Court has stated previously, “a sentence should not be disturbed on appeal so long as it does not exceed the maximum allowed by statute.” *Davis v. State*, 817 So. 2d 593, 597 (¶14) (Miss. Ct. App. 2002) (citing *Fleming v. State*, 604 So. 2d 280, 302 (Miss. 1992)). As Knox’s sentence is within the statutory limits prescribed by the Mississippi Legislature and it therefore may not be stated to be cruel and unusual. Therefore, this issue is without merit.

¶27. THE JUDGMENT OF THE CIRCUIT COURT OF JACKSON COUNTY OF CONVICTION OF MURDER AND SENTENCE OF LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO JACKSON COUNTY.

BRIDGES AND LEE, P.JJ., CHANDLER, GRIFFIS, AND BARNES, JJ., CONCUR. IRVING, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KING, C.J., AND ISHEE, J.

IRVING, J., DISSENTING:

¶28. I disagree with the majority’s conclusion that Knox’s constitutional right against double jeopardy was not infringed when he was required to stand trial a second time for the same crime. The majority finds that no jeopardy emanated from the first trial because a manifest necessity arose which justified the premature termination of that trial. That “manifest necessity,” in the majority’s view, was the discovery by the prosecution that its first witness was unrepresented by counsel and had made several incriminating

statements.¹ The record, in my judgment, does not lend any support to the finding that a manifest necessity existed, warranting the premature termination of Knox's first trial. Therefore, I respectfully dissent.

¶29. As I have already noted, the majority's decision is premised on the notion that the giving of self-incriminating testimony by an uncounseled witness constitutes a manifest necessity for declaring a mistrial in the trial of another, in this case Marlon Knox. This reasoning is utterly flawed. By definition, the phrase "manifest necessity for the declaration of a mistrial" suggests that there are some readily seen or understood reasons why the trial cannot continue. What is readily apparent about a witness's self incriminating statements compelling the conclusion that the utterance of such statements erects an impregnable fortress in the onward path of the trial of the accused? If the witness has already incriminated himself, can the incrimination be undone? When the defendant's second trial is held, will not the witness's prior incriminating statements against himself be just as incriminating. If indeed the prosecution was really concerned about having unwittingly taken advantage of the witness by having the witness give uncounseled, self-incriminating statements, then the solution would be not to use the witness's incriminating statements against him in the witness's trial, not to terminate the defendant's trial.

¶30. It seems rather clear to me, from my reading of the record, that the real reason the prosecution wanted to terminate Knox's first trial was not because the witness, Jermaine Williams, incriminated himself, but because Williams refused to incriminate Knox. The prosecution's displeasure with Williams had its genesis in the prosecution's lengthy effort to get Williams to admit that, in an earlier incident at the 504

¹ While the majority opinion does not expressly state that the prosecution first became aware after the witness had begun his testimony that the witness was unrepresented by counsel, it implicitly makes such statement.

Club, the victim, Willie James McGill,² had thrown a bottle and struck Knox on the head or shoulder. Of course, the significance of this evidence is that it would establish a clear motive for Knox's subsequent killing of McGill. After Williams grudgingly admitted that McGill had indeed struck Knox with a bottle, the prosecution embarked upon the unsuccessful task of getting Williams to admit that a day later Knox got revenge by shooting McGill in an unprovoked attack. At the risk of overburdening the record, I must quote generously from the trial transcript which places in perspective and context the prosecution's motion for a mistrial.

¶31. Immediately prior to the request for a mistrial, the following exchanges occurred:

Q. Okay. That's fine. Is that the only incident that involved Willie James McGill that evening?

A. That evening, yes.

Q. Okay. Now, I want to refresh your mind, if I could, please, to a point in time, being the next day. Were you supposed to go to work the next day?

A. Yes, but we had overslept.

Q. Who is "we"?

A. Me and Knox.

Q. What about Charles McKinney? Did he –

A. He come by to get us, but we didn't go.

Q. I see. When you say "we didn't go," you didn't go to work.

A. We didn't go to work.

Q. I see. Was there a time later in the day when you saw Charles McKinney?

² The transcript lists the person throwing the bottle as "Willie James McGee." However, there is no doubt that the person who threw the bottle, and who was later killed, was "Willie James McGill," not "Willie James McGee."

