STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1592

State of Minnesota,
Respondent,

vs.

James Andre Woodard,
Appellant.

Filed November 5, 2012
Affirmed
Hudson, Judge

Hennepin County District Court
File No. 27-CR-10-28700

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, III, Michael Richardson, Assistant County Attorneys, Minneapolis, Minnesota (for respondent)

Jill Clark, Jill Clark, LLC, Golden Valley, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Kalitowski, Judge; and Halbrooks, Judge.

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

Appellant argues that, because the government committed misconduct during his criminal trial, the district court erred by concluding that double jeopardy did not bar his retrial after a mistrial attributable to a hung jury. He additionally argues that retrial is

precluded because the district court also committed misconduct in its evidentiary hearing on the double-jeopardy issue. We affirm.

FACTS

The state charged appellant James Andre Woodard by amended complaint with first-degree assault using a dangerous weapon, prohibited person in possession of a firearm, first-degree attempted murder, and second-degree attempted murder, after a May 2010 shooting in which B.G. was severely injured.

Before trial, the state moved to introduce an out-of-court statement of C.W., a witness who spoke to police shortly after the police dispatch of the incident. The state argued that C.W.'s statements were excited utterances, they were not testimonial, and alternatively, that they fell under the forfeiture-by-wrongdoing exception to the Confrontation Clause because recorded jail calls revealed that appellant and his girlfriend, E.K., attempted to intimidate C.W. from testifying at trial. At an evidentiary hearing, the district court took testimony from the police officer who spoke to C.W.; C.W. did not appear. The district court ruled that the statement fell within the excited-utterance hearsay exception and, after weighing the factors under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004), concluded that the statement was not testimonial and therefore not barred by the Confrontation Clause.

At appellant's jury trial, C.W., who was subpoenaed by the state, failed to appear, and a warrant was issued for his arrest. The jury was unable to reach a verdict, and the district court declared a mistrial. The state declared its intention to retry appellant, and

the defense moved to dismiss based on an asserted violation of double jeopardy. At defense counsel's request, the district court agreed to conduct a hearing on that issue.

At the hearing, appellant argued that the state was precluded from retrying him because the government committed misconduct in the first trial by failing to disclose evidence, intentionally ignoring evidence of an alternative suspect, and intimidating witnesses. Specifically, appellant argued that, although the state alleged that he procured the absence of C.W., in fact the state had intimidated C.W. into not testifying, so that the state could instead introduce C.W.'s out-of-court statement to police, which was more advantageous to the state. Appellant also alleged that, although the first suspect identified by the victim and the police was Andre Wilson, the investigating officer, Sgt. Bruce Kohn, intentionally misdirected the investigation instead to appellant.[1]

Defense counsel stated that she had just received the prosecutor's notes indicating that the prosecutor interviewed C.W. at the county attorney's office during trial. In response, the prosecutor stated that C.W. did not show up on the day he was subpoenaed, the first day of trial; instead, he came to the county attorney's office on the second day of trial; the time he was asked to appear was not a time that he could testify; and he was asked to reappear at a certain time, but did not do so. The prosecutor stated that she had provided her notes to previous defense counsel and that, in any event, the forfeiture-by-wrongdoing motion was a back-up argument so that allegations about C.W.'s

[1] Appellant was also called "Dre." In any event, the district court acknowledged that it was undisputed that the first suspect name aired by police was Andre Wilson.

unavailability were not relevant. The prosecutor also noted that the defense never attempted to call C.W. to testify at trial.

Defense counsel also argued additional government misconduct by witness intimidation. First, the defense argued that when Sgt. Kohn interviewed D.K., the daughter of E.K., the child gave a version of events favorable to appellant during an initial untranscribed portion of the interview, but after pressure from Sgt. Kohn, she changed her version of events to implicate appellant in the second, transcribed portion of the interview. Second, the defense argued that, C.W.–E.J., who is C.W.'s mother, observed intimidation of C.W. Third, the defense argued that S.F., who was present when victim B.G. talked to police, said the first person identified as a suspect was not appellant. D.K., C.W.–E.J., and S.F. did not testify at trial, and defense counsel did not know which witnesses the previous defense attorney had subpoenaed for trial.

