NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JARRETT ALVIN KINLEY	:	
Appellant	:	No. 617 MDA 2025

Appeal from the PCRA Order Entered April 28, 2025
In the Court of Common Pleas of Northumberland County Criminal Division at No(s): CP-49-CR-0000801-2016

BEFORE: BOWES, J., DUBOW, J., and NEUMAN, J.

MEMORANDUM BY BOWES, J.: **FILED: NOVEMBER 19, 2026**

Jarrett Alvin Kinley appeals from the order denying his petition filed pursuant to the Post Conviction Relief Act ("PCRA"). Upon review, we are constrained to vacate Appellant's judgment of sentence, reverse his convictions, and discharge him.

Appellant was charged with various sexual offenses after his daughter, D.K., reported that he molested her over the course of nine years, and raped her during seven of them. D.K. detailed that Appellant's "first actions started shortly after her younger brother was born, and progressed to oral, anal[,] and vaginal intercourse up until she reached the age of sixteen." ***Commonwealth v. Kinley*** ("***Kinley I***"), 251 A.3d 1239, 2021 WL 983020, at *2 (Pa.Super. 2021) (non-precedential decision).

Appellant was represented at trial by Tami Fees, Esquire. As is relevant to the instant appeal:

> Prior to trial, the Commonwealth filed a motion *in limine* to prohibit defense counsel from admitting at trial handwritten pages from journals the complainant kept during the time in question. The Commonwealth claimed the entries either violated the Rape Shield Law, 18 Pa.C.S. [§] 3104, or were otherwise not relevant pursuant to Pa.R.E. 401. The trial court held an *in camera* review of the journal entries and heard argument from the parties on February 6, 2017. By order entered the next day, the trial court granted the Commonwealth's motion in part. The court found "that the journals were not relevant, however, they may be referred to as being kept by the [complainant] and the fact that they contain nothing about the alleged criminal incidents involving [Appellant]." Order, 2/7/17, at 1.

Id. at *1 (footnote and some citations omitted). Generally speaking, "the disputed entries concerned a fantasy relationship [D.K.], who was then [fifteen], was having with a [twenty]-year[-]old man [named Dennis]." ***Id***. at *1 n.2. The entries were written as if to Dennis.

On May 9, 2018, Appellant's first trial commenced with jury instructions and opening statements. Therein, Attorney Fees introduced Appellant's defense that the victim had fabricated the allegations as a means of avoiding Appellant's imposition of consequences when she would get into trouble. Particularly:

> She decided that she did not want to be in trouble. She wanted to date a much older man, someone that was in their [twenties] when she was [fifteen]. And as a result of a father being a good parent, saying that he did not want his child with someone that was [twenty] years older, or not [twenty] years older, I apologize. Who is [twenty] years of age while she was [fifteen]. He tried to stop the relationship, and the result of that were the claims that are being made.

N.T. Trial, 5/8/18, at 16-17. Immediately after Attorney Fees finished her opening statement, the trial court granted the Commonwealth's motion for a

mistrial based upon a finding that "defense counsel's opening remarks violated the Rape Shield Law[.]" ***Commonwealth v. Kinley*** ("***Kinley II***"), 319 A.3d 21, 2024 WL 1526592, at *1 n.1 (Pa.Super. 2024) (non-precedential decision) (cleaned up); ***see also*** Order, 5/9/18 (granting mistrial based upon "the Commonwealth having objected to counsel for the defendant's remarks in her opening statement as a violation of the Rape Shield Law" (unnecessary capitalization omitted)). Although Attorney Fees insisted that her statements did not violate the Rape Shield Law, she did not file a motion to bar retrial on double jeopardy grounds.

