[Cite as *State v. Kelly*, 2015-Ohio-1948.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101457

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KEVIN J. KELLY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-12-568672-A

BEFORE: E.T. Gallagher, J., E.A. Gallagher, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: May 21, 2015

ATTORNEYS FOR APPELLANT

Ian N. Friedman
McCarthy, Lebit, Crystal & Liffman Co.
101 Prospect Avenue, W., Suite 1800
Cleveland, Ohio 44115

Mark R. Devan
Berkman, Gordon, Murray & Devan
55 Public Square, Suite 2200
Cleveland, Ohio 44113

Anne B. Walton
Ian N. Friedman & Assoc., L.L.C.
1304 West 6th Street
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor

BY: Daniel T. Van
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

EILEEN T. GALLAGHER, J.:

{¶1} Defendant-appellant, Kevin J. Kelly ("Kelly"), appeals the trial court's denial of his motion to dismiss and assigns the following error for our review:

> 1. The trial court erred in denying Kelly's motion to dismiss on grounds of double jeopardy.

{¶2} Finding no merit to the appeal, we affirm.

I. Factual and Procedural History

{¶3} In January 2012, Kelly was indicted on five counts. The state dismissed the original indictment and filed an amended version. In the second indictment, Kelly was charged with two counts of kidnapping, one count of rape, one count of sexual battery, one count of corruption of a minor, three counts of attempted rape, two counts of gross sexual imposition, and four counts of underage alcohol use. Counts 1-6 were related to a victim, B.C., who was 14 years old at the time of the incident. Counts 7-16 were related to a second victim, D.K., who was 18 years old at the time of the incident. The crimes were alleged to have occurred on or about May 1, 1996 through June 30, 1996.

{¶4} On November 20, 2012, Kelly pleaded not guilty to all counts. Following several pretrial conferences, the four counts of underage alcohol use were dismissed because the statute of limitations had expired.

{¶5} Prior to trial, defense counsel filed a demand for discovery requesting the state to produce, among other things, the handwritten statement of B.C. that was referenced in an incident report produced by Lakewood police officer Fredrick Charles Mance ("Officer Mance"). When the statement was not produced, defense counsel

personally emailed the assistant prosecutor previously assigned to the case and formally requested production of B.C.'s statement a second time. Defense counsel noted that the last sentence of Officer Mance's incident report stated: "[S]ee [B.C.]'s written statement for more information." However, defense counsel was notified by the assistant prosecutor that no such handwritten statement existed. Thereafter, defense counsel made a third attempt to obtain the handwritten statement during a pretrial conference. Again, a newly assigned assistant prosecutor indicated that B.C. did not execute a handwritten statement.

{¶6} In November 2013, the case proceeded to a jury trial. During the cross-examination of B.C., there was a lengthy discussion concerning whether he completed a handwritten statement or whether his oral statement was simply memorialized in Officer Mance's incident report. Outside the presence of the jury, the trial court asked the assistant prosecutor whether Lakewood detectives received a handwritten statement from B.C. The assistant prosecutor replied, "[N]o, he didn't do a written statement. The victim didn't do a written statement."

{¶7} Upon resuming cross-examination, however, B.C. testified that he made a written statement while he was at the Lakewood Police Department on June 1, 2011. When asked whether he had seen his hand-written statement prior to testifying, B.C. stated that he believed he saw it approximately one year earlier during a meeting with the assistant prosecutor. While B.C. was providing his testimony, Detective Larry Kirkwood ("Det. Kirkwood") of the Lakewood Police Department, began looking through his case

file and discovered that B.C.'s statement was attached to Officer Mance's original incident report. At that time, Det. Kirkwood handed the statement to the assistant prosecutor, who then alerted the court of its existence.

{¶8} Following a discussion on the record, the trial court declared a mistrial and discharged the jury due to the state's failure to disclose the 2011 handwritten statement to defense counsel prior to trial. The court explained:

> THE COURT: * * * after considering all of the ramifications of his particular case, of course all of the information, I'm declaring a mistrial and I've excused the jury at this time.
>
> I have reviewed the proposition of [defense counsel], and I have looked over all of the information. And I think that the introduction of the statement coupled with the defense's theory of the case at this point clearly has dramatically affected the way they would go forward with their defense after this point. So with that being said, I would ask the State to turn over anything additionally.

Subsequently, the trial court conducted an in camera voir dire of B.C. and Det. Kirkwood.

{¶9} B.C. testified that he was "fairly certain [he] looked over [his] written police report the first time he met [with the assistant prosecutor]." However, he acknowledged that he was not willing to "commit 100%" to the fact that he reviewed his written statement during that meeting with the assistant prosecutor.

{¶10} Det. Kirkwood testified that he checked his file during B.C.'s cross-examination because he did not recall seeing a handwritten statement from B.C. in his case file. Det. Kirkwood explained that he did not review Officer Mance's incident report prior to trial because he knew he was not permitted to testify as to its contents. Because he did not know B.C.'s statement was attached to Officer Mance's incident

report, Det. Kirkwood incorrectly told the assistant prosecutor that she was in possession of all reports. Thus, Det. Kirkwood stated, "so far as [the assistant prosecutor] knew, she had everything from my file." Moreover, Det. Kirkwood stated that, because B.C.'s statement was handwritten, it was mistakenly not included in the grand jury packet sent to the prosecutor's office through the discovery portal because it would have been scanned and filed separately from the department's computer-generated reports.

{¶11} In April 2014, Kelly filed a motion to dismiss on grounds of double jeopardy, which the trial court denied. From that denial, Kelly now appeals.

II. Law and Analysis

{¶12} In his sole assignment of error, Kelly argues the trial court erred in denying his motion to dismiss on grounds of double jeopardy.

