

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LUKE MOTTER,

Defendant-Appellant.

UNPUBLISHED

October 1, 1999

No. 206477

Calhoun Circuit Court

LC No. 96-000292 FC

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from a plea-based conviction of second-degree murder, MCL 750.317; MSA 28.549, for which the trial court sentenced him to fifteen to thirty years in prison. We affirm.

I. Basic Facts And Procedural History

Defendant was tried before a jury on the charges of open murder, MCL 767.71; MSA 28.1011, and possession of a firearm during the commission of a felony, MCL 750.227b(1); MSA 28.424(2)(1). The trial ended in a hung jury, and the trial court declared a mistrial. Upon interviewing the jurors after their discharge, counsel were informed by at least one juror that he or she had observed the officer in charge of the case mouthing the word “guilty” during the prosecutor’s closing argument. Defendant then moved to dismiss the charges. The trial court denied the motion but agreed that, upon retrial, the offending officer would be excluded from the courtroom except while testifying. The parties then entered into a plea agreement pursuant to which defendant pleaded nolo contendere to second-degree murder.

II. Preservation Of The Issue; Standard Of Review

Defendant has preserved the issue, having raised it and the trial court having addressed it below. Defendant’s plea does not waive the right to present a double jeopardy claim on appeal. *People v Artman*, 218 Mich App 236, 244; 553 NW2d 673 (1996). “A double jeopardy issue constitutes a question of law that is reviewed de novo on appeal.” *Id.*

III. Double Jeopardy

“If the trial court declares a mistrial after jeopardy has attached, the state is precluded from bringing the defendant to trial a second time, unless the defendant consented to the mistrial or the mistrial was of manifest necessity.” *People v Booker (After Remand)*, 208 Mich App 163, 172; 527 NW2d 42 (1994). Neither the constitutional prohibition against double jeopardy nor the constitutional right to due process precludes retrial after a mistrial is declared because a jury is unable to reach a verdict. *People v Sierb*, 456 Mich 519, 520-521; 581 NW2d 219 (1998); *People v Thompson*, 424 Mich 118, 135-136; 379 NW2d 49 (1985). Similarly, the prohibition against double jeopardy “does not bar retrial where the prosecutor or judge made an innocent error or where the cause prompting the mistrial was outside their control.” *People v Dawson*, 431 Mich 234, 252-253; 427 NW2d 886 (1988) (footnotes omitted). Retrial is, however, barred if the objective facts and circumstances of the particular case indicate that the defendant was goaded into moving for or consenting to a mistrial because of intentional prosecutorial misconduct. *Id.* at 257; *People v Tracey*, 221 Mich App 321, 326; 561 NW2d 133 (1997).

The record in this case indicates that both the trial court and the prosecutor were unaware of the officer’s alleged misconduct until after the trial. Therefore, it cannot be said that defendant was goaded into consenting to the mistrial because of intentional prosecutorial misconduct, especially where, as here, defendant himself was not aware of the alleged misconduct at the time.¹ Accordingly, we find that retrial is not precluded on double jeopardy or due process grounds.

Affirmed.

/s/ Richard A. Bandstra

/s/ Kathleen Jansen

/s/ William C. Whitbeck

¹ We note that there is no indication that defendant ever sought an evidentiary hearing in the trial court regarding the officer’s alleged misconduct.