A second jury trial was conducted in 2019, wherein the following testimony was presented:

> In addition to the complainant, the Commonwealth called four witnesses: [Sherry Moroz,] a forensic interviewer employed by the Child Advocacy Center, who interviewed the complainant; [Patrick Bruno, M.D.,] an expert in the field of child abuse pediatrics, who testified regarding his physical examination of the complainant; [Ken] Davis, as a fact witness [who conducted a polygraph examination of Appellant]; and a state trooper, who interviewed both the complainant and her mother shortly after the last incident.
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> In his defense, [Appellant] presented testimony from four witnesses: his brother-in-law; the complainant's cousin; his wife, who is also the complainant's mother; and a nurse practitioner, who testified regarding [Appellant]'s history of erectile dysfunction and low testosterone levels. Additionally, [Appellant] testified on his own behalf to deny all of the allegations.

Kinley I, 2021 WL 983020, at *2.

Although no reference to Dennis's age was made at the second trial, the court allowed Appellant to present evidence that his stance on D.K.'s

relationship with Dennis provided her a motive to fabricate the allegations. To that end, Attorney Fees cross-examined D.K. about her relationship with Dennis, whom she denied ever dating and instead described as a friend and confidante. The complainant confirmed that she had addressed her journal entries to Dennis, and that Appellant forbade any communication with Dennis because he did not want her to have a relationship with him.

The jury convicted Appellant of rape by forcible compulsion, rape of a child, involuntary deviate sexual intercourse ("IDSI") by forcible compulsion, IDSI with complainant less than sixteen years of age and assailant at least four years older, incest of a minor when person less than thirteen years of age, and indecent assault when complainant is less than thirteen years of age. The court sentenced Appellant to an aggregate term of thirty to sixty years of incarceration followed by three years of probation, and denied his post-sentence motion.

On direct appeal, Appellant challenged, *inter alia*, the court's rulings in the second trial regarding the Rape Shield Law preventing him from establishing that the victim's attempted relationship with an older man provided her motivation to make up the allegations. According to Appellant, "[d]ue to the trial court's misapplication of the Rape Shield Law, the jury was wrongfully deprived of hearing his defense narrative that the complainant's charges against him were in retaliation for his prohibiting the complainant's relationship with an older male." ***Id***. at *5 (cleaned up). This Court addressed Appellant's argument as follows:

> Although [Appellant] discusses case law regarding the protections and scope of the Rape Shield Law, we need not decide whether the trial court misapplied the statute in this case. Despite the trial court's ruling on this issue, our review of the trial transcript reveals that defense counsel repeatedly presented evidence that this prohibited relationship caused the complainant to make her allegations.
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> . . . [Attorney Fees] cross-examined the complainant regarding "Dennis." In addition, the complainant's mother testified that [Appellant] told her he smashed the complainant's Nintendo because she was talking to some gentleman on the device that she was not allowed to be talking to. According to the complainant's mother, a couple minutes later the complainant disclosed that [Appellant] had been having sex with her since a month after her brother was born.
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> Although the trial court prohibited defense counsel from informing the jury that Dennis was an older man, it is clear that the relationship, and the complainant's alleged motive for making the allegations, were presented to the jury. Given these circumstances, [Appellant] does not explain why he should have been allowed to delve further into the relationship. Moreover, the trial court concluded that there was no actual relationship with Dennis, but merely the complainant's fantasy about one.
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> Contrary to [Appellant]'s claims, the record shows that he did provide evidence that the complainant's charges were merely an act of retaliation against him.

Id. at *5–6 (cleaned up). Ultimately, we affirmed Appellant's convictions but remanded for resentencing.

On August 29, 2022, the court imposed a new aggregate sentence of thirty to sixty years of incarceration without a probationary tail. Appellant did not appeal that sentence to this Court, and his judgment of sentence therefore became final on September 28, 2022. Appellant timely filed his first PCRA petition with the assistance of Stephanie M. Noel, Esquire. In that petition,

he alleged, among other things, that Attorney Fees rendered ineffective assistance by failing to file a motion to bar retrial on double jeopardy grounds pursuant to the United States and Pennsylvania constitutions. Although the court scheduled a hearing, it did not take place for these reasons:

> On June 12, 2023, the Commonwealth filed a motion to dismiss Appellant's petition on the ground that the motion filed by Appellant did not contain the requisite allegations necessary to constitute a PCRA petition but, rather, was a brief containing 186 pages of argument. On June 20, 2023, the PCRA court dismissed Appellant's petition without prejudice.
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> The next day, on June 21, 2023, Appellant filed a response to the Commonwealth's motion to dismiss. On June 26, 2023, the Commonwealth filed a motion to dismiss Appellant's response as moot, which the PCRA court granted on June 28, 2023. On June 30, 2023, Appellant filed a motion to vacate the PCRA court's June 20, 2023 order dismissing his petition without prejudice. On July 17, 2023, Appellant filed a notice of appeal challenging the PCRA court's June 20, 2023 order dismissing his petition without prejudice.