S.F., who lived in C.W.'s apartment building, testified at the hearing that she had seen Sgt. Kohn banging on C.W.'s door, calling him a "snitch" and shoving a subpoena under his door. She testified that she overheard voicemails directed to C.W., threatening him with harm if he did not testify on B.G.'s behalf, and that she did not identify appellant as the shooter on the day of the incident.

C.W.–E.J. testified that she recalled seeing police at C.W.'s apartment several times and that she saw police drill the lock off his door, go inside, and find that C.W. was not there. She testified that on one occasion, C.W. told her over the phone that mace was being sprayed in the peephole in his door and she could hear people outside his apartment identify themselves as police. She also testified that C.W. played voicemails to her in

which Sgt. Kohn told C.W. that he had missed appointments, he needed to come in, and he would be locked up until trial so that he could testify.

D.K., E.K.'s daughter, testified that she was interviewed by Sgt. Kohn at her high school without her parents' permission. She testified that she initially told Sgt. Kohn that she did not know what was going on, but after he intimidated her, in the second, recorded part of the interview, she made different statements, some of which were not accurate.

C.W. testified that he did not want to appear at the hearing because he had been harassed by Sgt. Kohn, who beat on his door when police were attempting to obtain a statement and because he spoke to the apartment maintenance man, whom he believed had changed his locks. He testified that on one occasion, mace was sprayed in his peephole, and that officers slid a subpoena under his door. C.W. also stated that he did not want to testify at trial because the neighbor had called him a snitch and he had been threatened by the police and people outside his door, who told him, "[d]on't let me catch you walking nowhere."

C.W. testified that he spoke to the prosecutor and a representative from the county attorney's office the day after trial began, telling them that he felt threatened and refused to testify; and they told him that they would get back in touch, but they never did. He testified that he also felt threatened by Sgt. Kohn's voicemails. He stated that he did not know that his mother had called the building manager, asking for a welfare check on him. He did not recall whether he had told police on the day of the incident that appellant was the shooter because he had been drinking that day, and he did not recall a recorded conversation a day or two later, in which he implicated appellant.

Sgt. Bruce Kohn testified that after he called C.W. three times to schedule an interview and went to his apartment, C.W. declined to be interviewed, and he eventually slid a subpoena under C.W.'s door. He denied that he had called C.W. a snitch and testified that he may have left a voicemail for C.W. but did not threaten him. He testified that he was not involved in a welfare check of C.W., but investigated those events by talking to building maintenance personnel.

Sgt. Kohn testified that he interviewed E.K. once about the incident and that he had referred a possible misdemeanor prosecution of E.K. for making a false report of a crime, but he did not refer a witness-tampering case against C.W. or E.K. He testified that, although he conducted informal and formal interviews with D.K., he did not turn off the tape recorder during those interviews, and he did not threaten or attempt to influence D.K.'s answers. He testified that based on police procedure, the informal portion of the interview was not transcribed, but it was contained on the tape of the complete interview, which was available to both parties.

At the end of the hearing, defense counsel stated that she had mistakenly offered into evidence Exhibit 2, which contained information including a suspect name of "Andre Wilson"; phone calls between E.K. and Sgt. Kohn; and interviews with C.W.–E.J., C.W., D.K., and S.F. But after consulting with her client, she withdrew her objection. Exhibit 8, the question-and-answer portion of Sgt. Kohn's interview with D.K., was also introduced.