- A. When he got off.
- Q. How long does he usually work?
- A. Eight to ten hours, like every day.
- Q. Do you recall what time of the day or night –
- A. No, sir.
- Q. -- that you saw Charles McKinney after he got off?
- A. No, sir.
- Q. Where did you see him when he got off?
- A. At my house.
- Q. And who was there when Charles McKinney arrived?
- A. Me, my sister, Jameka Rouse, and that's it. My baby.
- Q. What about Knox?
- A. Yes, he was there, too.
- Q. *Help us here. Knox was there.*
- A. Yeah.
- Q. All right. Now, what, if anything, did you and Knox and McKinney do?
- A. We rode to the store to get a blunt.
- * * * *
- Q. That's what you were going to the store for. That's what you said; right?
- A. Right.
- Q. *Okay. On the way to the store, did anything unusual happen?*
- A. *Other than we stopped the gun -- we stopped the car.*

- Q. Who was driving the car?
- A. To get the weed.
- Q. Who was driving the car?
- A. Charles McKinney.
- Q. And where were you seated in the car?
- A. In the back.
- Q. You were in the back? Are you sure?
- A. Yes.
- Q. And where was Mr. Knox?
- A. In the front.
- Q. In the front --
- A. Passenger side, the passenger side.
- Q. In the passenger side. I see. Was it a two-door or a four-door?
- A. Four-door.
- Q. What type of car was it?
- A. A Pontiac, a white Pontiac.
- Q. I see. And the white Pontiac was a Grand Am or something like that?
- A. Yes.
- Q. *All right. Did you have an occasion on the way to the store to stop off somewhere?*
- A. *Well, to get the weed.*
- Q. Who said stop the car?

- A. Knox.
- Q. Was the car stopped?
- A. Yes.
- Q. Who got out of the car?
- A. Knox.
- Q. Did you get out of the car?
- A. No, sir.
- Q. Did McKinney get out of the car?
- A. No, sir.
- Q. Did you have a gun on you at that time?
- A. No, sir.
- Q. So far as you knew, did Knox have a gun?
- A. No, sir.
- Q. Didn't know whether he had a gun, or not.
- A. No, sir.
- Q. *You're sitting in the car. What's the next thing you know happened?*
- A. I heard a gunshot.
- Q. How many shots did you hear?
- A. Five or six.
- Q. All right. After you heard the gunshots, what did you do?
- A. Got down. Like anybody would have got down, huh?
- Q. Once you get [sic] down, did you just stay down?

- A. Until I didn't hear no more.
- Q. What did you do when you didn't hear anymore?
- A. I got up.
- Q. Okay. What did you do then?
- A. We rode off.
- Q. Who is "we"?
- A. Me, Knox, and Charles.
- Q. *Did you have any type of a curiosity to ask Knox --*
- A. *Yes, sir.*
- Q. *-- what happened?*
- A. *Yes, sir.*
- Q. *What did he say happened?*
- A. *He shot in the air. I mean, it wasn't, it wasn't nothing. I mean, I didn't know, I didn't know if nobody had got shot.*
- Q. Okay.
- A. But I heard a lot of gunshots. I mean, I heard about five or six gunshots.
- Q. But he didn't say anybody shot at him. Right?
- A. *I didn't hear him say nothing but he shot in the air.*
- Q. That's what I mean. He never told you that anybody shot at him. Right?
- A. No, sir.
- Q. *All he said was, "I shot in the air."*
- A. No, sir. That -- that's all he said.

- Q. *Did you ask him why?*
- A. *No. Because it happens all the time, really.*
- Q. You're involved in gunshots all the time?
- A. No. I'm around gunshots all the time -- people shooting.
- Q. So, it's just not that big a deal to you.
- A. No.
- Q. Okay. You, Knox, and Charles McKinney are in the car leaving now.
- A. Yes.
- Q. Where is Knox in the car?
- A. Knox is in the front seat.
- Q. Where is McKinney in the car?
- A. He in the driver seat.
- Q. Where are you in the car?
- A. In the back seat.
- Q. *Did you see a gun then?*
- A. *No, sir.*
- Q. *So, he still didn't show you a gun.*
- A. No, sir.
- Q. *Well, did you think to ask him how he shot in the air? Or what he shot in the air with?*
- A. *Because I figured, if he shot in the air, he had a gun.*
- Q. *I see. But you didn't see one.*

- A. *No, sir.*
- Q. All right. After that, where did you go?
- A. Went to the store. Then we went to the trailer park.
- Q. Now --
- A. That's where I got out at.
- Q. The trailer park, though, that's not where you were living; right?
- A. No, sir.
- Q. You were living at Tall Pines.
- A. No, sir.
- Q. You weren't living at Tall Pines.
- A. Yes, sir. Yes, sir, I was living at Tall Pines.
- Q. All right, sir.
- A. The reason -- I had a friend that worked, that stayed out there that worked on my car. I had put a motor, a motor -- a 400 in a Chevrolet.
- Q. What was his name?
- A. I really don't remember his name. But I can get his name if you want me to.
- Q. It's not that important. Why did you get out at his house, or his trailer?
- A. That's where he was working at. That's where he work at on my car. That's where my car at.
- Q. And you were just going to check on your car?
- A. Yes, sir.
- Q. *At that particular point in time, did you know whether anybody had actually been shot?*