Kinley II, 2024 WL 1526592, at *2 (cleaned up).

The PCRA court did not rule upon the motion to vacate, and the appeal instead proceeded in this Court. After review, we held as follows:

> The PCRA court erred by failing to first provide Appellant notice of the nature of the defects and an opportunity to file an amended petition pursuant to [Pa.R.Crim.P.] 905(B). Therefore, we conclude, as a matter of law, that the PCRA court erred in dismissing Appellant's petition without prejudice. Consequently, we vacate the June 20, 2023 order dismissing Appellant's petition without prejudice and remand this case so the PCRA court may enter an order identifying the defects in Appellant's petition and offering Appellant an opportunity to file an amended petition.

Id. at *4 (cleaned up).

Following remand, the PCRA court neglected to timely comply with our directive. Upon application from Appellant, we ultimately ordered the court to conduct a hearing on the specific defects within Appellant's PCRA petition, and to thereafter allow Appellant the opportunity to amend his petition. On November 26, 2024, the PCRA court held a hearing wherein it identified the prolix nature of Appellant's petition as being problematic but permitted that writing to stand in as Appellant's pre-hearing brief in support of his PCRA petition.

At the ensuing evidentiary hearing, Appellant presented testimony from Attorney Fees and an expert in forensic nursing and forensic sexual assault examination. Regarding the double jeopardy issue, Attorney Fees affirmed her disagreement with the trial court's decision to grant a mistrial because she did not believe her statement violated the Rape Shield Law. ***See*** N.T. PCRA Hearing, 1/17/25, at 87-90. Nonetheless, she admitted that she did not have a strategic reason for why she did not file a motion to bar retrial. ***Id***. at 90.

The PCRA court took the matter under advisement and allowed the parties to brief their positions. On April 28, 2025, the PCRA court entered an order denying and dismissing Appellant's petition. This timely appeal followed. Appellant complied with the court's order to file a Pa.R.A.P. 1925(b) concise statement.[1] Thereafter, the PCRA court authored a response Rule

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[1] We remind the PCRA court that all Rule 1925(b) orders must include the address to which the Appellant may mail the statement on the court. ***See*** Pa.R.A.P. 1925(b)(3)(iii).

1925(a) opinion. In this Court, Appellant presents the following issues for our consideration:

> Did the PCRA court err in denying [Appellant] post-conviction relief where trial counsel provided ineffective assistance of counsel pursuant to Article I, [§] 9 of the Pennsylvania Constitution and the Sixth Amendment to the United States Constitution for:
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> I. failing to move to dismiss and bar retrial on double jeopardy grounds, pursuant to Article 1, [§] 10 of the Pennsylvania Constitution, the Fifth Amendment to the United States Constitution, and Pa.R.Crim.P. 605(B);
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> II. failing to consult with and/or call at trial an expert to rebut or undermine [Dr.] Bruno's testimony that physical findings consistent with sexual abuse supported D.K.'s otherwise entirely uncorroborated allegations of sexual abuse;
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> III. failing to object to various components of expert testimony offered by [Ms.] Moroz on the grounds that such testimony improperly commented on the credibility of the accuser and invaded the province of the jury as sole arbiter of credibility under ***Commonwealth v. Dunkle***, 602 A.2d 830 (Pa. 1992), and/or
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> IV. failing to request a delayed complaint jury instruction?
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> Did the PCRA court likewise err in denying [Appellant] relief in the form of a new trial where [Appellant] demonstrated that the cumulative prejudice from trial counsel's multiple unreasonable strategic failures and omissions rendered his trial fundamentally unfair under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, [§§] 1 and 9 of the Pennsylvania Constitution?