The district court issued its order denying the double-jeopardy motion. The district court found that no outrageous police or government misconduct had occurred

that would justify dismissal or prevent appellant's retrial. Specifically, the district court found that the state attempted to subpoena C.W. for trial; that he was not located until after trial; and that although his excited utterance to police identifying appellant as the shooter was admitted, the evidence did not support the theory that government misconduct precluded him from testifying. The district court also found that, although C.W. and his mother alleged various instances of police intimidation, and C.W. expressed displeasure at the frequent police presence in his apartment building, C.W. had previously stated that he was afraid of people in the neighborhood and of B.G. and that these were major factors in his reluctance to testify against appellant. The district court also found that the audiotape of D.K.'s police interview did not support the allegation that her identification of appellant as the shooter resulted from police intimidation or outrageous conduct, and that she did not testify at trial. The district court rejected appellant's theory that police displayed an intent to investigate only appellant by failing to ask relevant questions of S.F.; finding instead that S.F. was uncooperative with police, denied certain statements she made to police, and did not testify at trial. The district court additionally found that the evidence did not support the allegation that E.K. was intimidated by police or the prosecution, finding instead that jail calls between appellant and E.K. showed E.K.'s intent not to cooperate with police; that E.K.'s charge of misdemeanor giving police false information did not constitute police harassment or intimidation; and no indication existed that E.K. was called to testify at trial.

Appellant filed a second motion for a "mistrial" of the double-jeopardy hearing based on government misconduct by the district court. Appellant alleged that the district

court had indicated before the hearing that it would deny relief on the double-jeopardy issue and had improperly considered Exhibit 2. In a separate order, the district court also denied this motion. The district court found that, although the defense had originally moved to admit Exhibit 2, which contained no information prejudicial to the defense, based on defense counsel's later objection to the exhibit, the district court did not consider that exhibit in reaching its decision. This appeal follows.

D E C I S I O N

I

Appellant maintains that the district court erred by denying his motion to bar his retrial, arguing that double jeopardy precludes retrial because the state committed misconduct during his first trial. *See* Minn. R. Crim. P. 28.02, subd. 2(2)(b)(3) (allowing appeal of order denying a motion to dismiss a complaint after a mistrial, when the defendant alleges that retrial would violate double jeopardy). This court reviews legal issues regarding double jeopardy de novo. *State v. Large*, 607 N.W.2d 774, 778 (Minn. 2000). But we review the district court's factual findings concerning whether double jeopardy bars retrial for clear error. *State v. Fuller*, 374 N.W.2d 722, 726 (Minn. 1985).

The Double Jeopardy Clauses of the United States and Minnesota Constitutions bar the government from retrying a criminal defendant if a trial is terminated over a defendant's objection unless a "manifest necessity" existed that the trial be terminated. *Fuller*, 374 N.W.2d at 726 (citing *Oregon v. Kennedy*, 456 U.S. 667, 672, 102 S. Ct. 2083, 2087 (1982)). If a trial is terminated at a defendant's request, the double-jeopardy

clause bars a second trial only if the prosecutor committed misconduct, intending to cause a mistrial. *Id*. (citing *Kennedy*, 456 U.S. at 676, 102 S. Ct. at 2089).

"The prototypical example of manifest necessity is the deadlocked jury . . . . A trial judge's reasonable belief that the jury will be unable to reach a unanimous verdict is the classic reason for a mistrial." *State v. Yeboah*, 691 N.W.2d 87, 91 (Minn. App. 2005) (citation omitted). Therefore, "[r]etrial following the discharge of a hung jury . . . does not violate double jeopardy." *State v. Clifton*, 701 N.W.2d 793, 801 (Minn. 2005) (citing *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580, 6 L.Ed. 165 (1824)).