A. *No, sir, until a little bit later, about twenty minutes later.*

* * * *

Q. Have you talked to him [Knox] since he has been in jail?

A. I talked to him on the phone.

Q. *Okay. Did he tell you he shot the gun?*

A. *No, sir.*

Q. *Did he tell you that he shot at the guy?*

A. *No, sir.*

Q. *You didn't ask him if he did?*

A. *No, sir.*

Q. *Weren't you a little bit curious, if a guy was dead and shots had been fired in your presence, whether or not he had shot the gun?*

A. *I didn't ask him and he didn't tell me.*

Q. You just stayed away from it all?

A. Yes, sir.

Q. Was there a point in time that you went down to the police station?

A. Yes, sir. I went down there the same - - well, no. I didn't go down there the same night. I went down there a few nights - - after they had told me they needed me down there, I went down there.

Q. And you gave them a statement.

A. Yes.

Q. I know you don't remember exactly what the statement was, but is it pretty much close to what you're telling these folks today?

A. Yes, sir.

Q. Can you think of anything you left out of the statement, or out of your testimony here?

A. No, sir.

Q. And you eventually got charged with a crime, didn't you?

A. Yes, sir.

Q. What did you get charged with?

A. Accessory.

Q. After the fact?

A. Yes, sir.

Q. And you are here testifying?

A. Yes, sir.

Q. You've got an attorney. Is that right?

A. No, I don't have an attorney at present right now. I don't have one, because I ain't had - - it's just different, you know. But I ain't, I don't have one.

Q. What about Calvin Taylor?

A. Calvin Taylor was - - I hired him, but I don't have him right now. You know. I ain't finished with the - - it's - -

¶32. The above-quoted colloquy proves unequivocally that the prosecutor failed miserably to get Williams to even admit that he saw Knox with a gun, much less, that he saw Knox shoot McGill. Following this bout with the recalcitrant Williams, the record reflects that the following occurred:

BY MR. SAUCIER [THE PROSECUTOR]: I want to apologize to the Court. I was not involved in this case until just recently, but my understanding was, is that Mr. Taylor represented both Mr. McKinney and this gentleman, or I would have never called him to the stand. I feel like that I have violated his rights if he's not being represented, but we contacted Mr. Taylor to have him here. And I never was told by Mr. Taylor that he's not his attorney.

So I'm in a quandary here, because I have just gone and put a defendant on the stand, under oath, and he's pretty much confessed to – or some could interpret it as being a confession. And I'm afraid that maybe we might need Mr. Taylor here to have some type of explanation, because if, in fact, he hasn't, or isn't being represented by Mr. Taylor, then probably I need to stop my examination of him until he's fully advised of his rights.

BY THE COURT: Does Mr. Taylor represent you?

BY THE WITNESS: No, sir. I hired him. You know, I was working at the time, but a lot stuff came down on me at one time and I couldn't, you know, I couldn't really manage to keep on paying him, you know, like I had supposed to.

BY THE COURT: I don't even know, has he been indicted for this?

BY THE WITNESS: Yes, sir.

BY THE COURT: You have?

BY MR. SAUCIER: (Nodded, indicating yes.)

BY THE COURT: I'm not aware of Mr. Taylor – –

BY MS. MARTIN: Your Honor, I have spoken with Mr. Taylor, and he informed me that he did represent this person and the other person, except for he hasn't finished paying him all the way. I believe that's – –

BY THE WITNESS: But he not my lawyer right now.

BY MS. MARTIN: He's not your lawyer anymore.

BY THE COURT: That's right.

BY MS. MARTIN: Okay.

BY THE WITNESS: I ain't paid him. How he going to be my lawyer? You know what I'm saying? He don't talk to me.

BY THE COURT: Well, unless he's been given an order by the Court to withdraw, which I'm not aware whether he has, or not, he is still your lawyer until the Court allows him to withdraw. I guess we could check the court file on that or either call Calvin Taylor and –

–

BY MR. SAUCIER: If he has made an entry of appearance, then I would assume he is still the lawyer.

BY THE WITNESS: That's what I paid for, the entry of appearance.