Appellant's brief at 4 (cleaned up).

We begin with Appellant's first issue, which we find dispositive. It is well-settled that "our standard of review regarding an order denying a petition under the PCRA is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error." ***Commonwealth v. Cruz***, 355 A.3d 1, 4–5 (Pa.Super. 2026) (cleaned up). Further, "a court's review of a claim of ineffective assistance of counsel begins with the strong presumption that counsel was effective." ***Commonwealth v. Pacheco***, 340 A.3d 1038, 1041 (Pa.Super. 2025) (cleaned up). To overcome that presumption, a petitioner must establish all three prongs of the ineffectiveness test: "(1) the claim has arguable merit; (2) counsel lacked a reasonable basis for the action/inaction; and (3) prejudice resulted[.]" ***Id***. (cleaned up).

We have elucidated upon these prongs thusly:

> A claim has arguable merit where the factual averments, if accurate, could establish cause for relief. The ultimate question of whether facts rise to the level of arguable merit is a legal determination.
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> Regarding the second prong of the ineffectiveness test, we do not question whether there were other more logical courses of action which counsel could have pursued; rather, we must examine whether counsel's decisions had any reasonable basis. We will conclude that counsel's chosen strategy lacked a reasonable basis only if an appellant proves that an alternative not chosen offered a potential for success substantially greater than the course actually pursued.
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> With respect to the prejudice prong, the petitioner must demonstrate that but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different. A reasonable probability is a probability that is sufficient to undermine confidence in the

> outcome of the proceeding. The prejudice inquiry requires consideration of the totality of the evidence.

Id. at 1042 (cleaned up). Crucially, "failure to prove any one prong of the test will defeat the claim." ***Commonwealth v. Johnson***, 353 A.3d 609, 628 (Pa. 2026) (cleaned up).

In his first issue, Appellant avers that Attorney Fees rendered ineffective assistance by failing to move to dismiss the case and bar retrial on federal and state double jeopardy grounds. ***See*** Appellant's brief at 15. He contends that: (1) the trial court lacked the authority to grant the Commonwealth's request for a mistrial, (2) such remedy was not supported by manifest necessity, (3) a motion to bar retrial would have been successful, and (4) trial counsel could have had no reasonable strategic basis for not moving to dismiss the retrial on double jeopardy grounds. ***Id***. at 15-18.

Thus, our review of this issue is additionally guided by the following legal tenets. Double jeopardy attaches once a jury is empaneled and sworn. ***See Commonwealth v. Walker***, 954 A.2d 1249, 1255 n.7 (Pa.Super. 2008) (*en banc*). "As a general rule, the double jeopardy protections afforded by the United States and Pennsylvania Constitutions are coextensive and prohibit successive prosecutions and multiple punishments for the same offense." ***Commonwealth v. Gross***, 232 A.3d 819, 835 (Pa.Super. 2020) (*en banc*) (cleaned up). Courts across the country have reiterated the import of the protection against double jeopardy in the following manner:

> Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by

> an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed.
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> For these reasons, a prosecutor generally is permitted only one opportunity to compel a defendant to stand trial.

Gilliam v. Foster, 75 F.3d 881, 893 (4th Cir. 1996) (cleaned up).

Nevertheless, "the double jeopardy proscription does not mean . . . that the government is barred from retrying an accused every time an earlier proceeding is terminated prior to judgment." ***Commonwealth v. Clark***, 430 A.2d 655, 659 (Pa.Super. 1981) (cleaned up). Rather, "the question whether under the Double Jeopardy Clause there can be a new trial after a mistrial has been declared without the defendant's request or consent depends on whether there is a manifest necessity for the mistrial." ***Commonwealth v. Boyer***, 347 A.3d 689, 697 (Pa.Super. 2025) (cleaned up); ***see also Gilliam***, 75 F.3d at 893 (reiterating that "when a defendant opposes the grant of a mistrial, he may not be retried unless there was a manifest necessity for the grant of the mistrial or the failure to grant the mistrial would have defeated the ends of justice" (cleaned up)).

