STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 30, 2009
v	No. 278583 Wayne Circuit Court
DESMOND MAURICE KINDLE, Defendant-Appellant.	LC No. 06-013250-01

Before: Talbot, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

The trial court convicted defendant of four counts of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, discharging a weapon in a building, MCL 750.234b, and possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b(1).[1] Defendant was sentenced to 30 to 50 years for each of the assault with intent to commit murder convictions, two to five years for the felon in possession of a firearm conviction, two to four years for the discharging a weapon in a building conviction, and five years' imprisonment for the felony-firearm, second offense, conviction. We affirm.

A jury trial on the charges commenced on February 26, 2007, but the trial court declared a mistrial due to prosecutorial misconduct on the fifth day of trial. Defendant was retried in a bench trial, which resulted in the present convictions.

[1] Defendant was originally charged with eleven counts: (1) assault with intent to murder, MCL 750.83 (Thomas Kemp), (2) felonious assault, MCL 750.82 (Thomas Kemp), (3) assault with intent to murder, MCL 750.83 (Lacelia Jones), (4) felonious assault, MCL 750.82 (Lacelia Jones), (5) assault with intent to murder, MCL 750.83 (Germaine Clinkscale), (6) felonious assault, MCL 750.82 (Germaine Clinkscale), (7) assault with intent to murder, MCL 750.83 (Christopher Henderson), (8) felonious assault, MCL 750.82 (Christopher Henderson), (9) felon in possession of a firearm, MCL 750.224f, (10) discharging a weapon in a building, MCL 750.234b, and (11) felony-firearm, MCL 750.227b(1). Defendant was acquitted of counts two, four, six, and eight, but convicted of counts one, three, five, seven, nine, ten, and eleven.

Defendant first argues that double jeopardy barred retrial because the first trial ended in a mistrial due to intentional prosecutorial misconduct. We disagree.

At the first trial, the prosecutor asked Officer Charles Zwicker several questions regarding the processing of firearms as evidence in a given case, and in defendant's case in particular. Officer Zwicker testified as follows:

> *Q* [By the prosecutor]. Now, as part of your responsibilities to arrange for the appropriate testing and disposition of the evidence, when you get firearms, do you make some effort to find out more information about the weapon such as check to see who owns them?
>
> *A* [By Officer Zwicker]. Correct.
>
> *Q*. Check to [determine whether] they [are] registered anywhere?
>
> *A*. Correct.
>
> *Q*. Did you do that with . . . [the firearm] identified as [] Henderson's [firearm]?
>
> *A*. Yes, ma'am.
>
> *Q*. Did it in fact - - what did you find out about it?
>
> *A*. When I put it in the computer, it came back as no record originally which means there [was] - - it [had] never been reported stolen or anything like that. And it [had] a registered owner, and it came back as Christopher Henderson.
>
> *Q*. Okay. So even though you knew the gun was surrendered to you either directly or indirectly from [] Henderson you still checked it out?
>
> *A*. Oh, sure.
>
> *Q*. Okay. What about the other two [firearms] that were given to you . . . ?
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> ***
>
> *A*. [Two firearms belonged to] Thomas Kemp. . . . [Both firearms] were [] registered to him. [Neither firearm had a] record of [] ever being stolen.
>
> *Q*. Okay. You also checked the [Torres firearm]?
>
> *A*. Correct.
>
> *Q*. What did you find out about the [Torres]?
>
> *A*. . . . This gun was listed as stolen out of the city of Southfield on . . . August 18, 2006.

At this point, defense counsel requested a side bar. Shortly thereafter, the jury was excused, and defense counsel stated that information regarding the firearms was not included in his discovery package. Defense counsel further argued that evidence that the Torres firearm, purportedly used by defendant to perpetrate the crime, was stolen was inadmissible. Defense counsel insisted that he would have filed a motion in limine to exclude such evidence if he knew that it existed, and therefore, requested that the trial court grant a mistrial in favor of defendant, or at least a curative jury instruction. The prosecutor insisted that defense counsel had received background information for each firearm.