Appellant argues "that although mistrial by hung jury is an exception to the double jeopardy rule, government misconduct in the first trial is an exception to the hung jury exception." But appellant provides no authority for this position. He cites several cases addressing whether government misconduct precluded retrial after a mistrial that was declared at a defendant's request. *See, e.g.*, *Fuller*, 374 N.W.2d at 722 (concluding that double-jeopardy clause did not bar retrial when a defendant requested and obtained a mistrial following the unintentional or negligent elicitation of inadmissible evidence by the prosecutor); *State v. Lory*, 559 N.W.2d 425 (Minn. App. 1997) (concluding that double jeopardy did not bar retrial when the defendant requested mistrial, based in part on the trial judge's alleged misconduct, when record did not support finding of intentional misconduct), *review denied* (Minn. Apr. 15, 1997). But these cases did not involve a mistrial attributable to a hung jury. Appellant does not argue that the district court abused its discretion by declaring a mistrial based on a hung jury or that he did not consent to the mistrial. *Cf. State v. Hunter*, 815 N.W.2d 518, 522 (Minn. App. 2012)

(concluding that the district court did not abuse its discretion by determining that the jury was deadlocked and did not clearly err by finding that the defendant implicitly consented to the declaration of a mistrial). Therefore, simply stated, because appellant's first trial resulted in a mistrial attributable to a hung jury, his retrial did not violate principles of double jeopardy. *See Clifton*, 701 N.W.2d at 801. We also note that the district court was not even required to hold an evidentiary hearing on his allegations of government misconduct relating to the first trial.

In addition, even if we were to address the merits of appellant's challenge to the district court's denial of his double-jeopardy motion, we would conclude that the district court did not err by denying the motion. This court gives "considerable deference" to the district court's findings regarding the prosecutor's intent and motivation. *State v. Gaitan*, 536 N.W.2d 11, 16 (Minn. 1995) (quotation omitted). The district court's order thoroughly addressed the evidence presented on appellant's allegations of government misconduct, including police and prosecutorial intimidation of witnesses and failure to investigate another potential suspect. Based on our careful review of the evidence, we agree with the district court that these allegations lack merit. The district court's findings are not clearly erroneous, and the district court did not err by denying appellant's motion to bar retrial based on double jeopardy.

II

Appellant asserts that a second double-jeopardy violation occurred because the district court judge failed to act as an impartial decisionmaker during the evidentiary hearing. If "a defendant's mistrial motion is necessitated by judicial or prosecutorial

impropriety designed to avoid an acquittal," reprosecution might be barred. *United States v. Jorn*, 400 U.S. 470, 485 n.12, 91 S. Ct. 547, 557 n.12 (1971). But appellant's motion for relief following the evidentiary hearing is not properly characterized as requesting a mistrial because the hearing was not a proceeding upon which jeopardy may attach. *See Serfass v. United States*, 420 U.S. 377, 391, 95 S. Ct. 1055, 1064 (1975) (stating that jeopardy attaches when a proceeding begins before a tribunal "having jurisdiction to try the question of the guilt or innocence of the accused") (quotation omitted); *see also Black's Law Dictionary* 1023 (8th ed. 2004) (defining mistrial as "[a] trial that the judge brings to an end, without a determination on the merits, because of a procedural error or serious misconduct occurring during the proceedings" or "[a] trial that ends inconclusively because the jury cannot agree on a verdict"). In addition, although "[d]ue process entitles a criminal defendant to an impartial and disinterested tribunal," *McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998) (quotation omitted), we presume "that a judge has discharged his or her judicial duties properly." *State v. Mems*, 708 N.W.2d 526, 533 (Minn. 2006).

Appellant argues that the district court committed misconduct by prejudging his legal position, disparaging his counsel and witnesses, and not permitting his witnesses to testify. We disagree and conclude that appellant's claims are without substance. The district court initially (and understandably) appeared confused by appellant's unusual hearing request and questioned defense counsel on the legal basis for such a hearing, but nevertheless allowed counsel to explain her request and the specific issues raised. The district court permitted all of appellant's witnesses to testify and issued a comprehensive

order based on the evidence. Finally, in response to a post-hearing motion, the district court withdrew from the record an exhibit to which defense counsel objected, even though she had previously approved its submission. We conclude that appellant was not deprived of his right to a fair tribunal at the evidentiary hearing and that principles of double jeopardy do not bar his retrial.

Affirmed.