This Court has held that "in determining whether the circumstances surrounding the declaration of a mistrial constitute manifest necessity, we apply the standards established by both Pennsylvania and federal decisions." ***Walker***, 954 A.2d at 1254. To wit:

> Whether a grant of a mistrial is manifestly necessary is a question that turns on the facts presented to the trial court. It is not a mechanically applied standard, but rather is a determination that

> must be made in the context of the specific difficulty facing the trial judge. And, while manifest necessity for a mistrial does not require that a mistrial be necessary in the strictest sense of the word, it does require a high degree of necessity.

Gilliam, 75 F.3d at 895 (cleaned up).

We have further explained that we consider the propriety of a court's decision to grant a mistrial in this way:

> The decision to declare a mistrial is within the sound discretion of the court and will not be reversed absent a flagrant abuse of discretion. A mistrial is an extreme remedy that must be granted only when an incident is of such a nature that its unavoidable effect is to deprive [a] defendant of a fair trial. A trial court may remove taint caused by improper testimony through curative instructions. Courts must consider all surrounding circumstances before finding that curative instructions were insufficient and the extreme remedy of a mistrial is required.

Commonwealth v. Manley, 985 A.2d 256, 266 (Pa.Super. 2009) (cleaned up). Moreover:

> Failure to consider if there are less drastic alternatives to a mistrial creates doubt about the propriety of the exercise of the trial judge's discretion and is grounds for barring retrial because it indicates that the court failed to properly consider the defendant's significant interest in whether or not to take the case from the jury. Finally, it is well-established that any doubt relative to the existence of manifest necessity should be resolved in favor of the defendant.

Boyer, 347 A.3d at 696 (cleaned up). In sum, "the determination by a trial court to declare a mistrial after jeopardy has attached is not one to be lightly undertaken, since the defendant has a substantial interest in having his fate determined by the jury first impaneled." ***Commonwealth v. Diehl***, 615 A.2d 690, 691 (Pa. 1992) (cleaned up).

Lastly, we set forth the version of Pennsylvania's Rape Shield Law that was in effect at the time of Appellant's mistrial:[2]

> Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.

18 Pa.C.S. § 3104(a). When applying this law, "'past sexual conduct' has been interpreted to include a complainant's sexual history at any time prior to trial." ***Commonwealth v. McDaniels***, ___ A.3d ___, 2026 WL 1983135, at *2 (Pa.Super. 2026) (cleaned up). The purpose of the Rape Shield Law is "to prevent a trial from shifting its focus from the culpability of the accused toward the virtue and chastity of the victim." ***Id***. (cleaned up).

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[2] The Dissent avers that in conducting this analysis we are inappropriately considering the validity of the court's pre-trial ruling. ***See*** Dissenting Memorandum at 4 n.3. We recognize that the PCRA court, in its Rule 1925(a) opinion, only described the pre-trial motion that it granted as being based on a violation of the Rape Shield Law. ***See*** PCRA Court Opinion, 9/12/25, at 1 (pagination supplied). Respectfully, the PCRA court's post-hoc summary is not supported by the certified record because the trial court did not grant the Commonwealth's pre-trial motion on the basis of the Rape Shield Law violation. As detailed *supra*, the Commonwealth sought to exclude the journal on two alternate grounds: (1) Rape Shield Law and/or (2) relevance. The court explicitly granted the motion in part, finding the contents irrelevant, but permitted introduction of the existence of the journal and that the alleged abuse was not mentioned therein. It made no pre-trial ruling as to whether the admission of the contents would violate the Rape Shield Law. Thus, we are not addressing the validity of an implied pre-trial ruling, but rather the court's explicit reliance upon a violation of the Rape Shield Law as the reason it granted the mistrial. Accordingly, the Dissent's concern is unwarranted.