In response to defendant's motion for a mistrial, the trial court held the following:

> [M]anifest necessity require[d] that the [trial] court grant a mistrial . . . because there [was] no curative instruction that the court could remotely conceive of that would vitiate . . . the evidence that was presented that the [firearm], which was then going to be held up by the prosecuting attorney as being one that was wielded and shot by [] defendant, was at that time a stolen [firearm] from a resident in the city of Southfield, [Michigan], and [because] that particular evidence would be extremely prejudicial and harmful to [] defendant, precluding him from obtaining a fair trial in conformity with . . . *People v Drake*, 142 Mich App 357 [370 NW2d 355 (1985)].

Nevertheless, in response to defendant's motion to dismiss the case on the basis of prosecutorial misconduct, the trial court determined that the prosecutor did not intend to goad defendant into moving for a mistrial. Defendant argues that the trial court's rationale for granting a mistrial due to the prosecutor's line of questioning contradicted its rationale for denying defendant's motion to dismiss on the basis of prosecutorial misconduct. However, in *Dawson*, 431 Mich 234, 257; 427 NW2d 886 (1988), the Michigan Supreme Court stated, "Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, therefore, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause." On April 19, 2007, at a hearing on defendant's motion to dismiss, the trial court stated the following:

> The court does [not] feel that the testimony was elicited by the prosecution from [Officer Zwicker,] the police officer that was in charge of this case concerning the fact that the [firearm] was supposedly that of [defendant] was a stolen [firearm from] Southfield was something that was intentionally done by the prosecuting attorney to goad the defendant into motioning [sic] for a mistrial in this case.
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> ***
>
> I know that the court used the term [] prosecutorial misconduct as if it was pointing blame, okay, but in actuality; it was an act of negligence as opposed to intentional wrongdoing if there was that. The court remembers that [the prosecutor] indicated that she was of the firm belief that information concerning the [firearms], and I believe there were three [firearms] - - four [firearms] involved, that all four backgrounds on those [firearms] had been given to defense counsel.

> And I know that [defense counsel] protested that [he] had not been provided any background information concerning the [firearm] that was supposedly identified as being . . . possessed by [defendant] at the time this incident happened. And that [was] the reason I looked through [defense counsel's] file and [defense counsel] willingly allowed me to look through [his] file . . . and if I recall correctly in the terms that [defense counsel has], there were only . . . two [firearms] that were reflected or one in [his] materials.
>
> Now, things happen to where items can become lost. And I know [defense counsel] made a certain representation to me. And I take that at face value. And so, too, I take the representation made to me by [the prosecutor] at face value. I can [not] read between the lines or know as to what in actuality happened.
>
> But suffice it to say, I do [not] think there was really any intentional wrongdoing on the part of either party here. [][T]his was a tragic set of circumstances. And for that reason, []defendant's motion to dismiss premised upon purported prosecutorial misconduct is denied.

During the prior jury trial, the prosecutor insisted that she provided defense counsel with background information for each firearm. Likewise, defense counsel insisted that he never received the documents. Due to the subjective nature of the prosecutor's intent, which, "often may be unknowable, a court -- in considering a double jeopardy motion -- should rely primarily on the objective facts and circumstances." *Dawson, supra* at 254. The trial court concluded that the prosecutor's errors were not intentional on the basis of the objective facts and circumstances.

"A double jeopardy challenge involves a question of law that this Court reviews de novo." *People v Henry*, 248 Mich App 313, 318; 639 NW2d 285 (2001). However, the trial court's "findings [of prosecutorial intent] are subject to appellate review under the clearly erroneous standard." *Dawson*, *supra* at 258 (during oral argument, counsel conceded that trial prosecutor intended to cause a mistrial) (quotations omitted). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is 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), quoting *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006).

"The United States and Michigan Constitutions protect a person from being twice placed in jeopardy for the same offense." *People v Nutt*, 469 Mich 565, 575; 677 NW2d 1 (2004) (citing US Const, Am V; Const 1963, art 1, § 15). "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, 172-173; 527 NW2d 42 (1994).