BY MR. SAUCIER: And I know that he's made an entry of appearance, because we have given him discovery.

BY THE COURT: Oh, is that right?

BY MR. SAUCIER: Yes, sir. We've given Calvin discovery on both of these guys.

BY THE COURT: Let's take a break and I'll call Mr. Taylor.

BY MR. SAUCIER: I apologize. I'm sorry.

* * * *

BY THE COURT: I spoke with Calvin Taylor and he said that he represented McKinney in the Circuit Court. As to this gentleman here, Williams, he said that he had represented him at the preliminary hearing. And he pulled his file and he said he didn't know if he had entered anything here, or not, but his file didn't indicate that he had. And he hasn't spoken to him about this case or anything such as that. And he would be glad to come over in the morning if we needed him, or whatever, you know. But . . . so, he has not consulted with him about testifying or anything such as that.

BY MS. MARTIN: Your Honor, several months ago Mr. Taylor actually approached me and, about them, both of them testifying, Mr. McKinney and Mr. Williams. He told me that he represented both of them. And he brought Mr. McKinney up to the courthouse, and we spoke about both of his clients and both of their involvement and them testifying. And so --

BY THE COURT: I don't know what he -- he told me that, he acknowledged that you had talked to him about McKinney, and he said he, I think he got him to come here today from wherever he was, New Orleans. He said that he told you he didn't know where this gentleman was, he hadn't been by to see him. And he didn't know how to get in touch with him.

BY MS. MARTIN: That's correct, and I gave him his phone number. I said, well, I had accidentally just called him at a phone number that I was looking for a witness, and Jermaine answered the telephone there and this is his phone number.

BY THE COURT: All right. Well, why don't we do this? You all can get together with Mr. Taylor then between now and in the morning and decide what you want to do, and

we'll just take a recess at this point. And I'll tell the jury that we're going to recess for the day.

* * * *

BY MR. SAUCIER: *Your Honor, on that particular case, it's come to our attention that there was some miscommunication about the relationship with Jermaine Williams to being represented, [sic] or whether he was represented by an attorney, and because of that ambiguous situation and because of his apparent misunderstanding of whether he was being represented or not, I feel compelled to ask for a mistrial, because we did put him on the stand and he was in a mental flux as to what his position was at the time. And I would ask that it be rescheduled, perhaps for the earliest convenience, to the next term.*

BY THE COURT: All right. Is there any objection?

BY MR. SHADDOCK: No, Your Honor.

BY THE COURT: All right. The Court wasn't aware either one of these gentlemen were charged as accessories, and it came out just in the testimony without any prior knowledge by the Court so that the Court could give any type of instructions with respect to their right to testify or not testify and so forth, the warnings that should have been given.

Mr. Taylor, the attorney for one of the parties and who has represented the other witness at one time or another, was not here and should have been here, should have been here to represent his client.

So, with great reluctance – – and, certainly I understand these things, you know, do happen, but I'll grant the motion for a mistrial. I feel like that's the appropriate thing to do in view of what's transpired with respect to these witnesses. So, I'll grant the motion for a mistrial, and the case will be rescheduled for trial at the next term of court.

¶33. The contention that — these facts present a manifest necessity for the declaration of a mistrial — is just not a tenable contention. As I have already alluded to, I cannot grasp the logic of why the witness's precarious position created a manifest need to declare a mistrial in Knox's trial. But even if there was some nexus or correlation between the witness's precarious position and the appropriateness of going forward with Knox's trial because of some inexplicable harm that might occur, it seems to me that there were clear alternatives to the declaration of the mistrial. First, the court could have appointed someone to represent

Williams and continued with the trial. Second, the court could have advised Williams of his constitutional right not to incriminate himself or be compelled to be a witness against himself, and left it up to Williams to decide if he wanted to continue testifying. Third, the court could have ordered the prosecution not to use the witness's incriminating statements against him in any subsequent trial of the witness.

¶34. In arriving at its position, the majority also says that “[b]oth the State and defense counsel felt that a mistrial should be granted.” I do not think that is a proper reading of the defense’s position. Defense counsel simply advised the court that he did not object to the granting of the mistrial. He gave no input during the discussion between the prosecutor and the court. To deduce from his statement—that he did not object to the mistrial being granted—that he felt that a mistrial should be granted is to overlook a very important consideration: a defense lawyer is duty and ethically bound to secure a win for his client by any legal means available. It is possible that defense counsel may have been of the view that the prosecution had committed misconduct in its effort to obtain a mistrial and that, under such circumstances, he could raise the double jeopardy claim later, even if he did not object when the motion for a mistrial was made. In other words, defense counsel may have wanted the mistrial not because he thought a manifest necessity existed for declaring one, but reasons just the opposite. If being silent while the prosecutor committed a grievous error would operate to his client’s benefit, he was duty bound to let the sounds of silence speak for him.