Here, Appellant argues that the challenged portion of counsel's opening during the first trial could not have violated the Rape Shield Law because statements of counsel are not evidence, and allusions to the victim desiring to date an older person does not touch upon the victim's past sexual activity. ***See*** Appellant's brief at 24-26. Moreover, he emphasizes that the purpose of the Rape Shield Law to prevent the accused from shifting the focus of the trial to the victim's chastity was not implicated in this case because Appellant did not defend the complainant's accusations by claiming that she consented to the alleged sexual conduct. ***Id***. at 26-27. In that vein, he highlights that the court permitted him during the second trial to pursue a defense that the victim fabricated the allegations because Appellant did not want her to have a relationship with Dennis. ***Id***. at 27-28. Finally, he argues that the trial court did not consider less drastic alternatives before granting the remedy of a mistrial, such as providing a corrective instruction. ***Id***. at 31-32.

The Commonwealth in its brief does not claim that counsel's statements violated the Rape Shield Law. Instead, the Commonwealth insists that Appellant is not entitled to the protection against double jeopardy because Appellant violated a pre-trial ruling to exclude the contents of the victim's journal. Specifically, it claims that Attorney Fees "referenced the excluded journal during opening statement, physically displayed it before the jury, and argued that the complainant fabricated the allegations in order to justify an interest in pursuing an older individual[.]" Commonwealth's brief at 6 (citation omitted). Appellant, meanwhile, maintains that the court did not grant the

mistrial based upon defense counsel violating a pre-trial ruling regarding use of the victim's journal entries, and that there was no record evidence that Attorney Fees was holding anything during her opening statement. ***See*** Appellant's brief at 29-31.

We agree with Appellant that there is no indication in the transcript of the first trial that Attorney Fees was holding the journal, nor that the grant of a mistrial had anything to do with the pre-trial ruling about excluding the irrelevant contents of the journal. Indeed, since Attorney Fees was permitted to discuss the existence of the journal, we do not see how, even if she had been holding it, she would have been in violation of the pre-trial ruling. Furthermore, our review belies the Commonwealth's contention that Attorney Fees referenced excluded journal entries during the opening statement.

Rather, the record bears out that the Commonwealth moved for a mistrial based upon its position that counsel's statements about the victim's desire to date an older man violated the Rape Shield Law. Attorney Fees contested that characterization:

> There will be testimony that she was seeing someone and had nothing to do with her dating someone. That does not violate the Rape Shield Act. What it does, in fact, is show what her motive is for making these claims. [The statement about her wanting to date someone] doesn't say that they engaged in anything. She was seeing somebody. That is all. It doesn't violate her Rape Shield Act.

N.T. Trial, 5/8/18, at 19. This explanation clarifies that the basis for mentioning the prohibited relationship in the opening statement was not from

the contents of the journal entries, but anticipated testimony from a witness. In any event, the Commonwealth replied that it was "wholly prejudicial to point to the victim." ***Id***. After dismissing the jury to conduct a sidebar discussion, the trial court explained its decision as follows:

> I am granting the mistrial. What you have attempted to do is shift the burden to chastity of the victim and that's not where it is. I listened to, played back the part of your opening where you stated that she had a relationship with a guy in his [twenties]. First you said in his [twenties], and later you said was [twenty]. In my view, that constitutes an attempt to shift away from the guilt of the defendant to the chastity and virtue of the victim in this case. The mistrial is granted.

Id. at 19-20. Crucially absent was any discussion about the inadequacy of a corrective instruction or other such remedy.[3]

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[3] The Dissent places much emphasis on the PCRA court's Rule 1925(a) opinion in concluding that the trial court considered the alternatives before granting a mistrial. ***See*** Dissenting Memorandum at 5. We find this reliance misplaced. In its opinion, the PCRA court stated that "after taking the oral motion of the Commonwealth under advisement," the court "reviewed the trial transcript and determined that a curative instruction would be insufficient to ensure a fair trial and therefore declared a mistrial." PCRA Court Opinion, 9/12/25, at 3 (pagination supplied). Again, this assertion finds no support in the record. The trial court advised the **jury** that it would recess "for about 15, 20 minutes" and then it dismissed the jury from the courtroom. However, the transcript proceeds immediately to a notation that "[t]rial met pursuant to recess" and recorded what occurred at the sidebar. ***See*** N.T. Trial, 5/8/18, at 19. It was at this sidebar that the court granted the mistrial. The transcript contains no indication that the court recessed for any period of time away from the attorneys, only that it had the jury leave the courtroom while it conducted a sidebar discussion. Certainly, it is possible that the court recessed to chambers to consider the matter and the stenographer simply did not note it. However, we cannot assume that the court considered the matter for any period of time outside the presence of the attorneys where the record does not indicate that it did, nor can we infer that the court considered less drastic

