

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellant,

UNPUBLISHED  
February 15, 2011

v

WILLIAM EARL BINGLEY,  
Defendant-Appellee.

No. 292227  
Wayne Circuit Court  
LC No. 06-003518-FC

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Before: FITZGERALD, P.J., and MARKEY and BECKERING, JJ.

BECKERING, J. (*dissenting*).

I respectfully dissent. Following a mistrial that both the prosecution and defense agreed was warranted due to the prosecutor's misconduct, the prosecution appeals by right the trial court's order granting defendant's motion to dismiss on the basis of double jeopardy. The question before us is whether the trial court clearly erred by finding that the prosecutor intentionally provoked defendant into requesting a mistrial. Given the objective facts and circumstances of this case, I cannot imagine what the prosecutor could have expected to result from his actions other than a mistrial. Therefore, I disagree with the majority's conclusion that the trial court's factual finding was clearly erroneous, and I would affirm the trial court's May 15, 2009 dismissal order.

As stated by the majority, the United States and Michigan constitutions both preclude double jeopardy. US Const, Am V; Const 1963, art 1, § 15. When a defendant is tried by a jury, jeopardy attaches at the time the jury is selected and sworn. *People v Dawson*, 431 Mich 234, 251; 427 NW2d 886 (1988). If the trial ends before the jury reaches a verdict, the prohibition against double jeopardy may bar a retrial. *Id.* If the defendant moves for or consents to a mistrial "and the mistrial was caused by *innocent conduct* of the prosecutor or judge, or by factors beyond their control, or by defense counsel himself," a retrial is permitted. *Id.*, at 253 (emphasis added). But a retrial is not permitted "where prosecutorial conduct was intended to provoke the defendant into moving for a mistrial." *Id.*, citing *Oregon v Kennedy*, 456 US 667; 102 S Ct 2083; 72 L Ed 2d 416 (1982). Thus, when the court finds from the objective facts and circumstances of the case that the prosecutor intended to provoke the defendant into moving for a mistrial, double jeopardy bars retrial. *Dawson*, 431 Mich at 257. The court's determination regarding the prosecutor's intent is a factual finding that is reviewed for clear error. *Id.*, at 258, n 57; MCR 2.613(C).

To best determine whether the prosecutor intended to cause a mistrial in this case, it is necessary to view his actions in context. As the majority accurately summarizes, in 2006, defendant was charged with six counts of first-degree criminal sexual conduct for allegedly engaging in sexual penetration, using his finger or an object, with his ex-girlfriend's daughter between 2002 and December 2005. On Friday afternoon, October 24, 2008, three days before trial was scheduled to begin, the prosecutor filed a delayed notice of intent to introduce other-acts evidence under MCL 768.27a,<sup>1</sup> that defendant also had the complainant view pornographic movies and perform fellatio on him. During preliminary proceedings on the scheduled trial date, defendant objected to the prosecutor's delayed notice, asserting that with the disclosure of the existence of the evidence not coming until 31 months after the filing of the charges, and at the 11th hour before trial, it would be unfair to admit such evidence. In an effort to convince the court that good cause existed for the delayed notice, the prosecutor very clearly and repeatedly represented that he first learned of the fellatio allegation only days earlier. The prosecutor advised the court as follows:

[a]nd basically, it boils down to this. *I did not learn about it until Friday afternoon* when I spoke with the complaining witness. . . . *And in fact to this day, I don't know whether or not the child has told her mother that this, in fact happened.* . . . The good cause is that I didn't know it. [Emphasis added.]

\* \* \*

I don't think it's expected that a lawyer will inquire everyday of a witness, you know, was there anything else you didn't tell me; was there anything else you didn't tell me.

And quite frankly, I think the court and counsel can certainly envision a scenario where that tactic would be turned on its head, and a jury would suddenly now think that the prosecution has been badgering a witness to say the things the prosecution wants the witness to say.

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. . . And in this case, [good cause is] because I didn't know it.<sup>2</sup>

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<sup>1</sup> MCL 768.27a(1) provides in part that “[i]f the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown[.]”

<sup>2</sup> The prosecutor also indicated in the delayed notice filed with the court that his October 24, 2008 pretrial interview with the complainant was “the first time the prosecution learned of this allegation.”

Trial was adjourned because the complainant's school counseling records had not been produced for in camera review as requested by defendant and ordered by the trial court. With regard to the other-acts evidence, the court indicated that it was not satisfied that good cause was shown for the failure to timely disclose the evidence, and thus, it was not inclined to allow it. The court noted that it might reconsider its position should something be found in the complainant's school records that could render the evidence admissible under another court rule.