¶35. Apparently, the majority, while asserting that the defense counsel also felt that a mistrial should be granted, is not prepared to find that defense counsel’s willingness to permit a mistrial operated as a waiver of Knox’s right against being placed twice in jeopardy for the same offense. In this regard, the majority, citing *Johnson v. State*, 753 So. 2d 449, 454 (¶13) (Miss. Ct. App. 1999), finds that the right to be free from double jeopardy is a constitutional right that is not subject to waiver.

¶36. *Johnson* cites *Matlock v. State*, 732 So. 2d 168 (¶10) (Miss. 1999) for its bright line pronouncement that “double jeopardy is a constitutional right that is not subject to waiver.” *Matlock*, however, does not announce a bright line rule that the constitutional claim of double jeopardy can never be waived. It simply holds that a plea of guilty does not waive the claim of double jeopardy. *Id.* at (¶¶4, 11-12). Therefore, the question which must be answered, in the absence of Knox’s objection to the declaration of the mistrial, is whether the facts surrounding the motion for a mistrial represent prosecutorial maneuvering to obtain a mistrial, and thus a prosecutorial advantage.

¶37. “A criminal defendant has a ‘valued right’ to have his or her guilt or innocence determined by the jury to which the prosecution’s case is first presented.” *United State v. McIntosh*, 380 F. 3d 548, 553 (1st. Cir. 2004) (citing *United States v. Jorn*, 400 U.S. 470, 484 (1971)).

It is settled law that the Double Jeopardy Clause provides a defendant with a shield against prosecutorial maneuvering designed to provoke a mistrial. *Oregon v. Kennedy*, 456, U.S. 667, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982); [*United States v.*] *Dinitz*, 424 U.S. [600], 611 [(1976)]. Consequently, if the prosecutor purposefully instigated a mistrial or if he committed misconduct designed to bring one about, the Double Jeopardy Clause may be invoked as a bar to further prosecution notwithstanding the defendant’s consent (or failure to object) to the mistrial. *See Creighton v. Hall*, 310 F. 3d 221, 227 (1st Cir. 2002).

McIntosh, 380 F. 3d at 557.

¶38. In my judgment, the prosecutor urged the mistrial upon the court for the improper motive or purpose of obtaining an advantage over the defense, that is, to obtain a fresh start with a new and different witness who perhaps would be a little more cooperative in offering damaging evidence against Knox. The transcript of Knox’s second trial lends support to this supposition. In the retrial, Williams was not called as a witness. Instead, the prosecution called Charles McKinney, Jr., the other person charged with being an accessory after the fact.

¶39. McKinney was more cooperative or at least offered more damaging information against Knox than did Williams. Further, it is significant that prior to the beginning of McKinney's testimony the prosecution arranged for McKinney to advise the court that McKinney was willing to waive his right against self-incrimination and testify.

¶40. Surely the prosecution knew that Williams, like McKinney, was charged with being an accessory after the fact. Likewise, the prosecution knew that no defense lawyer was present when the prosecution first began its interrogation of Williams. The prosecution's assertion that it was concerned about protecting William's right against self-incrimination just does not pass muster in light of the fact that the professed concern did not arise until after Williams had completed his direct examination testimony and had failed to give the damaging testimony against Knox that the prosecution desired. The fact that Williams did not have counsel was not a bar to the prosecution's advising the court, at the beginning of Williams's testimony, that Williams was charged as an accessory after the fact.³ At that point the court could have advised Williams of his rights and left it up to Williams to decide whether he wanted to testify. Since the prosecution did not act to protect Williams's rights at the time when it really counted, I am compelled to conclude that the prosecution's belated assertion of this as the reason for wanting a mistrial was clearly pretextual, masking its real reason for wanting the mistrial.

¶41. It is tragic in this case that a human life was lost for nothing, but it would be even more tragic if the rule of law was not adhered to, for a failure to adhere to the rule of law imperils the existence of both our nation and the freedoms which it offers. I believe adherence to the rule of law requires that Knox's conviction be set aside as offending the constitutional provision against Double Jeopardy. Therefore, for the reasons offered, I respectfully dissent.

³ It was obvious that even if Williams had counsel, his counsel was not present in the courtroom.

KING, C.J., AND ISHEE, J., JOIN THIS SEPARATE OPINION.