COURT OF APPEALS
DECISION
DATED AND FILED

June 29, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0373-CR-LV

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

EUGENE KEELER,

DEFENDANT-PETITIONER.

APPEAL from a non-final order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Eugene Keeler appeals from a non-final order denying his motion to dismiss the charges against him for sexual assault of a child, contrary to § 948.02(2) STATS., sexual intercourse with a child age sixteen years or older, contrary to § 948.09, STATS., and felony theft, contrary to §§ 943.20(1)(a), 943.20(3)(c), and 939.05, STATS. He asserts that retrial of his

criminal charges is barred by double jeopardy. We conclude that retrial is not barred because the legal test barring retrials has not been met. The trial court concluded that any prosecutorial misconduct that occurred in the first trial was not done with the intent to provoke the defense into obtaining a mistrial. The record supports this conclusion. Therefore, we affirm.

I. BACKGROUND.

Keeler was charged with three counts of second-degree sexual assault of a child, two counts of sexual intercourse with a child age sixteen or over and one count of felony theft. In October 1993, he was tried and found guilty by a jury as to each count. During the trial, Detective Patricia Kraus (Kraus) sat with the prosecution and the prosecution told the jury she would be "assisting" throughout the trial. After voir dire, the jury was given instructions regarding having no contact with anyone involved in the case. The trial court stated:

> I mentioned that you must not discuss the case with anyone else. You must do what you can to avoid any contact with anyone who's involved in the case …. You've had a chance to see some of the people who are connected to the case. The attorneys know that they shouldn't be talking about the case between themselves or with witnesses anywhere a juror might overhear, but you need to help with this process and do what you can to avoid any contact outside the courtroom.
>
> … What's important is that you not have any discussions or contact, and that everyone do what they can to avoid having you overhear or see something outside of the courtroom that could affect how you look at the case.

During the course of the trial, Kraus engaged in a conversation with jurors in the hallway outside the courtroom. Testimony from the postconviction evidentiary hearing described the encounter as one initiated by Kraus, lasting five

to fifteen minutes, involving some laughter and statements about children, specifically "it's horrible how things like this happen to children."

Also during the course of the trial, Kraus told the prosecutor that a juror had commented to her that she had a bad cold. Kraus claimed this was the only contact she had with a juror. Thinking this contact with a juror was inconsequential, the prosecutor did not advise the defense or the court of the conversation.

After his conviction, Keeler sought postconviction relief, seeking a new trial on the grounds that his trial attorney was ineffective and that Kraus had improper contact with jurors during the trial. This motion was denied by the trial court. Keeler filed a petition with this court, asking that we remand his case to the trial court for an evidentiary hearing. His petition was denied. Keeler then appealed the trial court's decision denying his original postconviction motion. This court affirmed.

In 1997, Keeler filed another postconviction motion with the trial court pursuant to § 974.06, STATS. The trial court denied the motion on several grounds but granted a hearing with respect to the following two issues: (1) whether the detective present at the trial had improper contact with the jurors and (2) whether postconviction counsel was ineffective for failing to file a motion on the issue of improper juror contact. Kraus did not testify at the hearing. In vacating Keeler's convictions and ordering a new trial, the trial court found that Kraus engaged in juror contact to "establish some personal rapport with the jurors." The court continued:

> [T]he detective had an intent to ingratiate. Based on the common sense inferences about someone who reaches the rank of detective and the particular circumstances of this case, it is a rather overwhelming inference that the detective knew that such a conversation was wrong. The police investigation was subject to some significant criticism during the trial, and aside from a desire to curry some favor with the jurors, I can think of no other reason for the detective to risk the consequences of this improper conduct.

After the State made it clear it intended to retry Keeler, he then filed a motion to dismiss his case with prejudice on double jeopardy grounds. The trial court denied the motion.[1] In so doing, the trial court explained:

> From the record as it appears before me, there was misconduct on the part of this detective. I do not believe that it was the kind of conduct that was intended to goad the defense into requesting a mistrial. Neither do I think that the conduct rises to the level where it can fairly be described as an effort to deprive the defendant from having the case decided by the particular jury that had been impaneled.

Keeler now appeals that determination.

II. DISCUSSION.

The Fifth Amendment to the United States Constitution protects against repeated prosecution of a criminal defendant through the double jeopardy clause. It reads: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The Wisconsin Constitution similarly provides: "[N]o person for the same offense may be put twice in jeopardy of punishment." WIS. CONST. art. I, § 8. The protection does

[1] This motion was heard by a different judge than the one granting the motion for a new trial.

not, however, always provide against retrial by the government. *See* ***Oregon v. Kennedy***, 456 U.S. 667, 673 (1982). The circumstances surrounding the termination of the first trial dictate whether the double jeopardy clause bars retrial. *See* ***id.*** at 672-73. Generally, if the defendant moves for a mistrial, retrial is not barred. *See* ***id.*** However, the Supreme Court in ***Kennedy*** "adopted a standard that examines the prosecutor's intent when determining whether retrial is barred where prosecutorial misconduct provokes a defendant to move for a mistrial." ***State v. Lettice***, 221 Wis.2d 69, 81, 585 N.W.2d 171, 177 (Ct. App. 1998).

