[Cite as *State v. Murphy*, 2019-Ohio-5462.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

BRYANT MURPHY,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 MA 0018

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 16CR345

BEFORE:
Carol Ann Robb, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:
Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor*, Atty. Ralph M. Rivera,* Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Atty. Anthony P. Meranto, 4822 Market Street, Suite 301, Youngstown, Ohio 44512 for Defendant-Appellant.

Dated: December 30, 2019

Robb, J.

{¶1} Defendant-Appellant Bryant Murphy appeals the decision of the Mahoning County Common Pleas Court denying his motion to dismiss on double jeopardy grounds after a mistrial was granted at the request of the defense. Appellant contends the prosecutor's intentional act of speaking to the victim about her testimony while on a lunch break between her cross-examination and redirect examination satisfied the double jeopardy test of prosecutorial misconduct intentionally calculated to cause a mistrial. For the following reasons, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶2} Appellant was indicted for a January 9, 2016 incident reported by a correctional officer at the prison where Appellant was confined. He was charged with the offense of harassment with a bodily substance under R.C. 2921.38 divisions (A) (offender confined in detention facility) and (B) (law enforcement officer as victim), fifth-degree felonies. It was alleged that he squirted a substance containing urine and/or other bodily fluids through the cuff-port of his cell and into the face of the correctional officer with intent to harass, annoy, threaten, or alarm her. A superseding indictment added a repeat violent offender specification and a charge of felonious assault under R.C. 2903.11(A)(1) (knowingly causing serious physical harm), a second-degree felony. The bill of particulars explained that the incident caused the victim to fall (contributing to an eye injury) and resulted in emotional distress requiring psychological treatment.

{¶3} The jury was seated July 30, 2018. On the third day of trial, the victim testified Appellant used a bottle to spray her in the face with what she believed was urine and feces which caused her fall to the floor; the substance entered her mouth and eyes and got on her hair and uniform. (Tr. 32, 36-38). On cross-examination, defense counsel claimed it was untrue that Appellant threw feces at her and referred to test results reporting the tested sample of the substance contained urine. (Tr. 60-62). Defense counsel also asked if the prison considered terminating her, eliciting that her doctor at a

psychological care center recommended she be separated from Appellant (upon her return to work after eye surgery). (Tr. 69-70).

{¶4} After the victim's cross-examination but before redirect, a lunch recess was called at 12:23 p.m. Her testimony resumed at 1:40 p.m., and the court reminded her that she was still under oath. The prosecutor asked the witness if they spoke prior to her taking the stand, and she answered in the affirmative. He then asked if she was informed that testing by BCI found urine in the sample taken from her shirt. (Tr. 139). The prosecutor also asked the victim to explain why defense counsel asked if the prison contemplated terminating her, and she suggested her doctor originally advised her to avoid contact with inmates in general but then wrote a letter recommending she avoid contact with Appellant. (Tr. 140). At this point, defense counsel requested a sidebar, which was not recorded.

{¶5} Returning to the record, the court said defense counsel inquired as to whether the prosecutor spoke to the victim during the lunch break. (Tr. 141-142). The prosecutor disclosed that he went to the victim-witness office with the victim during the break and the victim's doctor was present as she would be testifying next. The prosecutor said the doctor tried to calm the victim down and the doctor's upcoming testimony was discussed. (Tr. 144). He said they also talked about the questions defense counsel posed to the victim and the questions the prosecutor would ask on redirect; the prosecutor insisted he did not coach the witness on her answers. (Tr. 143, 146). When the court asked the victim what they talked about on lunch break, she said she criticized defense counsel. (Tr. 146).

{¶6} Defense counsel opined the situation (of speaking to a witness on break) was akin to a prosecutor asking to speak privately to the witness during her testimony on the stand. He noted he was not accusing the prosecutor of a nefarious or malicious act and acknowledged the meeting may have been conducted with innocent intent. (Tr. 142, 144). Defense counsel argued a mistrial must be declared when a prosecutor speaks to a witness who is under oath on a break in their testimony in the presence of another witness. (Tr. 144).

{¶7} The court granted the motion for a mistrial, stating: "We had an occurrence which I felt, while not nefarious, and while not intended, and while not necessarily

improper, certainly possessed the appearance of impropriety * * *." (Tr. 148). The court memorialized the granting of the mistrial motion in an August 8, 2018 judgment. On December 10, 2018, Appellant filed a motion to dismiss on double jeopardy grounds. He reasoned that although the prosecutor may have been unaware the communication with the sworn witness was improper, it was still an intentional act and the mistrial was entirely attributable to that act.

{¶8} On January 14, 2019, the trial court denied the motion to dismiss. Appellant filed a timely notice of appeal. "[T]he denial of a motion to dismiss on double-jeopardy grounds is a final, appealable order." *State v. Anderson*, 138 Ohio St.3d 264, 2014-Ohio-542, 6 N.E.3d 23, ¶ 26.

ASSIGNMENT OF ERROR: DOUBLE JEOPARDY

{¶9} Appellant's sole assignment of error provides:

"The Trial Court Erred in Granting a Mistrial Rather than Dismissing the Indictment, as Re-Prosecution is barred by Double Jeopardy."

