EFiled: Sep 23 2013 05:05PM EDT
Filing ID 54270655
Case Number 220,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LAMONTE A. BUTLER,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 220, 2013
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

STATE'S ANSWERING BRIEF

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Dated: September 23, 2013

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NATURE AND STAGE OF THE PROCEEDINGS

On May 7, 2012, Lamonte A. Butler ("Butler") was indicted on charges of Attempted Robbery First Degree, Assault Second Degree, 2 counts of Possession of a Firearm During the Commission of a Felony ("PFDCF"), Conspiracy Second Degree, Carrying a Concealed Deadly Weapon, Resisting Arrest, Receiving a Stolen Firearm, Possession of a Firearm by a Person Prohibited and 2 misdemeanor drug charges. (A1, D.I. 2). Prior to trial, the Superior Court granted the State's motion to amend the lead charge to Robbery First Degree (A4, D.I. 26; A30) and the State dismissed the Receiving a Stolen Firearm charge. (A32-33).

On December 4, 2012, the Superior Court selected a petit jury consisting of 12 jurors and 4 alternates, and the jury was sworn. (A-26). During the lunch recess, the trial was assigned to a different judge. (A-48). The Superior Court conducted an additional *voir dire* of the jury. The court dismissed 2 jurors and contemplated dismissing 2 additional jurors. (A-66-76). Butler moved for a mistrial because "[w]e're going to have no alternates." Butler's counsel represented that double jeopardy was a "nonissue." (A-76 & 79). The Superior Court granted Butler's motion. (A-79).

Thereafter, on January 3, 2013, Butler filed a motion to dismiss, asserting double jeopardy precluded trial. (A-5, D.I. 35; A-42). On January 25, 2013, the State filed an opposition to the motion to dismiss. On January 25, 2013, Butler

filed a letter requesting that the second assigned judge, who granted Butler's motion for a mistrial, recuse herself. (A-6, D.I. 43; A-84). On January 28, 2013, the State also filed a motion for judicial recusal. (A-6, D.I. 44). On that same date, the Superior Court denied Butler's motion to dismiss and denied as moot Butler's motion to recuse. (A-6, D.I. 45 & 46). No action was taken on the State's motion.

On January 29, 2013, a four-day jury trial commenced, with a different Superior Court judge presiding. (A-6-7, D.I. 50). With the exception of one count of PFDCF, the jury found Butler guilty of all offenses. (*Id.*). On April 12, 2013, the Superior Court sentenced Butler to a total of 47 years of Level V incarceration, suspended after 11 years for decreasing levels of supervision. (A-7, D.I. 53; Op. Brf. Ex. A).

Butler appealed and filed an opening brief. This is the State's Answering Brief.

SUMMARY OF THE ARGUMENT

I. Denied. The Superior Court did not err in denying Butler's motion to dismiss in which he claimed that the Double Jeopardy Clause barred his re-trial because the Superior Court granted his request for a mistrial of his first trial where there were 12 jurors on the jury. Butler failed to prove that the Superior Court excused jurors with the bad faith intent to goad Butler to request a mistrial.

II. Admitted in part; Denied in part. The Superior Court erred in failing to decide Butler's motion to recuse before deciding Butler's motion to dismiss. However, the error has not affected any of Butler's trial rights and, thus, does not require reversal of Butler's convictions.

STATEMENT OF FACTS

On March 13, 2012, Butler and his friend of 20 years and codefendant, Kaala Collins ("Collins") were "hanging out" with friends in Wilmington and decided to go to Wawa on Route 13 at about 3:30 a.m. to get something to eat. (A-118, 125; B-6-7). When they returned and parked, they saw Richard Baldwin, a 22-year-old white man, who was walking down the street after having purchased and used drugs. (A-120, 128-29). Butler said to Collins, "You want to get him?" (A-120). Collins agreed to rob Baldwin. (*Id.*). Butler said "it was going to be easy." (A-121).

Collins testified that Butler repeatedly asked Baldwin for money, and when Baldwin continued to refuse, Butler began pistol whipping Baldwin. (A-120). According to Segundo Rodriguez, who witnessed the incident and called 911, as well as Collins and Baldwin, Butler's gun was silver or chrome. (A-116, 120; B-4). Collins, who did not have a gun, testified that he was a lookout. (A-120). After Butler started pistol whipping Baldwin, Baldwin gave his wallet to Collins, who began to walk away. (B-7). When Collins realized Butler was not walking away with him, he looked back and saw Butler continuing to pistol whip Baldwin in an effort to obtain Baldwin's cell phone. (*Id.*). Collins went back to stop Butler from beating Baldwin. (*Id.*). Collins and Butler then began walking back towards

their friend's house, and Collins threw the wallet in a trashcan. (*Id.*). Baldwin was bloody, with head lacerations that required staples. (B-5; A-130).

