

**VIRGINIA:**

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 16th day of December, 2021.*

Present: All the Justices.

Commonwealth of Virginia,	Appellant,
against	Record No. 210031
	Court of Appeals No. 1054-19-2
Greg Eugene Minittee,	Appellee.

Upon an appeal from a judgment rendered by the Court of Appeals of Virginia.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is reversible error in the judgment of the Court of Appeals of Virginia.

I.

A grand jury indicted Greg Minittee on two counts of robbery and two counts of use of a firearm in the commission of robbery following separate incidents at a convenience store. His trial on these charges began in the Circuit Court of the City of Richmond on Friday, November 30, 2018, with Judge W. Reilly Marchant presiding. By the end of the day, a jury was empaneled and sworn, and the Commonwealth had called five witnesses in its case-in-chief. Judge Marchant adjourned the proceedings for the weekend, with trial set to resume on Monday.

On Sunday, Judge Marchant's assistant emailed the following message to counsel for the parties:

Hello, unfortunately Judge Marchant injured his back and will be unable to appear in Court to continue the jury trial Monday morning. Therefore, a mistrial will have to be declared. Judge Taylor will take the bench at 10am and declare the mistrial and release the jurors. Judge Marchant hates to have do this and he apologizes profusely. He realizes the problems this may cause, but he is on medication and there is just no way for him to come in to continue the jury [trial]. I am sorry for the inconvenience.

The parties appeared for trial on Monday, with Judge Joi Jeter Taylor presiding. Both Minittee and the Commonwealth objected to a mistrial because their respective witnesses were present and they were prepared to proceed with trial. Minittee asserted no other basis for his objection. Acknowledging the objections, Judge Taylor stated the situation was “unfortunate,” but that Judge Marchant was physically unable to proceed with trial. She then dismissed the jury and declared a mistrial.

At a status hearing on December 13, 2018, the trial court denied Minittee’s motion for bond and continued further proceedings until the January 2019 docket call. Minittee objected to the case being reset for trial on double jeopardy and speedy trial grounds “just for purposes of the record.” The court responded that Minittee could “file a motion” if he chose to do so. Minittee’s new trial date was subsequently set for April 2019.

On March 15, 2019, Minittee filed a motion to dismiss the indictments on double jeopardy grounds. Minittee asserted jeopardy attached when the jury was empaneled and that he neither caused nor consented to the mistrial. Minittee also asserted for the first time that there was no manifest necessity for the mistrial, as required by Code § 8.01-361, because the trial court failed to consider any alternative to a mistrial, such as a continuance or appointment of a substitute judge. The Commonwealth, despite initially objecting to the mistrial, responded there was a manifest necessity for the mistrial because neither a substitute judge nor a continuance was practicable. Moreover, the Commonwealth asserted the court acted with deliberate and conscious reflection, as demonstrated by the statements in Judge Marchant’s email.

On April 3, 2019, Judge Marchant heard argument on Minittee’s motion to dismiss. He noted that, after the first day of trial, he was “neck deep” in “a very complex case.” He had made several pretrial rulings, presided over “a lengthy voir dire,” and heard five prosecution witnesses prior to the mistrial. Marchant opined “it would have been extremely hard for any other Judge to pick up and continue that case.” He also elaborated on his medical condition precipitating the mistrial, stating he

was lying in bed for a week before going to the emergency room on the following Saturday, where I had emergency back surgery on the following Monday, and then was flat on my back for three more weeks. And then when I did come back, I stayed here about an hour a day for another two weeks. So would we have continued the case until February 1st and asked these jurors to remember the evidence from six [sic] witnesses? I wouldn’t have even remembered the evidence from six [sic] witnesses. . . . And how would we

even know how far to continue it, because as this happened, i[t] happened over the course of a week, which ended up with me being in the emergency wagon on a Saturday night going to St. Mary's for emergency surgery after spending a week on my back. . . . And then after the surgery, which was Monday the 10th, it was – The doctor would not even allow me out of the house for two more weeks. . . . I don't know what possible alternative in this real world that you really and realistically are arguing.

Judge Marchant further stated that, as the trial judge, it was his decision to declare a mistrial, and “a manifest necessity for a mistrial exists where the Judge or juror cannot attend because of illness or death.” He explained the reason Judge Taylor was in court in his stead was to actually declare the mistrial because he was “not physically able to do it.”

Minittee asserted the record was devoid of any steps taken by the court before deciding to declare the mistrial. He also asserted Judge Marchant or Judge Taylor could have explained why calling a substitute judge was not possible. Judge Marchant responded:

So from my bed on Percocet, or whatever other medications I'm on, in excruciating pain, four days before emergency back surgery, I'm supposed to be somehow dictating to you all some sort of minute-by-minute medical situation as to why I'm not able to be there so that your client's double jeopardy is not put in double jeopardy?

Marchant also explained the mistrial was for Minittee's “benefit” because another judge would be unfamiliar with the case and Minittee “needs a clean slate . . . when I can be back and be healthy and give him a fair trial.” Marchant observed there was “nothing [the Commonwealth] could have said or done more than what was already done” to establish manifest necessity. Moreover, he disagreed with Minittee's suggestion that the Commonwealth should have requested a continuance, as any error in failing to request a continuance would have been harmless given that Judge Marchant ultimately was unavailable for multiple weeks. The court denied the motion to dismiss.

Minittee thereafter filed a motion to dismiss on statutory and constitutional speedy trial grounds and a motion to recuse Judge Marchant, but the trial court denied both motions. Minittee's second trial began on April 24, 2019. The jury found Minittee guilty on all counts, and he was sentenced to 20 years' imprisonment.

