

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC DELASSALAS,

Defendant-Appellant.

UNPUBLISHED

April 4, 2000

No. 214944

Calhoun Circuit Court

LC No. 98-000782-FH

Before: Gage, P.J., and Meter and Owens, JJ.

PER CURIAM.

Following the declaration of a mistrial, defendant was retried and convicted by a jury of criminal sexual conduct in the third degree pursuant to MCL 750.520d(1)(a); MSA 28.788(4)(1)(a). Defendant was sentenced to 6 to 22½ years of prison. Defendant argues on appeal that his second trial following the mistrial violated the Double Jeopardy Clause. We affirm.

At the beginning of defendant's first trial, after the jury had been impaneled, the prosecutor asked the judge to allow testimony to be taken regarding an alleged prior sexual touching of the victim by defendant. The trial court denied the request because trial was well underway and this was the first time defense counsel had heard of the event.

Subsequently, during the direct examination of the victim, the prosecutor asked if defendant had made a comment previously regarding "[the] attraction he had for you." After defendant objected to the leading nature of the question, the prosecutor asked if defendant was "at all attracted to you physically?" The victim responded: "He had grabbed my boobs before." At that point, defense counsel objected and the jury was sent from the courtroom. Defense counsel then moved for a mistrial on the ground that the prosecutor had elicited the very testimony that the court had earlier ruled could not be introduced. The court granted the motion.

Defendant was brought back before the same judge the next day, and following a one-and-one-half-day trial before a new jury he was convicted of third-degree criminal sexual conduct. Defense counsel failed to object to the retrial on the basis of the Double Jeopardy Clause. Further, no mention was made by defendant of a double jeopardy problem during the second trial. Defendant now asserts

for the first time on appeal that this second trial violated his constitutional right against being tried twice for the same crime contrary to the Double Jeopardy Clause. US Const, Am V; Const 1963, art 1, § 15.

Generally, appellate consideration of unpreserved claims of error is disfavored. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). However, there is some confusion regarding whether a double jeopardy claim is waived if not raised before or during trial. Compare *People v Cooper*, 398 Mich 450, 454-456; 247 NW2d 866 (1976); *People v Richardson Johnson*, 94 Mich App 388, 390; 288 NW2d 436 (1979); and *People v Jones*, 75 Mich App 261, 270-271; 254 NW2d 863 (1977). In any event, this Court may consider unpreserved constitutional claims for the first time on appeal when the alleged error could have been decisive of the outcome. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994); *People v Peerenboom*, 224 Mich App 195, 199; 568 NW2d 153 (1997).

An unpreserved constitutional error is subject to review under the plain error doctrine. *Carines*, *supra* at 764-765. Unless the requirements of the plain error doctrine are met, the defendant's claim of a violation of the Double Jeopardy Clause is forfeited as unpreserved. Defendant must show that (1) an error occurred, (2) the error was "clear or obvious," and (3) the error affected substantial rights. *Id.* at 763. As shown below, no error was committed by subjecting defendant to a second trial. Therefore, defendant's claim of a double jeopardy violation was forfeited.

There was no double jeopardy bar to the second trial. A second trial is not barred where a defendant either requests or consents to a mistrial ending the first prosecution, and that consent is not the result of "goading" from the prosecutor or judge. *People v Hicks*, 447 Mich 819, 828; 528 NW2d 136 (1994). Furthermore, double jeopardy does not bar retrial when "a mistrial results from apparently innocent or even negligent prosecutorial error, or from factors beyond his control." *People v Dawson*, 431 Mich 234, 257; 427 NW2d 886 (1988).

The questioning that led to the victim's reference to the previous touching does not indicate that the prosecutor was intentionally trying to elicit such information. The prosecutor told the trial court that she was attempting to elicit testimony regarding defendant's comment *at the time of the incident* that he had long wanted to have sex with the victim. This is supported by the prosecutor's questioning of the victim during the retrial that elicited from her, without defense objection, the defendant's statement that he had "always wanted to do this." Furthermore, defendant did not contest the prosecutor's assertion that she instructed the victim "not to discuss any other sexual act unless I specifically asked specific questions."

The circumstances do not indicate that the prosecutor intentionally provoked a mistrial. Rather, it appears that the victim's answer was unresponsive to the prosecutor's proper question. Generally, an unresponsive answer to a proper question is not grounds for granting a mistrial. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999), quoting *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). Accordingly, the trial court would have been justified in denying defendant's motion for a mistrial. Where defendant prevailed on his motion, he cannot complain on appeal that a double jeopardy bar to a retrial was raised by the trial court's grant of a requested mistrial. Therefore,

the Double Jeopardy Clause was not violated by holding the second trial. *Hicks, supra* at 827-828; *Dawson, supra* at 257. There being no plain error, defendant's unpreserved claim is forfeited. *Carines, supra*.

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Donald S. Owens