{¶10} Appellant contends a second attempt to prosecute him would violate the double jeopardy clause, claiming the state will gain an unfair advantage by knowing the strengths and weaknesses of its case from the first trial and the state should be precluded from getting a second chance to supply evidence it may not have presented at the first trial. He argues he was entitled to dismissal of the indictment because the mistrial was the result of intentional conduct by the prosecutor and the conduct was improper, even if the prosecutor was mistaken on whether the conduct was appropriate. In arguing the prosecutor's conduct with a sworn witness was improper, Appellant says the defense was prejudiced by the mid-examination strategizing to contradict points made by defense counsel during cross-examination. He believes the situation was worsened by the inclusion of the doctor who had not yet testified (noting the felonious assault offense can be based on psychological harm). Appellant also states the purpose of a witness separation order is to ensure a witness will not collaborate with other witnesses.

{¶11} The double jeopardy clause protects a person from being twice put in jeopardy for the same offense. Fifth Amendment to the U.S. Constitution; Article I, Section 10, Ohio Constitution. As the protections afforded by these two double jeopardy clauses are coextensive, the same analysis applies to double jeopardy claims brought

under either the state or federal constitution. *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, 903 N.E.2d 284, ¶ 14. Although the double jeopardy clause protects a criminal defendant from repeated prosecutions for the same offense, it generally does not bar a retrial after a defendant's motion for a mistrial is granted. *State v. Loza*, 71 Ohio St.3d 61, 71, 641 N.E.2d 1082 (1994), citing *Oregon v. Kennedy*, 456 U.S. 667, 671, 673, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). Essentially, a defendant waives his double jeopardy rights by demanding a mistrial. See *Kennedy*, 456 U.S. at 676 (the defendant's mistrial motion is "a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact").

{¶12} There is a "narrow exception" where the defendant's motion for a mistrial "is precipitated by prosecutorial misconduct that was intentionally calculated to cause or invite a mistrial." *Loza*, 71 Ohio St.3d at 71, citing *Kennedy*, 456 U.S. at 678-679. To invoke the exception, there must be both prosecutorial misconduct and prosecutorial intent. *Kennedy*, 456 U.S. at 675-676 ("Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, therefore, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause.").

{¶13} "Only where the prosecutorial conduct in question is intended to 'goad' the defendant into moving for a mistrial may defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." *Loza*, 71 Ohio St.3d at 71, quoting *Kennedy*, 456 U.S. at 676. It is not enough that the state's negligence (as opposed to intentional misconduct) required the trial court to grant the defendant's motion for a mistrial. *State v. Hodges*, 2018-Ohio-447, 105 N.E.3d 543, ¶ 18 (7th Dist.). *See also State v. Doherty*, 20 Ohio App.3d 275, 276, 485 N.E.2d 783 (1st Dist.1984) (double jeopardy dismissal unwarranted as a finding of prosecutorial error is insufficient to show the required "design").

{¶14} First, speaking to a sworn witness about defense questions and evidence during a break in her testimony is not necessarily prosecutorial misconduct. The prosecutor denied that he coached the witness, stating he did not tell her how to respond to questions; the defense argued the communication was improper regardless of whether answers were coached. The trial judge was in the best position to judge the prosecutor's

credibility on this topic. *See State v. Greene*, 7th Dist. Mahoning No. 02 CA 122, 2005-Ohio-4240, ¶ 26-28.

{¶15} Moreover, a prosecutor who informs a witness about the contents of other testimony does not engage in improper coaching. *State v. Parker*, 12th Dist. Butler No. CA2017-12-176, 2019-Ohio-830, ¶ 78 (the preparation of a witness for trial by informing him of conflicting testimony on the previous day is not improper coaching by the prosecutor). A prosecutor is entitled to prepare his witnesses by reviewing evidence and informing the witness what questions he will ask. *State v. Bowen*, 7th Dist. Columbiana No. 96 CO 68 (Dec. 8, 1999) ("A prosecutor is free to prepare witnesses and review their expected testimony in advance of trial in order to insure that the case proceeds in an orderly and coherent fashion"). *See also State v. Parham*, 2019-Ohio-358, 121 N.E.3d 412, ¶ 68 (10th Dist.) ("A prosecutor is free to prepare witnesses and review their expected testimony with them"), quoting *State v. McCoy*, 10th Dist. Franklin No. 99AP-1048 (Sept. 7, 2000); *United States v. Rivera-Hernandez*, 497 F.3d 71, 80 (1st Cir.2007) ("Prosecutors and defense attorneys alike are entitled to prepare their witnesses").

{¶16} Appellant believes this preparatory right and duty of the prosecutor no longer applies once the witness has been sworn. Appellant's reference to the purpose of witness separation and his complaint about the presence of the doctor during the break with the witness are unavailing. In Ohio, the separation of witnesses is governed by Evid.R. 615(A), which provides: "at the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses and it may make the order of its own motion." During the hearing on the mistrial motion, the prosecutor twice said there was no order of witness separation in the case, and neither the court nor defense counsel contradicted this statement. (Tr. 143-144). We were only provided with the transcript of the victim's testimony, and the victim was not advised on breaks in her testimony that she could not speak to other witnesses or the prosecutor.