After a search and a chase, Wilmington Police Department Uniform Patrol Division partners Jose Cintron and Gaelan MacNamara were able to take Collins and Butler into custody. (A-101-04; B-8-10). Officer Cintron did not find a firearm on Collins when he patted him down. (B-10). Although Officer MacNamara did not find anything on Butler when he patted him down (A-106), when Officer Lorne Peterson took custody of Butler, he patted Butler down again and found a silver, loaded Colt .45 caliber handgun, with blood on it. (A-107-09). Officer Peterson testified that he was "100 percent" sure that it was Butler on whom he found the handgun. (A-109). To a reasonable degree of scientific certainty, the DNA from the swab taken from the handgun found on Butler was consistent with the DNA from Baldwin's buccal swab. (A-115).[1] When a third officer searched Butler, he found a clear plastic sandwich bag that contained crack cocaine and 12 sandwich bags that contained marijuana. (B-1-2, 11).

While he was sitting in the ambulance receiving medical treatment, Baldwin identified both Collins and Butler as the individuals who had robbed him. (A-109-11; B-3; A-130).

[1] "[T]he probability of randomly selecting an unrelated individual with a DNA profile matching that of both the gun swabs and the profile of Richard Baldwin is one in 117 quintillion, 800 quadrillion in [the] Caucasian population." (A-115).

I. The Superior Court did not err in denying Butler's motion to dismiss based on the Double Jeopardy Clause.

Question Presented

Whether the Superior Court erred in denying Butler's motion to dismiss based on his claim that, even though 12 jurors remained after the second *voir dire*, the court nevertheless "goaded" him to request a mistrial.

Standard and Scope of Review

The Court reviews constitutional issues *de novo*.[2] However, "in the specific context of 'double jeopardy goading cases,' [this Court] must uphold the Superior Court's factual determination [regarding intent to goad] unless [this Court] finds it to be clearly erroneous."[3]

Merits of the Argument

Butler argues that the Superior Court erred in denying his motion to dismiss based on double jeopardy considerations.[4] Butler claimed below, as he does here, that he had a right under the double jeopardy provision to a trial by the specific jury selected on December 4, 2012, and that the trial judge "goaded" him into requesting a mistrial. Butler also claims that "even before Butler requested the mistrial he had already been deprived of [his] constitutional right to proceed before

[2] *Sullins v. State*, 930 A.2d 911, 915 (Del. 2007) (citing *Keyser v. State*, 893 A.2d 956, 961 (Del. 2006)).
[3] *Id.* at 916 (citation omitted).
[4] Op. Brf. at 7-16.

the first empaneled jury."[5] Butler's argument fails. The Superior Court correctly denied Butler's motion to dismiss.

Legal Background

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution protects a defendant against multiple punishments or successive prosecutions for the same offense.[6] That protection can preclude re-trial when a trial is not completed and a mistrial is declared[7] because a defendant has a "valued right to have his trial completed by a particular tribunal."[8] The right to trial before a particular tribunal is the source of a guiding principle in Double Jeopardy analysis – the defendant should retain the right to decide whether (or not) to proceed to judgment where prosecutorial or judicial error has occurred unless there is a "manifest necessity" for the court to declare a mistrial *sua sponte*. The United States Supreme Court has recognized:

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[5] *Id.* at 16.

[6] Butler does not appear to argue a claim based on Article 1, § 8 of the Delaware Constitution. To the extent that such a claim appears in his opening brief, he has waived the claim based on his failure to fully and fairly present it. *See Ortiz v. State*, 869 A.2d 285, 291 n. 4 (Del. 2005)).

[7] *Sullins*, 930 A.2d at 915-16 (citing *Earnest v. Dorsey*, 87 F.3d 1123, 128 (10th Cir. 1996) (citing *United States v. Dinitz*, 424 U.S. 600, 607 (1976) and *Arizona v. Washington*, 434 U.S 497, 505 (1978))).

[8] *Dinitz*, 424 U.S. at 607 (citing *Wade v. Hunter*, 336 U.S. 684, 689 (1949); *United States v. Jorn*, 400 U.S. 470, 484-85 (1971) (plurality opinion); *Downum v. United States*, 372 U.S. 734, 736 (1963)).

> If that right to go to a particular tribunal is valued, it is because, independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant the declaration of mistrial. Thus, where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error. In the absence of such a motion, the *Perez* doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings. See *United States v. Perez*, 9 Wheat. at 580, 6 L. Ed. at 166.[9]

Thus, in the absence of manifest necessity for a mistrial, it is the defendant's decision whether to request a mistrial when circumstances warrant. The *Dinitz* Court recognized that "the defendant generally does face a 'Hobson's choice' between giving up his first jury and continuing a trial tainted by prejudicial judicial or prosecutorial error. The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error."[10] However, a defendant's choice to move for a mistrial "generally removes any barrier to prosecution."[11]

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[9] *Dinitz*, 424 U.S. at 607-08 (quoting *Jorn*, 400 U.S. at 485) (emphasis added).
[10] *Id.* at 609.
[11] *Bailey v. State*, 521 A.2d 1069, 1075 (Del. 1987) (citing *Oregon v. Kennedy*, 456 U.S. 667 (1982)). *See also United States v. Scott*, 437 U.S. 82, 93 (1978) (holding that a defendant's motion for mistrial is deemed to be a waiver of his "valued right to have his guilt or innocence determined before the first trier of fact").