Unlike the cases ***Kennedy*** covers, in the present case, Keeler was unaware of the misconduct until after the trial, and thus, did not move for a mistrial on that issue. The standard of review in a case such as this was enunciated in ***Lettice***:

> [T]he question of whether the double jeopardy clauses of the United States and Wisconsin constitutions bar retrial, in the absence of a motion for mistrial by the defendant, where … prosecutorial misconduct violates a defendant's protected interests under the double jeopardy clause presents a mixed question of law and fact. Whether constitutional double jeopardy protections apply is a question of law we review *de novo*. Whether a prosecutor intended to provoke a mistrial in order to gain another chance to convict or harass the accused is a question of fact; thus, a trial court's determination that the prosecutor acted with [or without] intent to provoke a mistrial will not be overturned unless it is clearly erroneous.

Id. at 76-77, 585 N.W.2d at 175-76 (citations omitted).

In the present case, relying on ***United States ex rel. Clauser v. McCevers***, 731 F.2d 423, 431 (7th Cir. 1984), the State first argues that Kraus was not an agent of the State when she had improper contact with jurors. In ***Clauser***, the court, in the context of a double jeopardy claim, refused to attribute to the

prosecutor the acts of law enforcement officers who misrepresented evidence to the grand jury, which indicted the defendant. *See* ***id.*** The trial court here found, however, that Kraus was in fact "the agent of the prosecution at the time of the misconduct." This is a finding of fact which is supported by the record. Unlike the officers in ***Clauser***, Kraus was sitting at the prosecution table throughout the trial and the jury was instructed that she would be "assisting" the prosecutor. We will not overturn a factual determination by the trial court unless it is clearly erroneous. ***State v. Yang***, 201 Wis.2d 725, 735, 549 N.W.2d 769, 773 (Ct. App. 1996).

As indicated, the trial court also found that Kraus's actions amounted to misconduct and stated that "there was misconduct on the part of this detective." This is also a factual determination and we conclude it is not clearly erroneous and is supported by the record. *See* ***id.***

Keeler's main contention is that Kraus engaged in the misconduct with the intent to prevent an acquittal that she believed was likely in the absence of her misconduct, and thus, retrial is barred. Keeler claims that the prosecution feared an acquittal and tried, through Kraus, to gain favor with the jurors to prevent this. To support this, Keeler focuses on the trial court's grant of a new trial and its determination that as a defense strategy, "the police investigation was subject to some significant criticism during the trial, and aside from a desire to curry some favor with the jurors, I can think of no other reason for the detective to risk the consequences of this improper conduct." It is not clear, as Keeler contends, that the trial court meant that because Keeler's defense strategy focused on poor police investigation that the prosecution felt threatened by this strategy and wished to cause a mistrial. The trial court which denied Keeler's motion to dismiss determined that the prosecutorial misconduct did not rise to the level

intended to provoke the defendant into requesting a mistrial. The record supports this and Keeler offers nothing, aside from the trial court's own statements, to show otherwise.

The Wisconsin case ***State v. Lettice***, explains "that the circumstances under which such a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." ***Lettice***, 221 Wis.2d at 82, 585 N.W.2d at 178. ***Lettice*** instructs:

> We specifically hold that even in the absence of a motion for mistrial, the double jeopardy clause bars retrial when the prosecutorial misconduct is undertaken, not simply to prevent an acquittal, but to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct.

Id. at 89, 585 N.W.2d at 180. As stated, this presents a question of fact. ***Id.*** at 77, 585 N.W.2d at 175-76. In denying Keeler's motion for dismissal based on double jeopardy, the trial court focused on the issue of intent, and determined that the prosecutor did not possess the intent to provoke the defense to request a mistrial, and that the prosecutor did not believe that the trial would result in an acquittal absent the misconduct.

> From the record as it appears before me, there was misconduct on the part of this detective. *I do not believe that it was the kind of conduct that was intended to goad the defense into requesting a mistrial. Neither do I think that the conduct rises to the level where it can fairly be described as an effort to deprive the defendant from having the case decided by the particular jury* that had been impaneled.

The evidence regarding the circumstances of the misconduct supports the trial court's conclusion.

We conclude that the factual determinations regarding the prosecutor's intent are supported by the record and are not clearly erroneous. We, therefore, further conclude that retrial is not barred by the double jeopardy clauses of the United States Constitution and the Wisconsin Constitution. Accordingly, we affirm.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.