The prosecutor submitted a motion for reconsideration on December 4, 2009. He again stated that when the complainant disclosed the fellatio incident to him in October 2008, "[i]t was the first time the prosecution learned of this [allegation]" and he argued that because the trial had been adjourned, the 15-day notice requirement set forth in MCL 768.27a was no longer a factor. Although defendant filed a response opposing the prosecutor's motion, he later withdrew his objection as a matter of trial strategy and chose to use the complainant's late disclosure of the fellatio allegation to bolster his defense that all of the allegations were fabricated.

Trial began in March 2009. During opening statements, defense counsel made credibility the cornerstone of the defense. Counsel pointed out the evolving nature of the complainant's allegations, calling her most recent fellatio allegation several years after the acts allegedly occurred "the icing on the cake" establishing that the allegations were fabricated.

The complainant testified that she, her mother, and brother moved in with defendant when she was six years old. They lived with him while she was in the first and second grades. Complainant testified that defendant first molested her when she was seven years old. She described the incidents that were the subject of the charged offenses, which involved defendant's touching her vagina with his finger and a vibrator that complainant described as a "blade." She claimed she counted each time this occurred, and that all six incidents occurred over a one-month period. The prosecutor asked complainant whether defendant ever did "anything else to you that you would think was wrong or ... inappropriate?" Complainant then testified about an incident where defendant watched a pornographic film with her and had her perform fellatio on him. When asked why she had denied kissing a part of defendant's body during her preliminary examination testimony, complainant explained that there is a difference between kissing and licking.

On cross-examination, complainant agreed that when she gets into trouble, her mother, C.B., sometimes hits her with a brush on the bottom of her feet. She admitted that she sometimes makes things up, has gotten into trouble for doing so, and wants to make her mom happy. She agreed that when her family moved out of defendant's home, C.B. was angry at both defendant and defendant's mother, who was suing C.B. for money she owed. Complainant agreed that she knew of her mother's anger before telling anyone defendant had sexually abused her. After defendant's alleged sexual abuse came to light, complainant received therapy. However, she never told her therapist about the fellatio incident. When asked whether she had ever disclosed the fellatio incident to anyone prior to telling the prosecutor when he was preparing her to testify for trial, she stated that she had told her mother the previous year. Although C.B. attended a lot of complainant's therapy appointments with her, C.B. never told the therapists about the fellatio incident. Complainant also agreed that when she met with her pediatrician after she first disclosed that defendant had molested her, she described defendant putting his fingers on her vagina, but she did not tell her doctor about the use of a "blade" or that

defendant made her touch his penis. Complainant testified that defendant used the “blade” on her five times, but when confronted with her preliminary examination testimony, she agreed she had previously testified that defendant used the “blade” only one time. Defense counsel also elicited other instances where complainant’s trial testimony was inconsistent with her preliminary examination testimony, including that at the preliminary examination complainant denied having “ever seen any other part of [defendant’s] body,” which was inconsistent with his having her perform fellatio.

Complainant’s brother testified, as did complainant’s pediatrician.<sup>3</sup> Complainant’s mother, C.B., testified that she and her kids moved into defendant’s house in April 2003. Defendant watched the children after school while C.B. was at work. On December 3, 2005, C.B. and her children left defendant’s home following an incident of domestic violence. C.B. testified that she moved out because defendant no longer wanted her to live there and she did not want to ‘be hassled’ by defendant’s mother about leaving. They went to a homeless shelter for 49 days and then moved into an apartment sometime between January 14 and 17, 2006. A week to ten days after moving into the apartment, the complainant suddenly told C.B. that defendant had touched her inappropriately. C.B. testified to what her daughter told her regarding the charged offenses. C.B. did not immediately take her daughter to a doctor or contact the police.

On cross-examination, defense counsel questioned C.B. regarding several matters that could have either motivated complainant to falsely accuse defendant or motivated C.B. to encourage her daughter to testify falsely. Potential motives included: the deterioration and eventual break-up of C.B.’s relationship with defendant that culminated in a domestic violence incident with defendant being arrested; defendant’s mother telling C.B. she would have to move out of defendant’s home<sup>4</sup>; and defendant’s mother suing C.B. for money she owed. C.B. did not take her daughter to the police until two weeks after she learned of the abuse. She admitted that she had been served with the lawsuit by defendant’s mother on February 3, 2006, the same day she notified police of the alleged sexual abuse by defendant.