As this Court has noted:

> The double-jeopardy provision of the Fifth Amendment … does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed.[12]

When a defendant requests a mistrial, as Butler did, there is usually not the "semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed."[13]

There is, however, a "narrow exception" to the rule that a defendant's request for the mistrial removes the Double Jeopardy bar to retrial.[14] The Double Jeopardy Clause still "bars retrials where 'bad-faith conduct by judge or prosecutor' threatens the '(h)arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant."[15] In other words, where "the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial … a defendant [can] raise the bar of double jeopardy to a second trial."[16] However, to do so, the defendant bears the burden of proving that the prosecutor or

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[12] *Sullins*, 930 A.2d at 915 (quoting *Wade*, 336 U.S. at 688-89).
[13] *Id.*
[14] *Sudler v. State*, 611 A.2d 945, 948 (Del. 1992).
[15] *Dinitz*, 424 U.S. at 611 (internal citation omitted) (citing *Downum*, 372 U.S. at 736; *Gori v. United States*, 367 U.S. 364, 369 (1961); *Jorn*, 400 U.S. at 489, (Stewart, J., dissenting); *Wade v. Hunter*, 336 U.S. at 692).
[16] *Sudler*, 611 A.2d at 948 (quoting *Oregon v. Kennedy*, 456 U.S. at 676).

judge "acted with intent to provoke a mistrial,"[17] which is an "extremely exacting standard."[18] "[O]nly a high-handed wrong intentionally directed against [a] defendant's constitutional right will trigger his right not to be twice put in jeopardy for the same offense."[19]

Factual Background

On December 4, 2012, the Superior Court, presided over by a judge in the civil rotation ("Judge #1") (A-91), selected a petit jury consisting of 12 jurors and 4 alternates, and the jury was sworn. (A-26). The *voir dire* asked jurors if they would be available for trial through Friday, December 7, 2012. (A-7). Immediately following jury selection, the court took its lunch recess. During the recess, the trial was re-assigned to a judge in the criminal rotation ("Judge #2"), who had become available. (Op. Brf. at 8; A5, D.I. 29; A43; A-48; A91-92; A96). Judge #2 summoned counsel to chambers. (Op. Brf. at 8; A-92; A-96). The State requested that a court reporter be present, but the bailiff advised that Judge #2 only wished to discuss scheduling. (A-92). When counsel appeared, Judge #2 was familiarizing herself with the case. (*Id.*).

The State summarized for Judge #2 the earlier pre-trial discussions with Judge #1. (A-92). Judge #2 then inquired about plea negotiations. (Op. Brf. at 8;

[17] *Sullins*, 930 A.2d at 916 (citation omitted).
[18] *Id.* (citation omitted).
[19] *Id*. (quoting *United States v. Pavloyianis*, 996 F.2d 1467, 1469 (2d Cir. 1993)).

A-92). The State explained the prior plea offer, that Butler had rejected it, and that, on the day of trial, the only plea that the State would offer would be to the lead charge. (Op. Brf. at 8; A-92-93; A-97). Judge #2 outlined the weaknesses in the State's case and suggested that the parties resolve the case with a lesser plea to Robbery Second Degree and PFDCF. (Op. Brf. at 8; A92-93; A-97). The State declined to do so, and Butler's counsel stated, regardless, that Butler was unlikely to accept any plea offer. (A-93; A-97). Judge #2 asked whether the court had conducted a colloquy of Butler regarding his decision to go to trial. (Op. Brf. at 8; A-93). Counsel advised that a the court had not conducted a colloquy. (*Id.*).

Judge #2 then turned to scheduling issues. (Op. Brf. at 9; A-93; A-97). Judge #2 explained the conflicts in her schedule and, based on the time during which she could preside, concluded that the trial would likely have to continue to Monday, December 10, past the timeframe of which the jury was advised. (Op. Brf. at 9; A-93; A-97). Judge #2 decided to conduct additional *voir dire* to determine the jurors' availability for trial through Monday. Although the State opposed, defense counsel agreed that the scheduling issues might necessitate trial continuing to Monday and did not oppose the additional *voir dire* on that point. (A-93).

Judge #2 reviewed the *voir dire* originally asked of the jury and asked if they were asked if they were retired. When she learned that they were not, Judge #2

"stated that was a problem and she always does that" because prior employment can reveal a conflict. (A93-94; A98). Judge #2 also believed that the jury should have been asked about prior cooperation with the Attorney General's Office.

Following the conference in chambers, Judge #2 conducted a colloquy with Butler because: "My policy is that before we begin any testimony in the trial, that the defendant be absolutely sure this is what he wants to do." (A-61). Judge #2 also conducted additional *voir dire* of the 12 jurors and 4 alternates. The jurors were asked the following three questions:

> THE PROTHONOTARY: It is now estimated that the trial will last until Monday. If anyone cannot serve through Monday, please raise your hand.
>
> Have you, a relative, or a close friend ever assisted or cooperated with the police … or the Attorney General's Office in a civil or criminal investigation?
>
> If you are a retiree, please raise your hand and come forward when directed … so that we may find out about your previous employment.