"It is well established that the Double Jeopardy Clause does not preclude the retrial of a defendant whose conviction is set aside because of any error in the proceedings leading to conviction other than the insufficiency of the evidence to support the verdict." *People v Langley*, 187 Mich App 147, 150; 466 NW2d 724 (1991). In the context of a mistrial, double jeopardy is not a bar to a second trial or retrial if there was a "manifest necessity" for declaring the mistrial. *Oregon v Kennedy*, 456 US 667, 672; 102 S Ct 2083; 72 L Ed 2d 416 (1982); *People v Lett*, 466

Mich 206, 215-217; 644 NW2d 743 (2002). In the case of a mistrial declared at the behest of a defendant, the " 'manifest necessity' standard has no place in the application of the Double Jeopardy Clause." *Kennedy, supra* at 672; see also *Lett, supra* at 215. There is a narrow exception to this rule that arises when the prosecutor acts in a manner intended to goad a defendant into moving for a mistrial, in which case the defendant may raise the bar of double jeopardy to preclude a second prosecution after having proceeded in aborting the first trial on his or her own motion in response to the prosecutor's conduct. *Kennedy, supra* at 673-679; *Lett, supra.*

In the absence of prosecutorial misconduct so intentional and egregious that all other remedies are inadequate, retrial is not barred under the well-settled interpretation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. "Where a mistrial results from apparently innocent or even negligent prosecutorial error, or from factors beyond [her] control, the public interest in allowing a retrial outweighs the double jeopardy bar." *Dawson, supra* at 257. On the basis of the objective evidence in the record, the trial court's determination that the prosecutor did not intend to provoke defendant into moving for a mistrial was not clearly erroneous. *Mullen, supra* at 22.

In his standard four brief, defendant also argues that the prosecutor's presentation of Officer Zwicker's testimony violated his right to a fair trial. We disagree.

This Court reviews constitutional issues de novo. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). "It is well settled that a conviction obtained through the knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment." *Aceval, supra* at 292 (citing *Mooney v Holohan*, 294 US 103, 112; 55 S Ct 340; 79 L Ed 791 (1935)). However, "it is the misconduct's effect on the trial, not the blameworthiness of the prosecutor, which is the crucial inquiry for due process purposes. The entire focus of our analysis must be on the fairness of the trial, not on the prosecutor's or the court's culpability." *Aceval, supra* at 293 (citations and quotations omitted).

Defendant insists that the Torres 40 caliber firearm was analyzed for latent fingerprints upon Officer Zwicker's request and, therefore, Officer Zwicker's testimony that he did not request a fingerprint analysis must have been false. Officer Zwicker testified that he did not request that the Torres 40 caliber firearm to be tested for latent fingerprints because

> The [firearm] had been handled and wrapped in a tablecloth three to four different times. Wrapped and unwrapped three to four different times prior to coming into my custody. At that time I decided from experience that there is no way there would be any readable prints on that [firearm] so I did [not] waste the time.
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> ***

Officer Zwicker testified that he had no expectation that the gun would be dusted for fingerprints because he made no such request. He indicated that he first became aware of the fact that the gun had been dusted for prints after the first trial.

The trial court concluded that "although the officer in charge of the case, Officer Zwicker, had not meant for the [Torres 40 caliber firearm] to undergo fingerprint analysis because it had been handled on several occasions, it was fingerprinted with negative results." Defendant has failed to demonstrate that Officer Zwicker's testimony was false, or consequently, that he was denied a fair trial as a result of the testimony.

Defendant also argues that the prosecutor's presentation of testimony from witnesses, Mario Jones, Eric Draw, and Carla Lancaster violated his right to a fair trial. He contends that the testimony of these witnesses at the bench trial differed from their testimony given at the jury trial and, therefore, the prosecutor violated its duty to correct the false testimony.