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During the PCRA hearing, Attorney Fees conceded she had no reason not to file a motion to bar retrial. Moreover, this is an instance where, if we determine the issue is meritorious, then prejudice is beyond peradventure because if the motion was successful either in the trial court or on appeal, Appellant would have been discharged instead of proceeding to the second trial where he was convicted. Therefore, the only question is whether Appellant proved the arguable merit prong, which the PCRA court concluded Appellant could not do because "it was defense counsel's opening statements that triggered the mistrial." PCRA Court Opinion, 9/12/25, at 3 (pagination supplied).

Upon review, we cannot countenance the PCRA court's legal conclusions regarding this aspect of the claim. The statements by Attorney Fees during her opening at the first trial simply did not implicate past sexual conduct of D.K. by specific instances, reputation, or opinion. ***Cf. Boyer***, 347 A.3d at 697-98 (affirming mistrial after the defendant testified about, *inter alia*, the victim's engagement in prostitution). Even if the statements may have had the practical effect of casting doubt on the complainant's virtue, the

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alternatives when the record is silent in that regard. ***See Boyer***, 347 A.3d at 696 (reiterating "that any doubt relative to the existence of manifest necessity should be resolved in favor of the defendant" (cleaned up)).

statements themselves did not violate § 3104(a). Indeed, the court permitted Appellant to pursue evidence of this motive in the second trial.[4]

Furthermore, the trial court neglected to consider alternative remedies before granting the Commonwealth's request for a mistrial over Appellant's objection.[5] Conducting such an analysis is critical where the defendant does not request the mistrial. We find ***Walker*** particularly illustrative of the importance of this requirement to the manifest necessity component of double jeopardy jurisprudence.

Walker was charged with sexually assaulting a ten-year-old child. Although the victim had described the incident to medical personnel as including, *inter alia*, digital and penile penetration, she testified at trial that the contact occurred over her swimsuit. After hearing arguments, the court permitted the Commonwealth to question several medical personnel who confirmed that the child had disclosed the occurrence of penetration.

The following day, Walker's counsel presented additional argument against the admissibility of that testimony and the court agreed that its ruling

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[4] While the Dissent would not consider this, we find it instructive insofar as it demonstrates that the court's reliance upon a purported Rape Shield Law violation did not support the manifest necessity required for the grant of a mistrial over Appellant's objection.

[5] The Dissent highlights that Attorney Fees did not object to the mistrial declaration. However, the record bears out that counsel did not concede to the mistrial request and instead argued against it. Therefore, we do not find the timing of her objection to the mistrial fatal to Appellant's ineffectiveness claim regarding the unpursued double jeopardy motion.

the prior day was erroneous. The court then *sua sponte* declared a mistrial, explaining as follows:

> There is going to be a mistrial . . . imposed by the court out of a need to simply separate this case from this jury because of the utter impossibility of this court explaining things and instructing this jury adequately so that they can fairly deliberate to a verdict in the case. There's way too much that has been testified that—that I can't instruct them to ignore at this point in time.

Walker, 954 A.2d at 1252–53 (cleaned up).

Thereafter, Walker filed a motion to bar retrial, which the trial court denied. Before this Court *en banc*, we affirmed the court's order, in pertinent part, because:

> The trial court duly considered the unique facts and procedural posture of the case, determined that there was no way to "unring the bells" with respect to what the jury had heard, stated that curative instructions were impossible due to the amount of testimony already admitted, and found that there was no alternative but to declare a mistrial.