(A-36; A-66-67). Five jurors responded affirmatively. (A-36-39; A67-79). Juror #1 came forward because of "my job." Discussion with the juror revealed that she only needed a note to provide to her employer, and the court agreed to provide a note. (A-36-37; A-68-69).

Juror #7 approached and advised that he was scheduled to leave the country Monday afternoon. (A-37; A-69). The court excused him for cause. (A-37; A-69). Defense counsel started to object, and the court asked the juror to wait. (A-

37; A-69). Defense counsel explained that she believed dismissal was not necessary if trial did not go through Monday. (A-37; A-69). However, when the court asked whether Butler wanted a juror that's going to rush things, Butler's counsel replied, "No" and said nothing further – implicitly withdrawing the objection. (A-37; A-69).

Juror #15 came forward because he was a retired research scientist. (A-37; A-70). He indicated that he did not believe there was anything about his prior employment that would make it difficult to be objective. (A-37; A-70). He was permitted to remain on the jury.

Juror #8 came forward because he was retired from Delmarva Power. (A-37; A-70). He indicated that he had done collection work in the City of Wilmington and that "I had knives pointed at me, guns pointed at me." (A-38; A-72). When asked "Do you think that having been a victim, you can still sit back and be fair and impartial…," he replied "I can be fair about it, yeah. I have no problem whatsoever." (A-38; A-73-74). After he returned to his seat, the court stated "Personally, I'm not convinced." (A-38; A-74). The State responded, "It's our position he answered all the questions right, Your Honor." (A-38; A-74). The court then left it up to Butler: "If you want me to excuse him, I will. It's up to counsel." (A-38; A-74). The record reflects that defense counsel did not respond immediately and the court then said "Let's go on to somebody else and, then, you

can decide." (A-38; A-74). Defense counsel agreed. (A-38; A-74). Later, when Butler's counsel moved for a mistrial, it is clear that she believed the court should dismiss Juror #8: "he used to do collections, which, frankly, made him sound like somebody who broke knee caps for Delmarva Power and, then, he started talking about things that had happened to him with various weapons, in which he was a victim. And he didn't really have a great excuse for why he didn't come forward the first time that the two questions were asked about have you ever been a victim, or at least one." (A-39; A-76-78).

Juror #16 came forward next and explained, "I have a hearing problem. When you're speaking, if not in a microphone, I can't hear you." (A-38; A-75). The court excused Juror #16 for cause. (A-38; A-75). Neither the State nor Butler stated any objection. (A-38; A-75).

After the court addressed on the record the five jurors who had come forward in response to the additional *voir dire*, the jury was comprised of 12 jurors and 2 alternates. The State advised the court and defense counsel that it had learned that Juror #11 had not disclosed that he had been arrested in Pennsylvania for theft, receiving stolen property and intoxication (even though the charges had been dismissed). (A-38-39; A-75-76). During an off-the-record conference, the parties came to believe that the court would excuse 2 additional jurors for cause, leaving a panel of 12 jurors. (Op. Brf. at 10-11; A-94; A-98). The court agreed

that "two jurors had been excused for cause and, two others (#8 and #11) loomed as likely candidates for excusal for cause." (Op. Brf. Ex. B at ¶ 9).

Butler then moved for a mistrial because "[w]e're going to have no alternates" and "I'm not doing this twice, I'm not doing it with less than 12." Importantly, Butler's counsel represented that double jeopardy was a "nonissue." (A-39; A-76 & 79). The Superior Court granted Butler's motion. (A-39; A-79).

Butler waived his Double Jeopardy claim

As a preliminary matter, Butler waived any claim based on Double Jeopardy. When Butler moved for a mistrial, the State asked, "The jury was sworn; right?" (A-39; A-77). The following discussion then occurred:

> [Defense Counsel]: So, if I'm looking at a mistrial you can't re-bring it?
>
> [Prosecutor #1]: Well, I think we can but I'm asking – I don't want to engage in motion practice afterwards, because I agree with everything you said, you know what I mean. It's your call.
>
> (Brief Pause.)
>
> [Defense Counsel]: [Summarizing a portion of the second *voir dire*] … But now we have no alternates after further questioning. Recognizing that the jury has been sworn, the defense has to ask for a mistrial, I mean a new date, and a new date soon.
>
> [Prosecutor #2 and Defense Counsel make court aware Butler is currently incarcerated for another crime]
>
> [Prosecutor #2]: And the only other issue, which I think is being remedied here is, the jury was, in fact, sworn; so the issue of double jeopardy having attached at this point in time –

> [Defense Counsel]: Right. But since – **I think that it becomes a nonissue** because the defense is asking for the mistrial because I need a full complement of jurors, for lack of a better word.
>
> (A-39; A-77-79) (emphasis added).

Following defense counsel's statement that double jeopardy was a "nonissue," the Superior Court granted his motion. (A-39; A-79). In agreeing that double jeopardy was a "nonissue," Butler waived any claim of violation of his Double Jeopardy rights in connection with his request for a mistrial.[20] Thus, he cannot now argue that the Superior Court "goaded" him to request a mistrial on December 4, 2012 and that his January 2013 conviction must be reversed.[21]

Even if Butler did not waive his Double Jeopardy claim, the Superior Court correctly denied his motion to dismiss.

