

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD NORMAN PAULOS,

Defendant-Appellant.

UNPUBLISHED
October 15, 1996

No. 167930
LC No. 89-014747

Before: Marilyn Kelly, P.J., and MacKenzie and J.R. Ernst*, JJ.

PER CURIAM.

Defendant pleaded nolo contendere but mentally ill to second-degree murder, MCL 750.317; MSA 28.549 and MCL 768.36(1); MSA 28.1059(1), and was sentenced to ten to fifteen years' imprisonment. He appeals as of right. We affirm.

Defendant argues that his plea was barred by the Double Jeopardy Clause of the state and federal constitutions on the basis that, after his first trial, this Court reversed and remanded for a new trial due to prosecutorial error. We disagree. Defendant is correct that *People v Dawson*, 431 Mich 234; 427 NW2d 886 (1988) bars retrial where a defendant's motion for mistrial is caused by "knowing prosecutorial misconduct that was intended to prejudice the defendant." Defendant's first trial ended in a jury verdict of guilty, not a mistrial, however, and his conviction was reversed for prosecutorial error, not prosecutorial misconduct. *Dawson*, therefore, does not apply in this case. Instead this case involves the general rule, that the Double Jeopardy Clause is not violated where a defendant is retried after his conviction is set aside because of an error in the first trial, unless the error was that there was insufficient evidence of guilt to convict the defendant. *People v Torres*, 452 Mich 43, 74; ___ NW2d ___ (1996), citing *People v Langley*, 187 Mich App 147, 149; 466 NW2d 724 (1991). See also *Dawson, supra*, pp 252-253, 257. Since there is no allegation in this case that there was insufficient evidence to support defendant's conviction, retrial was appropriate and no double jeopardy violation occurred.

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant next argues that he was denied effective assistance of counsel because counsel failed to raise the double jeopardy issue prior to defendant's retrial. Since we have already determined that no double jeopardy violation occurred in this case, this argument is moot.

Affirmed.

/s/ Marilyn Kelly

/s/ Barbara B. MacKenzie

/s/ J. Richard Ernst