Id. at 1256 (citation omitted).

Unlike in ***Walker***, the trial court in the matter *sub judice* wholly failed to address whether an instruction or other remedy would be adequate to remedy the perceived violation in the opening statement. Absent a violation of the Rape Shield Law and without any discussion about why less drastic measures could not alleviate the court's concerns about counsel's statements in her opening, it is apparent that Appellant's second trial was barred by double jeopardy. ***See Boyer***, 347 A.3d at 696 (holding that "failure to consider if there are less drastic alternatives to a mistrial creates doubt about

the propriety of the exercise of the trial judge's discretion and is grounds for barring retrial" and "any doubt relative to the existence of manifest necessity should be resolved in favor of the defendant" (cleaned up)); ***see also Commonwealth v. Pressley***, 311 A.3d 565, 2023 WL 8453142, at *8 (Pa.Super. 2023) (non-precedential decision) (reversing order denying motion to bar retrial and discharging the appellant where the evidence that formed the basis of the court declaring a mistrial over the defendant's objection was in fact relevant and admissible, thereby "weigh[ing] against manifest necessity[,]" and despite the court considering a curative instruction, it still misapplied the law and therefore abused its discretion (cleaned up)). Having established the arguable merit prong, we conclude that counsel rendered ineffective assistance by failing to file a motion to bar retrial.

Accordingly, we hold that the PCRA court erred in denying this claim. The question, then, is what relief is due to Appellant.

> When a court rules in favor of a PCRA petitioner, "it shall order appropriate relief and issue supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence or other matters that are necessary and proper." 42 Pa.C.S. § 9546.
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> Generally, when a petitioner is granted PCRA relief for ineffective assistance of counsel, a new trial is granted. However, when the ineffectiveness claim arises from trial counsel's failure to raise a proper double jeopardy argument before trial, a new trial would violate the defendant's double jeopardy rights.

Commonwealth v. Young, 35 A.3d 54, 64–65 (Pa.Super. 2011) (cleaned up). Since all other remedies would run afoul of Appellant's protection against

double jeopardy, we are compelled to vacate his judgment of sentence, reverse his convictions, and discharge him.

Given the gravity of these offenses and Appellant's extensive sentence, we do not make this decision lightly. Nevertheless, it is mandated by the constitutional protections afforded to all those who are accused of a crime and deemed innocent by this country and Commonwealth until proven guilty.[6]

Judgment of sentence vacated. Convictions reversed. Appellant discharged.

Judge Dubow joins this Memorandum.

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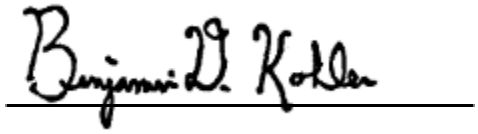
[6] As the Fourth Circuit has aptly elucidated:

> For better or worse, . . . the Double Jeopardy Clause has been construed by the Supreme Court [of the United States] to permit the retrial of a defendant after a mistrial is granted over his objection only when manifest necessity or the ends of public justice compelled that the mistrial be granted, and the Supreme Court has directed reviewing courts to examine the ruling of the trial judge to determine whether sound discretion was exercised in granting the mistrial. Were we to hold otherwise, the protection afforded by the Double Jeopardy Clause would no longer safeguard a defendant's right to have a trial completed by an empaneled jury—a right long held to be encompassed within the protections afforded by the Clause—but would provide protection only against demonstrable prosecutorial or judicial misconduct. Further, the review for sound discretion . . . would be relegated to a ministerial rubber stamp of a state trial judge's decision to grant a mistrial irrespective of the irrationality of that decision. While we abhor the result—because, as in all cases in which the Double Jeopardy Clause bars reprosecution, the defendants will not be held to account for their alleged crimes—our application of the law as we understand it compels us to [reach this result].

Gilliam, 75 F.3d at 903 (cleaned up).

Judge Neuman files a Dissenting Memorandum.

Judgment Entered.



Benjamin D. Kohler, Esq.
Prothonotary

Date: 11/19/2026