Even if the Court considers the substance of his claim, Butler has failed to establish that the Superior Court erred in denying his motion to dismiss. Butler does not – and cannot – dispute that 12 jurors remained when he requested a mistrial. However, Butler complains that alternates had been substituted for "the original 12 jurors selected by Butler" and that he has a constitutional right to trial before those 12 jurors and that "even before Butler requested the mistrial he had

[20] Double Jeopardy rights can be waived without a colloquy. *See Dinitz*, 424 U.S. at 609 n. 11 ("This Court has implicitly rejected the contention that the permissibility of a retrial following a mistrial … depends on a knowing, voluntary, and intelligent waiver of a constitutional right.") (citations omitted).

[21] Although the Superior Court did not base denial of his motion to dismiss on waiver, this Court may affirm the denial on this alternate ground. *See Unitrin, Inc. v. Amer. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995).

already been deprived of [his] constitutional right to proceed before the first empaneled jury."[22] If Butler were correct that he has a right to "the original 12 jurors selected by Butler," then Superior Court Criminal Rule 24(c)[23] allowing substitution of alternates before deliberations would be unconstitutional. It is not. In *Claudio*, this Court recognized that "the present procedure, pursuant to Superior Court Criminal Rule 24, which provides for the use of alternate jurors and their substitution *prior* to the commencement of the jury's deliberations has been upheld under the Delaware Constitution by this Court."[24]

In *Claudio*, the Court conducted an exhaustive analysis of the right to jury trial under both the United States and Delaware Constitutions. The Court recognized that the Delaware Constitution preserves common law features of the jury system that the United States Constitution does not.[25] The Court explained that, at common law, there was a "costly and time consuming process" when a juror became ill or died during trial.[26] However, "[t]his Court and others have

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[22]Op. Brf. at 16.

[23] Superior Court Criminal Rule 24(c) provides in pertinent part: "The court may direct that not more than 6 jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors…."

[24] *See Claudio v. State*, 585 A.2d 1278, 1298-1300 (Del. 1991) (citing *Ruffin v. State*, 123 A.2d 461 (Del. 1956)).

[25] *Claudio*, 585 A.2d at 1297-98.

[26] *Id*. at 1298.

recognized the validity of implementing procedures which improve the operation of the jury system, as it existed at common law, *without* changing the fundamental common law features of right to trial by jury."[27] The Court continued: "The present [Superior Court Criminal Rule 24(c)] procedure … which provides for the simultaneous selection of regular and alternate jurors and allows alternate jurors to be substituted *prior* to the commencement of the jury's deliberations, is the functional equivalent of the common law system."[28] In other words, the Superior Court Criminal Rule 24(c) system of alternate jurors is constitutional. Thus, when Judge #2 substituted alternates for "regular jurors" after conducting the additional *voir dire*, she did not violate Butler's constitutional rights. As a result, Butler's claim fails.

His claim also fails because he has failed to establish that the Superior Court dismissed the 2 jurors, and would have dismissed 2 additional jurors, with the intent to cause a mistrial. Although findings of fact regarding intent to goad are entitled to deference unless clearly erroneous,[29] even if the Court reviewed the entire decision *de novo*, it is clear that the Superior Court correctly denied Butler's motion to dismiss. Notably, when Butler moved for a mistrial, his counsel did not claim that the Court's actions in excusing the jurors for cause was inappropriate or

[27] *Id.* (citing *Ruffin*, 123 A.2d 461) (emphasis in original).
[28] *Claudio*, 585 A.2d at 1299 (emphasis in original).
[29] *Sullins*, 930 A.2d at 916.

was done with the intent to "goad" Butler into requesting a mistrial. Indeed, at the time he requested a mistrial, Butler made absolutely no mention of bad faith excusals for cause or even that the excusals for cause were error.[30] Instead, when confronted with the issue of Double Jeopardy, Butler's counsel advised it was a "nonissue" and moved for a mistrial only because she preferred "a new date soon" rather than risk any possibility that all 12 jurors would not remain through the at most week-long trial. Thus, in addition to revealing waiver of any Double Jeopardy claim, defense counsel's "nonissue" comment also reveals that Butler did not believe that the court was acting with the intent to goad him into requesting a mistrial. Moreover, one would have expected any defense attorney, particularly a seasoned defense attorney like Butler's, to have made a record of the court's improper intent rather than stating that Double Jeopardy was a nonissue.[31] The lack of such a record reflects the lack of any belief that Judge #2 was acting in bad faith to goad Butler. Bad faith cannot arise after the fact.

There is no basis for Butler's claim that the Superior Court dismissed the jurors with the intent to cause a mistrial. Butler relies on the fact that two conferences were not recorded to argue that Judge #2 intended to goad Butler into

[30] Butler does not claim that he made any such assertion of improperly motivated dismissal of jurors during the off-the-record conference.