{¶17} Moreover, the rule specifically explains: "An order directing the 'exclusion' or 'separation' of witnesses or the like, in general terms without specification of other or additional limitations, is effective only to require the exclusion of witnesses from the hearing during the testimony of other witnesses." Evid.R. 615(A). Therefore, even where there is a separation order, the general order just bars the witness from the courtroom

during other testimony. *Id.* Other forms of separation (while within the trial court's discretion) must be made explicitly by the court. 2003 Staff Note to Evid.R. 615 (restrictions which must be explicitly declared include out of court contact between witnesses or contact between witnesses and third parties). The language of Evid.R. 615(A) rejects the premise that other restrictions are implicit in the separation or exclusion order, which only requires the witness to leave the courtroom during other testimony. *Id.*

{¶18} As the Ohio Supreme Court has observed: "No general rule absolutely forbids attorney-witness contact between direct and cross-examination. Trial courts may forbid such contact, and often do so, but here, the court did not. Such contact may create an appearance of impropriety, but does not necessarily prevent a fair trial." (Citations omitted.) *State v. Henness*, 79 Ohio St.3d 53, 60, 679 N.E.2d 686 (1997) (where the prosecutor spent time with the witness and provided her with her prior statement during an extended recess caused by the witness's failure to return to court after testifying on direct). The Court noted: "The opposing counsel in an adversary system is not without weapons to cope with 'coached' witnesses." *Id.*, quoting *Geders v. United States*, 425 U.S. 80, 89, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976).

{¶19} In *Geders*, the United States Supreme Court held a defendant's right to counsel was violated when he was prohibited from speaking to his attorney during an overnight recess between his direct and cross-examination. *Geders*, 425 U.S. at 89. *Compare Perry v. Leeke*, 488 U.S. 272, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989) (no violation if the court wishes to preclude the defendant from speaking with attorney during a 15 minute recess in his testimony). In *Perry*, the Court pointed out, "it is entirely appropriate for a trial judge to decide, after listening to the direct examination of any witness, whether the defendant or a nondefendant, that cross-examination is more likely to elicit truthful responses if it goes forward without allowing the witness an opportunity to consult with third parties, including his or her lawyer." *Perry*, 488 U.S. at 282. The trial judge has discretion on a break in testimony to maintain the status quo by prohibiting a witness from having contact with others or to permit a witness to consult with others. *Id.* at 283-284 (which may depend on a judge's standard practice, the particulars of a given case, or state law governing the topic).

{¶20} Here, the trial court did not forbid communication with anyone during the break in the victim's testimony or otherwise restrict the prosecutor's access to the victim between cross-examination and redirect examination. Consequently, the victim's contact with the prosecutor and her doctor during the break was not prohibited. See *Henness*, 79 Ohio St.3d at 60. *See also State v. Boddie*, 3d Dist. Allen No. 1-2000-72, 2001-Ohio-2261 (finding no deprivation of the right to a fair trial where the prosecutor removed an exhibit from the courtroom and met with a witness to explain how the exhibit was organized during a recess while the witness's cross-examination was suspended).[1]

{¶21} Furthermore and regardless of the impropriety issue, there is no indication the prosecutor's contact with the victim on the lunch break was "intentionally calculated to cause or invite a mistrial." *See Loza*, 71 Ohio St.3d at 71, citing *Kennedy*, 456 U.S. at 678-679. This part of the test does not merely consider whether the complained of act was intentionally performed but asks whether the act of prosecutorial misconduct was intentionally calculated to trigger a mistrial. The trial court found on the record that the prosecutor's conduct was not nefarious or malicious and the result was not intended; defense counsel agreed, noting he was not accusing the prosecutor. (Tr. 142, 148). The trial judge was in the best position to judge the prosecutor's credibility. *See Greene*, 7th Dist. No. 02 CA 122 at ¶ 26-28. *See also Kennedy*, 456 U.S. at 675 (the trial court's decision on whether the prosecutor had intent calculated to invite a mistrial is a factual one based on the circumstances and includes inference from objective facts). In any event, an independent review of the record discloses no indication the prosecutor spoke with the victim on the lunch break with an intent to "goad" the defendant into moving for a mistrial. As it cannot be said there was "intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause," Appellant's argument fails. *See Kennedy*, 456 U.S. at 675-676.

[1] *See also State v. Randle*, 2018-Ohio-207, 104 N.E.3d 202, ¶ 28-32 (3d Dist.) (affirming the denial of mistrial motion where the prosecutor received a recess to speak with witnesses); *State v. Cook*, 6th Dist. Ottawa No. OT-07-020, 2008-Ohio-89, ¶ 55-59 (the witness's conversation with the prosecutor's victim-witness advocate during a break in his testimony did not deprive defendant of a fair trial, even where the court had ordered witness not to speak to the prosecution during the break).

{¶22} Accordingly, Appellant's sole assignment of error is overruled, and the trial court's judgment is affirmed.

Donofrio, J., concurs.

Waite, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.