"Generally, an issue is unpreserved if it was not properly raised before the trial court." *People v Sands*, 261 Mich App 158, 160; 680 NW2d 500 (2004). At his sentencing hearing, defendant raised several objections, including the allegation that witnesses Lancaster, Mario, and Draw conspired with the prosecutor to present false testimony to the trial court. However, defendant did not raise his issues prior to sentencing. His untimely assertion of his issue resulted in forfeiture, and therefore, this Court shall review defendant's claim for plain error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000); *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). "Under the plain error rule, defendants must show that (1) error occurred, (2) the error was . . . clear or obvious, and (3) the plain error affected [defendant's] substantial rights. Generally, the third factor requires a showing . . . that the error affected the outcome of the trial proceedings." *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006).

Defendant maintains the trial court erred in relying on Draw's allegedly false testimony. However, Draw's testimony at defendant's jury trial, and at defendant's subsequent bench trial was generally consistent. At defendant's bench trial, on cross-examination, Draw testified as follows:

> *Q* [By defense counsel]. So at no time during this statement you made to the police did you ever at any time say oh, by the way, I saw a man and a woman in the men's bathroom?
>
> *A.* That is correct.
>
> *Q.* And you basically for the first time revealed this information when, just before the first trial, is that correct?
>
> *A.* That [is] correct.
>
> *Q.* When you were in the prosecutor's office, is that right?
>
> *A.* That [is] correct.
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>
> *Q.* And Mario Jones was with you at the time, is that right?
>
> *A.* That [is] correct.

Q. And Carla Lancaster[?]

A. That [is] correct.

Q. And the four of you together discussed this bathroom observation, is that right?

A. That [is] correct.

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Q. So when you were being interviewed in [the prosecutor's] office, the question was did you see anybody with the Rock Bottom jacket?

A. No, you are wrong. The question came about was have I seen him. I said well, I seen him before in the bathroom. He was like well, what did he have on? And that is when I said oh, he had on the Rock Bottom jacket.

When defense counsel asked Draw to explain why he had not reported his encounter with defendant near the men's restroom to police officers, Draw replied, "[The restroom incident] was totally irrelevant to the shooting." At defendant's jury trial, defense counsel questioned Draw regarding his statement to police officers, dated November 3, 2006, as follows:

Q [By defense counsel]. You said nothing about seeing a man in the bathroom in your statement; is that correct?

A. That never came up.

Q. And you never volunteered it?

A. As far as me volunteering that information?

Q. Yes?

A. I did [not] volunteer that information because that type of question was [not] asked.

At defendant's bench trial, Mario testified that he observed an altercation on the dance floor. A man in a black Rock Bottom jacket then began shooting. During the shooting, Mario could not discern the gunman's facial features, however, he remembered seeing the same person, defendant, near the men's restroom earlier that night.

At defendant's prior jury trial, Mario testified that the gunman was wearing a black jacket. Mario testified that he observed defendant shooting. Consistent with his bench trial testimony, Mario testified that he could not see the gunman's face during the shooting, but he did see defendant's face earlier that night in the men's restroom. Mario further testified that he determined that defendant was the gunman because he was wearing a black Rock Bottom jacket.

Lancaster's bench trial testimony was generally consistent with her jury trial testimony. Lancaster testified that the gunman was wearing a black jacket, black shirt, and a skullcap. Lancaster also testified that she observed defendant and a woman near the men's restroom prior to the shooting incident. At the jury trial, Lancaster testified that she had dismissed the encounter near the men's restroom as insignificant until she saw the same woman in the courtroom. At the bench trial, Lancaster testified that she recognized the woman from the men's restroom after Lancaster noticed the woman staring at her with an angry countenance throughout the jury trial. However, at the bench trial Lancaster added that the person shooting was the same person that she had seen earlier that night near the men's restroom because he was wearing a black Rock Bottom jacket. An assessment of a witness's credibility is rightfully reposed in the trier of fact. *People v Lemmon*, 456 Mich 625, 646; 576 NW2d 129 (1998). The record is devoid of any evidence that error occurred, that the purported error was obvious, and that it affected defendant's substantial rights. *Pipes, supra* at 279.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra