STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED October 23, 2012
v	No. 306148 Wayne Circuit Court
MICHAEL JANUARY, Defendant-Appellee.	LC No. 11-002271

Before: O'CONNELL, P.J., and DONOFRIO and BECKERING, JJ.

PER CURIAM.

The prosecution appeals as of right the trial court's dismissal of the charges against defendant on the basis of double jeopardy. Because the trial court clearly erred by determining that the prosecutor goaded defendant into moving for a mistrial and that retrial was therefore barred, we reverse and remand for a new trial before a different judge.

Defendant was charged with second-degree murder, MCL 750.317, and second-degree child abuse, MCL 750.136b(3), following the death of his girlfriend's three-month-old daughter. After the defense rested during defendant's trial, the prosecutor, Keisha Glenn, stated that she did not wish to call any rebuttal witnesses. The trial court excused the jurors for lunch and engaged in further discussion with the attorneys on the record. At that time, Glenn stated that she wanted to call a hospital social worker to rebut defendant's testimony, and the trial court denied her request. Thereafter, the trial court recessed and Glenn left the courtroom.

As Glenn was walking toward the elevator after leaving the courtroom she saw her supervisor, Lora Weingarden, waiting for an elevator. Weingarden asked Glenn how the trial was going, and Glenn responded that defendant had "lied through his teeth" during his testimony. Unbeknownst to Glenn, juror 14 from the trial was standing nearby and heard Glenn's statement. Larry Polk, with whom defendant's attorney shared office space, heard Glenn make the statement and saw that juror 14 was standing nearby. Polk walked over to Glenn and informed her that a juror was standing behind her. Glenn did not discuss the case further.

After the recess, Glenn informed the trial court about what had occurred in the hallway. Glenn claimed that she did not know that juror 14 was in the hallway and that the juror was not wearing her juror badge. The trial court called juror 14 into the courtroom, and the juror stated that she overheard Glenn say that defendant had lied through his teeth. The juror also stated that

she had told the other jurors what she had heard. The trial court then granted a mistrial at defendant's request:

> *MS. DIALLO [defense counsel]*: Judge, I don't want to do this. I don't want to try this case again, but I would have to ask at this time for a mistrial. And I don't want to have to do it, but that's the only remedy at this time that I can in good conscience on behalf of my client ask for.
>
> *MS. GLENN*: Judge, I certainly agree with defense counsel's position.
>
> It's a very – I certainly in no way intended for this to happen. I did not see her there. She did not have on her badge.
>
> *THE COURT*: It's not her job to wear her badge. It's your job to know who the jurors are and not talk in front of them.
>
> *MS. GLENN*: Well, judge, the way that we know who the jurors are is that they're identified by badges that they're wearing.
>
> I did not intend it, Your Honor. I apologize to the Court. I know that—
>
> *THE COURT*: This is the second time a prosecutor has done this. We have had to call a mistrial because you're talking in the hallway about the case. It's ridiculous.
>
> I am declaring a mistrial and it's completely your fault.

Thereafter, defendant filed a motion to bar retrial based on double jeopardy grounds. Following an evidentiary hearing, the trial court granted the motion. The court determined that Glenn had recognized that juror 14 was present in the hallway and intentionally made the statement about defendant's testimony, knowing that the juror would hear it, in order to goad defense counsel into moving for a mistrial.

The prosecution argues that the trial court erred by determining that Glenn intentionally caused a mistrial and granting defendant's motion on that basis. We review de novo whether a new trial would violate a defendant's constitutional double jeopardy protections. *People v Szalma*, 487 Mich 708, 715; 790 NW2d 662 (2010). We review for clear error the trial court's factual findings, including its determination "whether the prosecutor intended to goad the defendant into moving for a mistrial." *People v Dawson*, 431 Mich 234, 258; 427 NW2d 886 (1988). A finding is clearly erroneous if we are left with a definite and firm conviction that a mistake has been made. *People v Mullen*, 282 Mich App 14, 22; 762 NW2d 170 (2008).

"The United States and Michigan Constitutions prohibit a defendant from being twice placed in jeopardy for the same offense." *People v Echavarria*, 233 Mich App 356, 362; 592 NW2d 737 (1999). "When a mistrial is declared, retrial is permissible under double jeopardy principles where manifest necessity required the mistrial or the defendant consented to the mistrial and the mistrial was caused by innocent conduct on the part of the prosecutor or judge,

or by factors beyond their control." *Id*. at 363. When defense counsel moves for or consents to a mistrial that is caused by innocent conduct, factors beyond the control of the prosecutor or judge, or by defense counsel herself, retrial is generally permitted on the premise that defense counsel waived a double jeopardy claim by moving for or consenting to the mistrial. *People v Gavel***,** 202 Mich App 51, 53; 507 NW2d 786 (1993). A defendant does not waive a double jeopardy claim, however, when the motion for a mistrial is prompted by intentional prosecutorial conduct. *Id*. "[T]he Double Jeopardy Clause bars retrial where prosecutorial conduct was intended to provoke the defendant into moving for a mistrial." *Dawson*, 431 Mich at 253.

> Where a mistrial results from apparently innocent or even negligent prosecutorial error, or from factors beyond [the prosecutor's] control, the public interest in allowing a retrial outweighs the double jeopardy bar. The balance tilts, however, where the judge finds, on the basis of the "objective facts and circumstances of the particular case," that the prosecutor intended to goad the defendant into moving for a mistrial. [*Id*. at 257, citing *Oregon v Kennedy*, 456 US 667, 675-676; 102 S Ct 2083; 72 L Ed 2d 416 (1982).]

In *Dawson*, our Supreme Court determined that the prosecutor's motivation for a new trial and response to the defendant's motion for a mistrial were relevant considerations in determining whether the prosecutor intended to goad the defendant into moving for a mistrial.[1] *Dawson*, 431 Mich at 258-259.

In this case, several of the trial court's factual findings were clearly erroneous, which led to the court's erroneous determination that Glenn intended to goad defense counsel into moving for a mistrial. In particular, the court erred when it found that, "Ms. Glen[n] recognized juror 14 . . . when she entered the elevator hallway and saw Ms. Weingarden, a couple of interns, and a couple of other people, which included [juror 14]." The court gave several reasons to support its finding that Glenn saw juror 14 when she entered the hallway, but its reasoning is replete with factual errors. The court reasoned that Glenn would recognize juror 14 because, not only was juror 14 a juror in the ongoing trial, but she was a "conspicuous" juror because she had been talking to another juror during trial, a fact that had been pointed out to Glenn. At the evidentiary hearing, however, Glenn did not contest that she knew who juror 14 was or that she would have recognized juror 14 on sight. In fact, Glenn testified that when she saw juror 14 in the hallway after she made the statement, she immediately recognized her as a juror, even without a juror badge. Thus, the trial court's finding that Glenn recognized juror 14 as a juror presupposed that Glenn actually saw the juror in the hallway.

The court also reasoned that with only a few people in the hallway, each person would be clearly visible. That finding, however, assumes that juror 14 was already in the hallway when

[1] In *Dawson*, the Court held that retrial was barred because the prosecutor intentionally goaded the defendant into moving for a mistrial. *Dawson*, 431 Mich at 258-259. On appeal, the prosecution conceded that the trial prosecutor intended to cause a mistrial. *Id*. at 258. The Court also noted that the prosecution's case was going poorly and that the prosecutor did not object to the defendant's motion for a mistrial. *Id.* at 258-259.

Glenn approached. No evidence indicates where juror 14 was *when Glenn entered the hallway*.[2] The evidence merely shows that juror 14 was in the hallway *when Glenn made the statement*. The court reasoned that juror 14 must have been in the hallway when Glenn approached because the juror was only two feet away from Glenn when Glenn made the statement, and there was no testimony that juror 14 walked up to Glenn. The court's reasoning is flawed. The fact that juror 14 was standing a few feet from Glenn does not create a reasonable inference that the juror was already there when Glenn walked into the hallway. This is particularly true considering that Glenn, Weingarden, and Polk all testified that juror 14 was standing *behind* Glenn when the statement was made, and not next to Glenn as the court found. Thus, the record does not show that juror 14 was in the hallway when Glenn approached.

The court also found that "Ms. Weingarden asked Ms. Glenn a question and she answered it, knowing that the juror was there, about a foot from her, and knowing the whole hallway would hear what she said." As discussed above, the court clearly erred by finding that Glenn knew that juror 14 was in the hallway. Therefore, this finding, premised on the fact that Glenn saw juror 14 in the hallway, also constituted clear error. For the same reasons, the court erred by finding that "Ms. Glenn intentionally spoke disparagingly about the defendant's testimony in front of a juror to goad the defendant into moving for a mistrial . . . ." Although Glenn acknowledges that she made a disparaging statement in front of the juror, no evidence indicates that she intended to cause a mistrial. Such intent cannot reasonably be inferred based on the facts supported by the record, i.e., that Glenn made the statement while standing in the hallway, that juror 14 was standing a few feet behind her at the time that she made the statement, and that Glenn would have recognized the juror if she had seen her. The circumstances are simply too tenuous to reasonably conclude that Glenn intentionally made the statement in front of juror 14 in order to provoke a mistrial.

Further, the trial court's findings with respect to Glenn's reasons for wanting a mistrial were also clearly erroneous. The court found that the infant's mother did not believe that defendant had intentionally done anything wrong. This finding is wholly unsupported by the record. Although the baby's mother testified that she trusted defendant enough to leave her daughter alone with him and that defendant comforted her after her baby was taken to the hospital, those statements do not show that the mother did not think that defendant had harmed the child. In addition, the court found that the medical examiner's time frame regarding when the injuries occurred did not support the prosecution's case. The medical examiner clearly testified, however, that although the injuries were "fairly recent," he could give no specific time frame regarding when the injuries occurred. Further, although the trial court denied Glenn's request to call a hospital social worker to rebut defendant's testimony, that witness was not critical to the prosecution's case because the statements that defendant made to the social worker were included in the medical records, which had already been admitted during Glenn's case-in-chief. Glenn was able to argue defendant's credibility on those points even without the rebuttal witness. Thus, the denial of the rebuttal witness was not significant enough to cause Glenn to

[2] Juror 14 was never asked when she entered the hallway.

provoke a mistrial. Therefore, the trial court's findings regarding Glenn's reasons for wanting a mistrial were clearly erroneous.

Accordingly, after reviewing the entire record, we are left with a definite and firm conviction that a mistake has been made and that reversal is warranted. Based on the evidence, we conclude that Glenn did not intentionally goad defense counsel into moving for a mistrial because Glenn's actions were not intentional, she did not have significant motivation to cause a mistrial, and, although she did not object to the mistrial, it is clear from the record that she was apologetic when the court declared a mistrial and was not content or satisfied by that result.

Further, we remand this case for retrial before a different judge. This Court "may remand to a different judge if the original judge would have difficulty in putting aside previously expressed views or findings, if reassignment is advisable to preserve the appearance of justice, and if reassignment would not entail excessive waste or duplication." *Bayati v Bayati*, 264 Mich App 595, 602-603; 691 NW2d 812 (2004). All of these considerations are met in this case. Retrial necessarily requires beginning anew, and no resources will be wasted or duplicated. Moreover, retrial before a different judge is warranted because the trial court manifested bias against the prosecutor. After Glenn informed the trial court of what had occurred in the hallway, the trial court remarked, "[t]his is the second time a prosecutor has done this." The court then granted defendant's motion for a mistrial and stated to Glenn, "it's completely your fault." The trial court's frustration that a similar, unrelated incident had previously occurred was evident. The trial court then made factual determinations following the evidentiary hearing that had no record support. Accordingly, in light of the trial court's statements and unsupported findings, and in order to preserve the appearance of justice, we remand for retrial before a different judge.

Reversed and remanded for a new trial before a different judge. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Pat M. Donofrio
/s/ Jane M. Beckering