COURT OF APPEALS
DECISION
DATED AND FILED

August 22, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 01-0798-CRLV

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHAD EVERTS,

DEFENDANT-PETITIONER.

APPEAL from an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed*.

¶1 BROWN, J.[1] Chad Everts contends that the prosecutor in this case, assistant district attorney Shelly Rusch, intentionally provoked a mistrial because her case was going badly and, therefore, that double jeopardy attached such that it

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

was error for the trial court to allow the State to retry him. He petitioned for review of the nonfinal order allowing retrial. We granted a stay of the trial and ordered briefing to determine whether we should grant the petition for leave to appeal. We now grant leave but affirm the order on the grounds that the trial court's finding that Rusch did not intentionally provoke a mistrial is not clearly erroneous.

¶2 Everts was charged with misdemeanor battery and disorderly conduct in connection with an assault upon David Greeno. Everts requested a jury trial, and the date of the jury selection was November 8, 2000. On that date, all the witnesses were brought into the courtroom where the trial court ordered them not to speak to one another about the case or to discuss the case with the lawyers in the presence of other witnesses. A jury was empanelled and the trial commenced.

¶3 Everts's theory of defense was that he did not commit the crime and was not present when the crime was committed. Rather, he contended that one Robbie Merriman was the perpetrator. Everts asserted that Merriman's motive in battering Greeno was because Greeno had written sexually suggestive letters to Merriman's little sister. To that end, when the State rested, the defense called several witnesses. First to be called was Merriman. Merriman admitted knowing of the letters but claimed he did not know who sent them.

¶4 Next to be called was Jackie Hanson, who testified that Merriman admitted to beating a man named David and further testified that Merriman described the beating in great detail, which detail was consistent with a police officer's observations of Greeno's injuries. Hanson added that the reason for the beating was "because of some letters that this guy supposedly wrote to his sister."

According to Hanson, Merriman said that Greeno "didn't need to be a pervert towards those little girls. They were too young."

¶5 Stephanie Mazelewski testified next, indicating that she was a witness to the same conversation testified to by Hanson and largely corroborated Hanson's account.

¶6 The fourth witness was Jeremy Vignieri, who testified that he was a friend of Merriman's. He had driven Merriman to the park where the battery occurred and, while he did not claim to witness the fight, he did witness Merriman leaving the scene of the fight. He further testified that he had gone in search of Everts that night, but could not locate him.

¶7 Finally, the defense called Crystal Lyannas, who testified that she personally saw Merriman kick Greeno in the face and head. On cross-examination, when asked why she had not come forward with this information to the district attorney, Lyannas expressed fear of being labeled a "snitch" and said that they will "come after me because people know where I live." She also testified that she was looking for Everts in the park as well, but could not find him.

¶8 Due to the lateness of the hour, the court adjourned further testimony until the morning. The defense wanted to call Jon Cronin, an investigator for the state public defender's office, regarding a prior inconsistent statement of a witness. Rusch, the prosecutor, objected and the court decided to determine the matter in the morning.

¶9 Rusch immediately left the courtroom. Cronin left shortly thereafter. Upon exiting, Cronin was approached by Lyannas, who said that Rusch had approached a group of witnesses—some of whom had yet to testify. Merriman

was in this group that was located outside the courtroom. Rusch told Merriman that Lyannas had just testified that she saw Merriman kicking Greeno in the face. According to Lyannas, Rusch's comment was made in a loud voice and was capable of being heard by all the witnesses.

¶10 The next morning, defense counsel filed a motion for mistrial on grounds of prosecutorial misconduct. Rusch did not contest the historical facts about what took place outside the courtroom. In fact, before the court, she admitted that she had violated a court order, but thought it to be a technicality because she thought that, other than investigator Cronin, the defense had no more witnesses, so the sequestration order had no further benefit. She indicated that the reason for her statement was not to intimidate the other witnesses from fingering Merriman, but to accuse Merriman of not being forthcoming with her. According to Rusch, this was the first time she had heard of Merriman's involvement. She said she was hopeful that Merriman would confess, upon being confronted by her, that he and Everts had both been part of a group involved in the beating.

¶11 The trial court was clearly upset with Rusch. The court stated that for Rusch to "stalk out of here upset about the way things were going and go out and confront a witness out there in a manner in which became violative of the Court's order is a pretty serious matter." The court ruled that Rusch's conduct was improper because she had violated his ruling that she not talk to a witness in front of other witnesses. The court said, "Let's make it clear right now we are going to have adherence to our rules in the courts.… [Y]ou know what I think about exclusionary rules…. But there is a point … that if that's what it takes to insure that things are done the way they are supposed to be done, then that's what we have got to do." For a remedy, the court dismissed the case with prejudice.

