

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

WILLIE POWELL,

Defendant-Appellee.

UNPUBLISHED

March 17, 2000

No. 219268

Wayne Circuit Court

LC No. 97-006538

Before: Murphy, P.J., and Hood and Fitzgerald, JJ.

PER CURIAM.

The prosecution appeals as of right from the trial court's order granting defendant's motion to dismiss charges of first-degree and felony-murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; 28.424(2). We reverse.

On February 3, 1997, the owner of the Starkist Market, Steve Mardrosian, was found dead in his store as a result of multiple gunshot wounds to the head. Although the cash register was enclosed behind bulletproof glass, the victim's body was located outside the enclosed area near the coolers. At the preliminary examination, witness Lawrence Reese testified that he smoked crack cocaine with defendant. While they were smoking the crack, defendant admitted to committing the victim's murder.

At trial, the victim's brother, Adel Mardrosian, testified that Steve would only leave the enclosed bulletproof area if a regular customer needed assistance. Adel identified defendant as a regular customer. Prior to calling Reese to testify at trial, the prosecutor advised the trial court that Reese had indicated to the *officer in charge* that he was *refusing to testify*. The prosecutor requested that the trial court allow Reese to state his reasons for refusing to testify at trial on the record. Reese was called and sworn to testify outside the presence of the jury. At that time, Reese admitted that he had testified at the preliminary examination under oath. Furthermore, he had appeared at an evidentiary hearing before the trial court for purposes of identifying defendant through photographs. Reese admitted that he told the judge that he did not want to testify when he appeared at the evidentiary hearing. Reese reiterated that he did not wish to testify at trial because of the problems he was experiencing in prison. Specifically, he had received threats and had been called a "rat" by other

inmates. At the conclusion of this testimony, the prosecutor requested a declaration that Reese was unavailable in order to allow the use of his preliminary examination testimony at trial.

Defense counsel was allowed to cross-examine Reese. At that time, Reese admitted that he had a problem with the prosecutor because he felt that the prosecutor was not protecting him. However, Reese then denied that his problems in prison were the reason for his refusal to testify. Reese testified that he could protect himself. Rather, his “conscience” was bothering him, and “some” of the testimony presented at the preliminary examination was untrue, although he did not give specific details of untruths. On re-direct examination, Reese testified that he was shown a photograph of defendant when police were investigating various robberies. In response, Reese stated “this guy right here just robbed and killed a man at the store.” Reese did not deny that defendant had confessed to the crime. Rather, he denied that he had made certain statements to the police. Reese stated that he had been “coached,” but also acknowledged that he was “high” at the time. The trial court then made inquiry of Reese. Reese told the court that he intended to testify truthfully.

Reese testified before the jury. Upon questioning by the prosecutor, Reese acknowledged that he had given a statement to police and testified at a preliminary examination. During both occasions, Reese stated that defendant had confessed to the victim’s murder. However, upon cross-examination, Reese testified that his testimony at the preliminary examination was not true. At that time, the prosecutor requested that counsel be appointed for Reese to advise him of the potential of committing perjury. Defense counsel objected to the interruption. The defense asserted that the prosecutor was engaging in “clear misconduct” and denying defendant his right of confrontation. The trial court appointed counsel to represent Reese, who exercised his right not to incriminate himself. Consequently, defense counsel moved for a mistrial which was granted. Defendant later moved to dismiss the charges based on double jeopardy. The trial court granted the motion to dismiss, but failed to state a reason or make any finding regarding intentional or innocent conduct by the prosecutor.

The prosecutor contends that the trial court erred in granting defendant’s motion to dismiss the charges. We agree. Whether retrial will violate the constitutional prohibition against double jeopardy presents a question of law which we review de novo. *People v Echavarría*, 233 Mich App 356, 358; 592 NW2d 737 (1999). A defendant may not be twice placed in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15. Jeopardy attaches at the time the jury is selected and sworn. *People v Mehall*, 454 Mich 1, 4; 557 NW2d 110 (1997). Once a trial concludes prematurely, retrial for the same offense is prohibited. *Id.* Where the defendant moves for a mistrial or where the defendant consents to a mistrial, retrial is generally allowed based on the premise that, by moving for or consenting to a mistrial, the defendant waives a double jeopardy claim. *People v Dawson*, 431 Mich 234, 253; 427 NW2d 886 (1988). However, in order to allow the consent exception to apply, the mistrial must be caused by innocent conduct of the prosecutor or trial judge or by factors beyond their control. *Id.*

In the present case, defendant contends that he did not consent to a mistrial and intentional prosecutorial misconduct caused him to move for a mistrial. We disagree. Defendant’s characterization of the prosecutor’s actions as misconduct is erroneous. Prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence. *People v Noble*, ___ Mich App ___; ___ NW2d ___

(docket no. 206833, released 12/3/1999). In the present case, Reese had previously expressed an unwillingness to testify. Despite expressing his reservations, the prosecutor states, and defense counsel does not dispute, that Reese identified defendant as the murderer based on a prior conversation. At trial, the prosecutor learned through his officer in charge that Reese was once again expressing an unwillingness to testify. Consequently, the prosecutor requested that the trial court make a record regarding Reese's reservations and rule regarding the use of preliminary examination testimony.

Defendant contends that the prosecutor acted inappropriately because of his knowledge that Reese was recanting his prior sworn testimony. Review of the record reveals that Reese reiterated that defendant had confessed to the crime. Reese, however, took issue with statements made by police officers. Reese stated that he must have been "coached" because certain statements were not made by him. However, Reese had also acknowledged that he was "high" when he spoke to police. At this time, Reese's testimony was essentially consistent. It continued to assert that defendant had killed the victim. Furthermore, there was no indication that defendant had been sworn prior to giving any statement to the police. However, upon appearing before the jury, Reese began to testify that his preliminary examination testimony was untrue. Upon receiving an indication that Reese would recant portions of his *sworn testimony*, the prosecutor requested that the trial court appoint counsel for Reese such that he would be apprised of the consequences of recanting preliminary examination testimony. After consulting with an attorney, Reese chose not to testify at trial. While a prosecutor may not intimidate witnesses in or out of court, *People v Layher*, ___ Mich App ___; ___ NW2d ___ (docket no. 208502, released 11/19/ 1999), a prosecutor may inform a witness that false testimony could result in a perjury charge. *Id.* Furthermore, we note that while it is asserted that the prosecutor precluded defendant's cross-examination of Reese, the prosecutor merely objected to the continuation of testimony without advising Reese of the consequences. It was the trial court's determination as to the appropriate course of action, and it concluded that trial would cease until Reese met with an attorney. Accordingly, defendant's contention that retrial is barred due to prosecutorial misconduct is without merit.

Defendant next argues that he did not consent to mistrial, but rather, his motion was premised on the circumstances surrounding the prosecutor's actions. However, where defense counsel clearly indicates an unwillingness to continue a trial, but refuses to acquiesce in the declaration of a mistrial, the defendant effectively consented to discontinuance of the trial by expressly objecting to the trial's continuance. *Echavarria, supra.* Accordingly, retrial is allowed under the circumstances. *Dawson, supra.*

Reversed and remanded. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Harold Hood
/s/ E. Thomas Fitzgerald