To further his theory that complainant’s allegations against defendant were fabricated, defense counsel cross-examined C.B. about the timing of the fellatio disclosure. C.B. changed her testimony several times. She first testified that her daughter probably first told her about the fellatio allegation in 2008. Defense counsel highlighted the delayed disclosure through the following exchange:

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<sup>3</sup> Complainant’s brother testified that he occasionally observed complainant rubbing defendant’s back when he and defendant’s son would go out to play, but he indicated on cross-examination that he and defendant’s son would sometimes rub defendant’s back as well because defendant had been in a car accident. The complainant’s pediatrician testified to what complainant told her during a January 31, 2006 doctor’s visit. Complainant’s physical examination was normal, and there was no history given to her by the mother of any previous incidents of suspected abuse.

<sup>4</sup> C.B. initially admitted that defendant’s mother told her to leave defendant’s home, but later in her testimony she denied this happened and claimed she chose to move out herself.

Q. Well [the fellatio allegation] was certainly was never mentioned to the doctor, right?

A. No

Q. And it was certainly not mentioned to any of the therapist [sic], right?

A. No

Q. And it certainly was not mentioned to the police, right?

A. Correct.

On further cross-examination C.B. changed her testimony and contended that complainant first told her about the fellatio allegation in early 2006, around the time complainant was interviewed by Kids Talk. Then she testified that complainant first told her about it “way after” and “months down the line within [the] same year” as the preliminary examination, which took place on March 17, 2006. She confirmed it was May, 2006. C.B. admitted that complainant had been going to therapy for over two and a half years, that at various times the therapist would have her recount what happened, and that complainant never said anything about defendant having her perform fellatio. C.B. also admitted that she never told any therapist about it either. C.B. then further admitted that she did not tell the prosecutor about the fellatio allegation until October 2008:

Q. You didn’t tell the officer in charge; and you didn’t tell the Prosecutor about that either, did you?

A. I told them, yes I did.

Q. You told [the prosecutor] that in October 2008, just four months ago, correct?

A. Yes.

Q. So this is something that you kept to yourself, kept from the therapist, kept from the police and kept from the Prosecutor for two and a half years; is that correct?

A. Correct.

Upon my review of the record, it appears that defendant effectively cross-examined the prosecution’s witnesses and undermined the prosecutor’s case using the delayed reporting of alleged fellatio.

On redirect examination, the prosecutor attempted to rehabilitate C.B., relying heavily on leading questions. The prosecutor clarified that C.B. took her daughter to the doctor on January 31, 2006, before defendant’s mother had served her with the lawsuit. He asked C.B. to explain why she waited two weeks after complainant revealed the abuse before going to the police, and C.B. stated that she was “in shock.” As for the delayed disclosure of the fellatio allegation, the prosecutor embarked on the following series of leading questions:

Q. ...[y]ou went to the Police Department on February 5th-

A. Yes.

Q. – of 2006? And you went to visit Kids Talk, where [complainant] spoke; is that right?

A. Yes.

\* \* \*

Q. Do you remember talking to me on that date?

A. Yes.

Q. Do you remember talking to Detective Helke on that date?

A. Yes.

Q. *Do you remember telling me about the uh fellatio or the oral sex on that date?*  
[Emphasis added.]

A. Yes.

Q. Okay, you do or you're just saying that—

A. I do.

Q. –because I asked you?

A. I do.

Q. Now that's different than what you testified to right?

A. I think so, yes.

Q. Okay, can you explain what's going through your mind in terms of that issue right now; why would you—

At that moment, the court interrupted the proceedings, called for a side-bar, and then excused the jury from the courtroom. The court noted that the prosecutor's conduct in eliciting from C.B. testimony that she had told him about the fellatio allegation in 2006 "flies in the face" of his repeated representations to the court at the time of the October 27, 2008 hearing, wherein he proclaimed that he had only learned of this allegation three days earlier. Responding to the court, the prosecutor again indicated that he had known about the fellatio allegation since the Kids Talk interviews in February 2006, and asserted that the court was mistaken about his October 2008 representations. When confronted with his motion for reconsideration, the prosecutor claimed that he was "obviously mistaken" when representing in the motion that he had just learned of the fellatio allegation, and while it "obviously" conveys that impression and

“incorrectly perceives my state of mind,” “obviously I knew something!” Defense counsel indicated that he was blind-sided by the revelation and questioned how the prosecutor could know this information for two and a half years, not tell the court or anybody else, and then file a piece of paper with the court representing that he did not become aware of it until October 2008. The court ordered a recess and instructed the prosecutor to “go upstairs and talk to somebody,” presumably his supervisor, about what he had just done and how the court should proceed thereafter.<sup>5</sup>

After the prosecutor returned, defendant moved for a mistrial on the grounds that the prosecutor deliberately and intentionally misrepresented when he first learned of the fellatio allegation, that defendant had relied on the prosecutor’s misrepresentation when he agreed not to oppose the evidence and that defendant was prejudiced by the new revelation that the allegation was first made in February 2006, because its effect was to undercut his defense of fabrication. The trial court initially denied the motion and directed the parties to devise a limiting instruction it could give to the jury. The following morning, after the parties were unable to craft a curative instruction and the prosecution indicated it had no basis to object, the trial court granted defendant’s motion for a mistrial.