¶12 Subsequently, the court heard the State's motion to reconsider. The State, represented by district attorney Robert Jambois, correctly observed that dismissal with prejudice upon a motion for mistrial due to prosecutorial misconduct is the remedy only upon a finding that the prosecution intentionally acted improperly in order to provoke a mistrial because the case was going badly. ***State v. Copening***, 100 Wis. 2d 700, 714, 309 N.W.2d 821 (1981). Jambois acknowledged that Rusch had violated the court's order. But he asserted that, at the time of the original motion to dismiss, the trial court made no historical findings of fact regarding whether Rusch had acted with intent to provoke a mistrial because her case was faltering. Jambois suggested that if the court were to conduct such an analysis, he was convinced that the court would find no intent to provoke a mistrial. The court acknowledged that the State had pronounced the proper test, that it had not conducted the proper test at the time of the original motion to dismiss, and that, as a matter of fact, Rusch had not spoken to Merriman out in the hall on November 8 for the purpose of provoking a mistrial. The court then reversed its ruling. It ordered that Everts stand trial a second time. Everts appeals that finding.

¶13 We begin with our standard of review. This is a constitutional question involving double jeopardy. As such, Everts contends that we should make a de novo finding of fact regarding Rusch's intent based upon the transcript in the record. He cites ***State v. Patricia A.P.***, 195 Wis. 2d 855, 862, 537 N.W.2d 47 (Ct. App. 1995), for the following proposition:

> Where, as here, the facts are undisputed, the application of the United States Constitution to those facts is a question of law, which we decide without deference to the trial court's ruling.

Everts claims that the facts are uncontested and can allow for only one conclusion: that the prosecution's misconduct was aimed at either thwarting an acquittal or securing "another kick at the cat." He asserts that the State's repeated reliance upon the "clearly erroneous" standard is unwarranted where the facts of what happened out in the hallway are undisputed.

¶14 We reject Everts's view of the proper standard of review. The question is not what happened in the hallway, but what motivated Rusch's conduct in the hallway. The undisputed facts occurring in the hallway do not give us any insight, one way or the other, about whether Rusch was intent upon securing a mistrial. And the question of Rusch's intent was not undisputed; indeed, it was hotly debated by Everts's counsel accusing Rusch of intentionally seeking a mistrial and Rusch steadfastly maintaining that there was a totally innocent explanation for her conduct. The question of Rusch's intent was therefore disputed and became a question of fact for the fact finder to decide. The correct standard of review is therefore set forth in ***State v. Hampton***, 207 Wis. 2d 367, 384, 558 N.W.2d 884 (Ct. App. 1996):

> 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 did not act with intent to provoke a mistrial will not be overturned unless it is clearly erroneous.

The immediate problem is that, in this case, the trial court took no testimony under oath from Rusch or otherwise conducted a factual hearing. None was requested by either side. Our review of the transcript informs us that the parties were content with having the court make a determination about Rusch's intent based upon the record that the court already had before it. The trial court therefore looked to the record and immediately focused on Rusch's resistance to the mistrial motion on

November 8 as strong evidence that she was not trying to provoke a mistrial. The court related that Rusch spoke "rather aggressively about her objection to the granting of the mistrial." The court concluded that while Rusch did not persuade the court to forego a grant of mistrial at the time, Rusch's arguments "had persuasive aspects to it." The court thereupon reversed its previous ruling that the case be dismissed with prejudice and ordered that the State be allowed to retry Everts.

¶15 The immediate question is whether we must send this back for a fact-finding hearing on the basis that questions of intent are questions of fact that depend upon credibility determinations.[2] We decide that we should not. The parties were obviously content with the trial court's making a credibility determination based upon the record before it and based upon the trial court's personal observations that had occurred up to that time. What the trial court ultimately chose to do, with no objection, was to take the statements made by Rusch during the hearing on the original motion to dismiss and determine those statements to be truthful and credible. Instead, we will treat the court's decision as a credibility assessment based upon the statements made and conduct shown by Rusch at the November 8 hearing.

¶16 Moreover, the court's conclusions are given deference by this court. We do not know Rusch. The trial court does. The trial court heard the trial and observed the demeanor of the witnesses and the lawyers. The trial court was in the

[2] This discussion forecloses the State's motion that this court declare the appeal frivolous. The State's motion is grounded on the idea that since the standard of review is clearly erroneous and since the trial court's findings are not clearly erroneous, the appeal was a waste. As we see from the discussion, things are not as clear as the State makes them out to be. The State's motion is denied.

best position to make the call about Rusch's intent. We will apply the clearly erroneous standard. While the court referred to Rusch's zealous defense of her actions in the hallway as well as her defense to the accusation that she was trying to provoke a mistrial, the court cited no part of the record to support this finding of zealous defense. When that happens, the appellate court will search the record for evidence to support the trial court's findings of fact. ***Becker v. Zoschke***, 76 Wis. 2d 336, 347, 251 N.W.2d 431 (1977). We have perused the record of the November 8 motion to dismiss with prejudice. This is what we find.