[31] The trial court's improper off-the-record conferences do not negate this point. Once the court came back-on-the-record, defense counsel summarized the excusals for cause and made her motion for mistrial, making absolutely no mention of being goaded into requesting a mistrial and instead stating that Double Jeopardy was a nonissue.

requesting a mistrial. The State agrees with Butler that Trial Judge #2 violated the requirement to record all substantive conferences when she did not record the in-chambers conference and a portion of the conference after conducting additional *voir dire* of the jurors.[32] However, that violation did not require the Superior Court to grant his motion to dismiss and does not now entitle Butler to reversal of his conviction and a bar against retrial.[33] "It is generally established that a showing of prejudice is required for finding reversible error in the omission of any portion of criminal proceedings."[34] Butler has failed to establish prejudice. Butler does not argue that "the incomplete record impedes appellate review or hampers the efforts of substitute counsel on appeal."[35] Indeed, as evidenced by Butler's reliance on the affidavits of two deputy attorneys general present at the unrecorded conferences,[36] there is no dispute between the parties as to what occurred in the unrecorded conferences.[37]

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[32] Super. Ct. Crim. R. 26.1; *Stephenson v. State*, 606 A.2d 740, 741 n.2 (Del. 1992) ("The recording of all substantive sidebar and chambers conferences is and has been mandatory.").
[33] *See* Op. Brf. at 16 (requesting reversal of conviction and imposition of a bar against retrial).
[34] *Jensen v. State*, 482 A.2d 105, 118 (Del. 1984).
[35] *Caldwell v. State,* 780 A.2d 1037, 1057-58 n.67 (Del. 2001).
[36] *See* Op. Brf. at 8-11 (citing Affidavit of Joseph Grubb (A91-95) & Affidavit of Daniel Logan (A96-99)).
[37] The State notes that "[i]t is the appellant's responsibility to provide this Court with a record of the trial proceedings that are relevant to the claims of error raised on appeal." *Butler Seramone–Isaacs v. Mells*, 873 A.2d 301, 305 (Del. 2005). Moreover, "[w]here no transcript is made of a proceeding, Supreme Court Rule 9(g) provides the appellant with a remedy." *Id.* at 304. Rule 9(g), in pertinent part, provides: "The parties may enter into a stipulation as to the substance of testimony or other proceedings as may be essential to a decision of the issues to be presented on the appeal, whether or not a stenographic record has been made. The stipulation shall be approved by the judge of the trial court and certified to this Court in lieu of a transcript and

Moreover, Judge #2's failure to record the chambers conference and a portion of the conference following the additional voir dire, while a violation of Rule 26.1 and this Court's repeated admonitions, is *not* the reason Butler requested a mistrial. Instead, Butler argues that "he was forced to request the mistrial by the court's deliberate actions which led to the excusal of 4 sworn jurors with whom he had been content." (Op. Brf. at 12 (citing A-42)). The lack of dispute as to what occurred during the unrecorded conferences precludes any argument that the lack of a transcript prejudices Butler's ability to argue his double jeopardy claim. Thus, while Judge #2 erred in failing to record the conferences, that error has no bearing on Butler's double jeopardy claim and does not otherwise entitle Butler to reversal.

Butler also bases his claim of the court's bad faith on the fact that "[t]he further *voir dire* conducted went beyond the issue of the sworn jurors' extended availability and resulted in the excusal of 4 of those jurors." (Op. Brf. at 15). Butler further argues that "[t]he judge did this without making specific inquiries, considering other options or making any specific findings." (*Id.*). Butler relies on *Sudler*[38] to support his claim that Double Jeopardy precluded his January 2013 re-trial. (*Id.*). But, Butler ignores that *Sudler* had different facts and a different standard than his case.

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without the necessity of the directions required under subparagraphs (ii) and (iii) of paragraph (e) above." Del. Supr. Ct. R. 9(g). Butler has not sought to provide a record, other than the prosecturs' affidavits, in lieu of the transcript under Rule 9(g).

[38] 611 A.2d at 948.

In *Sudler*, a jury of 12 remained when it became apparent that the trial would extend past the expected conclusion date and over the Good Friday holiday into the week following Easter.[39] The judge questioned the jurors about their continued availability.[40] Only 7 would be available the following week, and the court excused the other 5 jurors.[41] Like here, there were improper unrecorded conferences.[42] However, unlike here where a full jury of 12 jurors remained, only 7 jurors remained in *Sudler*. Moreover, unlike here where Butler requested a mistrial, the trial judge in *Sudler* declared a mistrial *sua sponte*.[43] As a result, instead of applying the *Sullins*/*Oregon v. Kennedy* goading test applicable here, which it discussed, the *Sudler* Court applied the "manifest necessity" test.[44] The "doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option to continue with trial, until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of proceedings."[45] The manifest necessity test is clearly much different than the *Sullins* requirement that defendant bears the burden of

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[39] *Id.*at 945-46.
[40] *Id.*at 946.
[41] *Id.*
[42] *Id.*
[43] *Id.* at 945 ("The excusal of these jurors amounted to a *sua sponte* mistrial declaration by the trial judge."), 948 ("This effectively constituted a mistrial *sua sponte*….") & 949 ("Having concluded that the trial court effectively declared a mistrial *sua sponte*…."). Butler does not argue – nor could he – that Judge #2 *sua sponte* declared a mistrial.
[44] *Id.* at 949.
[45] *Id.*

proving the "extremely exacting standard" that the court acted in bad faith.[46] Thus, Butler's argument that Judge #2's excusals for cause were the result of a lack of "specific inquiries" and "specific findings" does not, as it did in *Sudler*, bar retrial.

At most, the claims of lack of detailed enough inquiry and findings could be examined as evidence that Judge #2 had bad faith towards Butler. However, it is insufficient to establish bad faith, and Butler fails to point to other evidence of bad faith that meets the "extremely exacting standard." Indeed, when the second *voir dire* leading to Butler's request for mistrial is examined, it is clear Butler failed to meet this heavy burden.[47]

Butler argues that Judge #2 excused Juror #7, who said that he was leaving the country Monday afternoon, "despite the fact the trial may well be over by then and despite Butler's attempt to explain that to the judge." (Op. Brf. at 15 (citing A-37)). However, Butler ignores that when Butler's counsel first started to speak, Judge #2 immediately asked Juror #7 to wait and listened to counsel's comments. (A-37). Butler, likewise, ignores that, at the conclusion of the discussion, his counsel agreed that the defense did not want a juror who would be rushing a decision and made no further argument that Juror #7 should not be excused. (A-37).

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[46] *Compare* 611 A.2d at 949 *with* 930 A.2d at 916.

[47] Butler cannot dispute that the trial judge has broad discretion in determining how and to what extent to conduct *voir dire*. *See, e.g., Ortiz v. State*, 869 A.2d 285, 291 (Del. 2005) (citing *Aldridge v. United States*, 283 U.S. 308, 310 (1931) & *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981)).

Butler next complains that "[t]he judge also automatically dismissed [Juror #16] who simply explained she had a hard time hearing unless the speaker used a microphone." (Op. Brf. at 15). This complaint fails to advance Butler's argument. First, Butler mischaracterizes what Juror #16 said. She did not say she "has a *hard time* hearing unless the speaker used a microphone" she said, "When you're speaking, if not in a microphone, *I can't hear* you." (A-38; A-75) (emphasis added). Not being able to hear and having a hard time hearing present different considerations. And, Butler ignores that he failed to object to the court excusing Juror #16 for cause. (A-38; A-75). Even if Judge #2 could have, or even should have, explored options to allow a hearing impaired juror to continue to serve, the failure to do so does not reflect a bad faith intent to goad Butler into requesting a mistrial.[48]

As to Juror #8, Butler ignores that his counsel's comments show that Butler believed he should be excused for cause. When she was explaining the decision to move for a mistrial, Butler's counsel said that Juror #8 sounded like some type of loan enforcer, was a victim multiple times and was initially dishonest when *voir dired*. (A-39; A-76-78). As a result, Butler cannot reasonably argue that the off-the-record discussion from which the parties came to believe Judge #2 would

[48] *See Dinitz*, 424 U.S. at 611-12 (holding that, even if it was an overreaction to exclude one of defendant's two attorneys from the remainder of trial, the Double Jeopardy Clause did not bar retrial after defendant's request for a mistrial was granted because there was no evidence "that the judge's action was motivated by bad faith or undertaken to harass or prejudice the [defendant].")

likely excuse Juror #8 reveals the judge's bad faith attempt to goad Butler into requesting a mistrial.

Examining the jurors who came forward but were not excused also reveals that Butler failed to prove the trial court's bad faith. Juror #1 was the first of five jurors to approach after the additional *voir dire*. (A-67). She stated that she had approached because of her job. (*Id.*). Judge #2 did not look for a way to excuse Juror #1. Instead, Judge #2 ferretted out that if the court provided her a note to give to her employer, Juror #1 could continue to serve. (A-67-69). Judge #2 agreed to provide a note. (A-69). After Butler requested a mistrial, and the State made a comment suggesting that the court might have excused Juror #1 for cause, Judge #2 again made clear that Juror #1 only needed a note. (A-79).

Similarly, Juror #15's additional questioning reveals that Judge #2 was following her procedure of questioning regarding prior employment of retirees to ferret out conflict rather than simply to find jurors to strike so that Butler would have to request a mistrial. Juror #15 said that he was previously a research scientist and when he said that he did not believe that his prior employment would prevent him from being fair and objective, Judge #2 performed no further questioning and allowed him to remain on the jury. (A-37).

Accordingly, even if this Court reviews the Superior Court's factual finding regarding lack of intent to provoke a mistrial under a *de novo* standard, rather than

a clearly erroneous standard, Butler failed to meet the "extremely exacting standard" of proving that Judge #2 acted with intent to provoke a mistrial. Butler has failed to establish either that Judge #2's failure to record the conferences evidenced bad faith, rather than simply bad judgment, or any other basis for finding the Superior Court excused jurors in bad faith. The Superior Court correctly denied Butler's motion to dismiss, and this Court should affirm.