Thereafter, defendant filed a motion to dismiss, in which he argued that retrial was barred by double jeopardy because of the prosecutor’s misconduct. The trial court determined that the prosecutor’s actions were intentional in order to achieve a mistrial:

I do believe that [the prosecutor] deliberately misrepresented his knowledge of matters in October and in December. . . . I believe that he made the statement as he did in October and December for the purposes of trying to establish good cause.

I believe that the and I find, I don’t just believe, but I find that the misrepresentations that were made in October and December were relied upon by the Court and by the Defense and that the Defense prepared its case based on those misrepresentations. The Court observed—heard the testimony of all of the People’s witnesses in this matter and the brother’s testimony, the complainant’s testimony and the mother’s testimony was impeached by the [d]efense. The testimony was inconsistent even on direct examination. . . . The complainant’s testimony was impeached by her testimony at the exam stage, it was inconsistent with the testimony of her examining physician, the doctor. The mother’s testimony was inconsistent. The case was . . . certainly going to be a question of

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<sup>5</sup> The prosecutor surreptitiously left an audio recording device in the courtroom, recording the conversation of the judge and others remaining in the courtroom after he left. He then sought to use the recording in order to disqualify the judge, claiming that her angry remarks regarding his conduct showed that she was now biased against him and that he could not receive fair treatment if the case were retried. I respectfully request the prosecutor’s office to evaluate the propriety of such conduct as well as the prosecutor’s actions that give rise to this appeal.

credibility for the triars [sic] of fact. By the time the . . . mother was testifying, she was one of the last witnesses that was going to be called, it was in redirect. The question was and how it was phrased was just totally leading and it was in such direct conflict with what counsel had stated to this Court repeatedly on prior occasion that it literally smacked the Court in the face. . . .

I believe and I do find his actions were intentional to achieve a mistrial.

Although the prosecution disagreed with the trial court's factual finding regarding the prosecutor's intentions, it agreed that given such finding the appropriate remedy was dismissal with prejudice. On appeal, the prosecution challenges the trial court's factual finding that the prosecutor intended to provoke a mistrial.

The fellatio allegation was relevant to the prosecution's case because it allowed the jury to infer that it was more probable that defendant committed the charged sexual acts if he also had the victim perform fellatio. MCL 768.27a; MRE 401; *People v Smith*, 282 Mich App 191, 204; 772 NW2d 428 (2009); *People v Pattison*, 276 Mich App 613, 620; 741 NW2d 558 (2007). In order to admit evidence of the fellatio allegation despite its late disclosure, the prosecutor intentionally and repeatedly told the court and defendant that the allegation first came to light in October 2008. Thereafter, defense counsel relied on the prosecutor's representations regarding the late disclosure to support his theory that the allegations were evolving and fabricated. Given defendant's opening statement, it was clear that defendant was relying on the delayed disclosure of the fellatio allegation as a cornerstone of his defense. Yet the prosecutor made no attempt to notify defendant or the court about his prior knowledge of the allegation until after extensive, and what appears to have been very effective, cross-examination of the prosecution's witnesses regarding the late disclosure. After admission of the evidence appeared to have backfired on the prosecutor, he deliberately and intentionally chose to elicit testimony from C.B.—through leading questions on redirect—that she had told him about the fellatio allegation in 2006. The prosecutor's decision to elicit such testimony was undeniably an attempt to undercut the very theory the prosecutor gave defendant in October 2008, when he misrepresented the timing of the disclosure. Given the superior fact-finding ability of the trial court, MCR 2.613(C); *Dawson*, 431 Mich at 258 n 57, I cannot conclude that the court clearly erred by finding that the prosecutor deliberately provoked a mistrial, as I am unable to discern what he could have anticipated resulting from his actions other than a mistrial.<sup>6</sup> Accordingly, I would affirm the trial court's dismissal order.

/s/ Jane M. Beckering

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<sup>6</sup> In this regard I note the long-standing notion that “[t]he law presumes that an individual intends the natural consequences of his voluntary actions.” *People v Nelson*, 35 Mich App 368, 371; 192 NW2d 682 (1971).