On appeal to the Court of Appeals of Virginia, Minittee challenged the denial of his motion to dismiss on double jeopardy grounds, the motion to dismiss on speedy trial grounds, and the motion to recuse. The Commonwealth responded, in part, that Minittee failed to preserve

for appeal the issue of manifest necessity because the objection to the mistrial that he stated to Judge Taylor was not sufficiently specific.

In a memorandum opinion, the Court of Appeals reversed Minittee's convictions and dismissed the indictments, holding the trial court erred in denying the motion to dismiss on double jeopardy grounds. *Minittee v. Commonwealth*, Record No. 1054-19-2, 2020 WL 7222162, at \*1 (Va. Ct. App. Dec. 8, 2020) (unpublished). As a preliminary matter, the court concluded Minittee had objected with sufficient specificity at trial to preserve his challenge to the propriety of the mistrial declaration. By asserting he was prepared to proceed with trial, "Minittee presented a less drastic alternative to the mistrial in his objection" and therefore "the decision regarding whether to declare the *sua sponte* mistrial was squarely before the trial court." *Id.* at \*2 n.2. The court further observed that, based on the objections by Minittee and the Commonwealth, the trial court "was on notice that the necessity of the mistrial was an issue." *Id.* at \*4.

As to the merits of Minittee's argument, the Court of Appeals determined there was no evidence clearly indicating, at the time of the mistrial, the less drastic alternatives, if any, the trial court considered prior to declaring the mistrial. *Id.* Thus, the record did not support a finding that the mistrial was a manifest necessity, and the court was "left with no other alternative" than to conclude the trial court abused its discretion in declaring a mistrial over Minittee's objection "without detailing its consideration of less drastic alternatives for the record." *Id.* at \*5. The court declined to address Minittee's remaining challenges to the trial court's denial of the motion to dismiss on speedy trial grounds and the motion to recuse because the reversal and dismissal rendered those arguments moot. *Id.* at \*5 n.4.

We awarded the Commonwealth an appeal on the following assignments of error and assignment of cross-error:

#### Assignments of Error

- I. The Court of Appeals erred in finding that Minittee sufficiently preserved the issue of double jeopardy for appeal.
- II. The Court of Appeals erred in determining that the trial judge abused his discretion by declaring a mistrial.

## Assignment of Cross-Error

- I. If this Honorable Court finds that the Court of Appeals erred in finding a violation of Mr. Minittee's double jeopardy rights, then the Court of Appeals also erred in refusing to rule on Mr. Minittee's remaining assignments of error regarding the violation of his speedy trial right, and the trial judge's refusal to recuse himself.

## II.

The Court of Appeals' "interpretation of the Rules of this Court . . . presents a question of law that we review de novo." *Kenner v. Commonwealth*, 299 Va. 414, 428 (2021) (quoting *LaCava v. Commonwealth*, 283 Va. 465, 469-70 (2012)). The contemporaneous objection rule applicable to the Court of Appeals is contained in Rule 5A:18 "and parallels the requirements of the contemporaneous objection rule applicable to this Court" in Rule 5:25. *Maxwell v. Commonwealth*, 287 Va. 258, 264 (2014). Rule 5A:18 provides, in relevant part, that "[n]o ruling of the trial court . . . will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling." *See also* Rule 5:25 (providing same). The Rule "afford[s] the trial judge an opportunity to rule intelligently on objections." *Maxwell*, 287 Va. at 264-65 (internal quotation omitted). When making an objection, "the parties must inform the [trial] court of the precise points of objection in the minds of counsel . . . at a point in the proceeding when the trial court is in a position, not only to consider the asserted error, but also to rectify the effect of the asserted error." *Id.* at 265 (internal quotations and citation omitted).

Applying these principles, we conclude Minittee's objection to the mistrial was insufficient to preserve for appeal his argument concerning the manifest necessity of the mistrial declaration. To preserve the issue of manifest necessity, the contemporaneous objection rule required Minittee to object not only to the mistrial, but to the precise point that a manifest necessity did not exist to declare the mistrial. *See id.* The sole basis for Minittee's objection to the mistrial was that he was prepared to proceed with trial because his witnesses were present. Minittee never asserted there was no manifest necessity for ending his first trial. If Minittee had made a timely objection on such grounds, Judge Taylor would have had an opportunity to consult with Judge Marchant. Based upon Judge Marchant's detailed statements during the April 3 hearing regarding his reasons for determining that a mistrial was necessary, she would have

been able to find there was manifest necessity to declare a mistrial and discharge the jury under Code § 8.01-361.

III.

Because Minittee has waived his challenge to the manifest necessity of the mistrial, the Court of Appeals erred in ruling on the merits of this issue. Consequently, the trial court's ruling on the motion to dismiss on double jeopardy grounds stands. Although Minittee urges this Court to address the merits of his challenges to the trial court's denial of the motion to dismiss on speedy trial grounds and the motion to recuse, consideration of these claims in the first instance is appropriate in the Court of Appeals. *See Nicholson v. Commonwealth*, 300 Va. 17, \_\_\_, 858 S.E.2d 821, 824-25 (2021).

Accordingly, we reverse the judgment of the Court of Appeals and remand to the Court of Appeals for consideration of Minittee's claims regarding the trial court's denial of his motion to dismiss on statutory and constitutional speedy trial grounds and his motion to recuse.

This order shall be certified to the Court of Appeals of Virginia and the Circuit Court of the City of Richmond.

A Copy,

Teste:

A handwritten signature in blue ink, appearing to read "Minittee". The signature is written in a cursive, flowing style.

Clerk