II. The Superior Court's error in failing to decide Butler's motion to recuse before deciding Butler's motion to dismiss does not require reversal of his conviction.

Question Presented

Whether the Superior Court abused its discretion in denying as moot Butler's letter motion to recuse after deciding Butler's motion to dismiss.

Standard and Scope of Review

This Court reviews denial of a motion to recuse for abuse of discretion.[49]

Merits of the Argument

Butler argues that "Judge #2 abused her discretion when she denied Butler's motion to recuse herself from deciding his motion to dismiss without conducting the required analysis under *Los v. Los*."[50] The State concedes that the Superior Court committed error in deciding the motion to dismiss without first deciding Butler's motion to recuse. Butler's motion to recuse specifically requested Judge #2 recuse herself from consideration of his motion to dismiss.[51] As a result, Judge #2 should have conducted the *Los* analysis and determined whether she was required to recuse herself before deciding Butler's motion to dismiss. However,

[49] *Los v. Los*, 595 A.2d 381, 385 (Del. 1991).
[50] Op. Brf. at 17.
[51] The State also filed a Motion for Judicial Recusal requesting that the judge recuse herself from all further proceedings, including decision on Butler's motion to dismiss, because of an appearance of bias created by Judge #2's failure to record all substantive matters. (A-6, D.I. 44; A-85;). Because the State's motion was filed on the same day that the Superior Court denied as moot Butler's motion to recuse (A6, D.I. 44 & 46), it is not clear whether Judge #2 was aware of the State's motion prior to denying Butler's motion as moot.

the Superior Court's error does not require this Court to reverse Butler's conviction.

It cannot be disputed that a judge other than Judge #2 presided over Butler's January 2013 trial.[52] Butler makes no claim that the judge who presided over his January 2013 trial was not a "fair and impartial judge."[53] Thus, with respect to the trial, it cannot be disputed that Butler received his due process right to a "fair trial in a fair tribunal."[54] Therefore, it would be inappropriate to reverse Butler's conviction for the Superior Court's failure to decide the motion to recuse before deciding the motion to dismiss. At most, the relief to which Butler is entitled for this error at this juncture is that another Superior Court judge decide his motion to dismiss. But that is not the only possible relief.

The State respectfully submits that the Court may address the Superior Court's error in several different ways. First, the Court may remand the case for Judge #2 to conduct the *Los* analysis to determine whether she should have recused herself prior to deciding Butler's motion to dismiss. If the Court proceeds in this manner, the State suggests that the remand order specify that, if Judge #2 determines she was not required to recuse herself prior to deciding the motion to dismiss, the case should immediately return to this Court for review of that

[52] Judge #2 noted denied as moot Butler's motion to recuse, because she was moving to the civil rotation and "Defendant's trial is scheduled for January 29, 2013 and a judge in the criminal rotation will preside over this trial." (Op. Brf. Ex. C).
[53] *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997) (cited by Op. Brf. at 17).
[54] *In re Murchison*, 359 U.S. 133, 136 (1955) (quoted by Op. Brf. at 17).

analysis. Alternatively, should Judge #2 determine that she should have recused herself prior to deciding the motion to dismiss, another Superior Court judge should decide the motion to dismiss before returning the case from remand.

Second, without ordering a remand, this Court may conduct its own objective *Los* analysis to determine whether there was an appearance of bias requiring recusal. Neither Butler nor the State asserted that Judge #2 had an actual bias. (A-89; Op. Brf. at 18 ("It is not alleged that recusal was required under the first, or subjective prong of the *Los* test.")). Instead, the State below and Butler on appeal argued that there was an appearance of bias requiring recusal under the second prong of *Los.* (A-89; Op. Brf. at 18). This Court has previously conducted its own analysis of the second, objective *Los* prong in the absence of such analysis by the court below,[55] and the Court could do so here. If the Court finds that Judge #2 was not required to recuse herself under the objective prong, then the error in failing to decide the motion to recuse before deciding the motion to dismiss was harmless, and the Court would then decide whether the motion to dismiss was correctly denied. If the Court finds Judge #2 should have recused herself, then the State submits the Court has two further options. The Court could remand the case for another Superior Court judge to decide the motion to dismiss anew.

[55] *See, e.g., Fritzinger v. State*, 10 A.3d 603 (Del. 2010). In *Fritzinger,* the defendant learned after trial about information in the CAC tape of the child victim, about which the State and trial judge knew before trial, and which raised a question about the appearance of bias, this Court conducted its own objective analysis and held that reassignment to another judge was required on remand for convictions that were reversed on grounds other than recusal.

Alternatively, if the Court concludes, through a *de novo* review, that the motion to dismiss was correctly denied, then a remand would not be necessary. The State respectfully submits that the Court should follow this last course and affirm Butler's convictions.

CONCLUSION

For the foregoing reasons, the Court should affirm Butler's convictions.

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Dated: September 23, 2013

CERTIFICATE OF SERVICE

I, Karen V. Sullivan, Esquire, do hereby certify that on September 23, 2013, I have caused a copy of the State's Answering Brief to be served via File & ServeXpress upon the following:

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