¶17 Rusch said she went out in the hall to confront Merriman because she felt that Merriman had not been forthcoming with her about his involvement. She was not concerned about the other witnesses being around Merriman because she thought that, other than the possible testimony of Cronin, the defense was done with its case. She based this assumption on the fact that the defense witness list had five people on it and five people had testified. She said that had she understood the defense's case to be still pending, she would have been much more careful about how she confronted Merriman. She said that she told Merriman that if he had any contact with any of the witnesses, she would view it as an attempt to intimidate them. She felt that, contrary to the notion that the case was going badly, she had a "really good" chance at impeaching the witnesses on rebuttal. She had a rebuttal witness who saw what really happened. She said numerous times that she wanted the case to go to the jury; she did not want a mistrial. Moreover, we note that the victim knew Everts and identified him as the perpetrator, along with another man he knew as "Kevin."

¶18 The above recitations are evidence from which the trial court could find that Rusch did not think her case was going badly and did not go out into the

hall to confront Merriman with the intention of provoking a mistrial. We affirm the trial court.[3]

¶19 That having been said, we echo the trial court's concerns about Rusch's in-court behavior. The trial court mentioned that Rusch's facial gestures toward certain witnesses and to the court were inappropriate. The trial court was also concerned about Rusch's letting her anger get the best of her such that she stalked out of the courtroom to confront Merriman in front of other witnesses, thus violating the sequestration rule.

¶20 We are also concerned with certain conduct that occurred prior to the start of the jury trial. According to Everts's mother, Rusch called the mother to ask her to convince her son to plead guilty, despite the fact that Everts had retained counsel at the time. When the allegation reached the trial court, the court said that the defense had a choice of either adjourning this matter so that testimony could be taken or dispensing with the allegation and proceeding to trial. Because Everts was being held in county jail at the time for inability to make cash bail, he opted to dispense with the allegation. But, significantly, before the trial court, Rusch admitted that she had called the mother. Rusch justified the call on the basis that

[3] We caution that the prosecutor who is savvy enough to engage in conduct likely to get the defense to object and ask for a mistrial is going to be savvy enough to object to the mistrial when the defense moves for it. If the law were such that mere zealous defense against a mistrial motion were enough for a finding that the conduct was not for the purpose of provoking a mistrial, then the prosecutor would have it both ways. If the motion for mistrial were denied, the prosecutor would get away with the offending conduct. If the motion were granted, the remedy would be limited to a grant of a new trial rather than dismissal with prejudice and the prosecutor would have gotten away from a bad result. We thus reject the idea that a mere defense against a motion to dismiss for prosecutorial misconduct is prima facie evidence that the prosecutor did not intend to provoke a mistrial. Rather, courts must look at each instance on a case-by-case basis and determine the intent of the prosecutor based on the facts at hand. We are satisfied that the trial court conducted the proper analysis in this case.

she thought the mother had some inculpatory information concerning her son and wanted the mother to speak to the son in this regard. Regardless of the fact that we do not think Rusch's explanation makes sense, the call is absolutely prohibited. As Everts points out, it is improper for an opposing lawyer to communicate with a represented party ex parte about the subject matter of the representation without the consent of the other party's lawyer. SCR 20:4.2 (2000). Moreover, Everts correctly cites SCR 20:8.4(a) (2000) for the proposition that what an attorney cannot ethically himself or herself do, he or she cannot induce another to do.

¶21 To all of this, Rusch's response to the trial court was that if anyone thought she had engaged in misconduct, report her to the bar. Our reply is, if a pattern arises and this court documents it, then this court will report her unless the circuit court in Kenosha does it first. We noted a pattern of conduct concerning a former district attorney in Kenosha in ***State v. Ruiz***, 113 Wis. 2d 273, 281-82, 335 N.W.2d 892 (Ct. App. 1983), *rev'd on other grounds*, 118 Wis. 2d 177, 347 N.W.2d 352 (1984). The supreme court eventually reported that district attorney to the bar. ***State v. Ruiz***, 118 Wis. 2d 177, 203 n.5, 347 N.W.2d 352 (1984). The district attorney received a public reprimand as a result. ***In the Matter of Disciplinary Proceedings against Robert D. Zapf***, 126 Wis. 2d 123, 127 N.W.2d 654 (1985). We note that, already, there is ***State v. Robinson***, No. 00-2048-CR, unpublished slip op. (WI App July 3, 2001) (per curiam), where Rusch engaged in improper cross-examination of the defendant, asking him to comment on another witness's truthfulness. We cited the law on that subject and concluded that she had squarely violated the prohibition against conducting this line of questioning.

¶22 The trial court in this case admonished Rusch about following the rules of court. We likewise admonish Rusch.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.