{¶13} As an initial matter, we acknowledge this court's jurisdiction to hear this appeal, noting that the Ohio Supreme Court recently held that:

> [h]aving determined that an order denying a motion to dismiss on double-jeopardy grounds denies a "provisional remedy" as that term is defined in the statute, that the order in effect determines the action with respect to the provisional remedy, and that the appealing party would not be afforded a meaningful review of the decision if that party had to wait for final judgment as to all proceedings in the action, we hold that the order is a final, appealable order.

State v. Anderson, 138 Ohio St.3d 264, 2014-Ohio-542, 6 N.E.3d 23, ¶ 60.

{¶14} Despite the state's argument to the contrary, we review the denial of a motion to dismiss on double jeopardy grounds de novo even though we review a judgment granting the same motion for abuse of discretion. *State v. Mattison*, 8th Dist. Cuyahoga

No. 90155, 2008-Ohio-4090, ¶ 1; *State v. Betts*, 8th Dist. Cuyahoga No. 88607, 2007-Ohio-5533, ¶ 20, citing *In re Ford*, 987 F.2d 334, 339 (6th Cir.1992).

{¶15} The Fifth Amendment's Double Jeopardy Clause protects a criminal defendant from repeated prosecutions for the same offense. *Oregon v. Kennedy*, 456 U.S. 667, 671, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). The reasons behind the prohibition against double jeopardy are that:

> the State with all its resources and power, should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty.

Green v. United States, 355 U.S. 184, 187-188, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

{¶16} Generally, there are no double jeopardy considerations when a mistrial is declared. *State v. Gaines*, 8th Dist. Cuyahoga No. 82301, 2003-Ohio-6855. If a defendant's motion for mistrial is granted, or the trial court sua sponte declares a mistrial, the state is generally not precluded from retrying a criminal defendant. *United States v. Tateo*, 377 U.S. 463, 467, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964); *State v. Loza*, 71 Ohio St.3d 61, 70, 641 N.E.2d 1082 (1994).

{¶17} However, a narrow exception to this rule applies when the defendant's request is prompted or instigated by prosecutorial misconduct designed to goad the defendant into seeking a mistrial. *Kennedy* at 676; *State v. Glover*, 35 Ohio St.3d 18, 517 N.E.2d 900 (1988).

> Prosecutorial misconduct, by itself, is not enough to trigger the exception to the Double Jeopardy Clause — the state must intend "to subvert the protections afforded by the

> Double Jeopardy Clause." *Kennedy*, *supra*, 456 U.S. at 675. In other words, only conduct "intentionally calculated to cause or invite mistrial" will bar retrial. *United States v. Thomas*, 728 F.2d 313, 318 (C.A.6, 1984).

N. Olmsted v. Himes, 8th Dist. Cuyahoga Nos. 84076 and 84078, 2004-Ohio-4241, ¶ 38.

{¶18} In arguing the protections of the Double Jeopardy Clause should bar his reprosecution, Kelly contends the state had prior knowledge of B.C.'s handwritten statement and purposefully withheld it in order to goad Kelly into seeking a mistrial. We disagree.

{¶19} Generally, the narrow exception adopted by the United States Supreme Court in *Kennedy* is reserved for the limited set of circumstances where the nature of the state's misconduct clearly and unquestionably demonstrates its intent to cause or invite a mistrial.

{¶20} For instance, in *State v. Mattison*, 8th Dist. Cuyahoga No. 90155, 2008-Ohio-4090, the victim testified that he was shopping at a convenience store when the defendant exited the store and struck him with a brick. On cross-examination, defense counsel asked the victim whether defendant was often in the area of the store and the victim replied, "[He] is in that area every day. Seven days a week, 24 hours a day." *Id.* at ¶ 3. On redirect examination of the victim, the prosecuting attorney asked, "[Victim], you said that [defendant] is always around this corner store 24 hours a day, seven days a week?" When the victim agreed that he so testified, the prosecuting attorney asked, "What did you mean by that?" The victim replied, "He's a drug dealer." *Id.*

{¶21} The defendant asked the court to declare a mistrial on grounds that the state deliberately elicited that response from the victim because it knew in advance what answer the victim would give. The court agreed, noting that the state's case had been "going south" and that the state must have known what the answer would be, such that it could only be presumed to have asked the question in order to provoke defendant's motion for a mistrial. *Id*. at ¶ 4.

{¶22} On appeal, this court affirmed the trial court's dismissal of defendant's indictment with prejudice, finding that the state intentionally goaded the defendant into requesting a mistrial where the state knew its case was "going south" and asked the victim a question that served no other purpose than to elicit a response that the defendant was a drug dealer. *Id*. at ¶ 11. This court explained that the prosecutor's specific intent was established by his admission that he asked the question knowing the jury could make an inference about drug dealing "if they wanted." *Id*.

{¶23} After careful review of the record, we are unable to conclude that the assistant prosecutor's failure to disclose B.C.'s handwritten statement was the result of a strategical ploy to induce a mistrial. Unlike the scenario in *Mattison*, there is nothing in the record to suggest the state's case was "going south" at the time B.C.'s statement was produced. Moreover, unlike *Mattison*, there is insufficient evidence in this record to suggest the assistant prosecutor acted deliberately. Instead, the state's failure to disclose the statement appears to have been the result of an inadvertent oversight, or at the very most, a miscommunication between the Lakewood Police Department and the

prosecutor's office. *See State v. King*, 5th Dist. Muskingum No. CT2010-0010, 2010-Ohio-5701 (finding the state did not act with intent to goad appellee into asking for a mistrial where the state admitted on the record that it inadvertently omitted to provide the text messages in discovery).

{¶24} In our view, the record supports the trial court's finding that, although the omission of the discovery was unfortunate, there did not appear to be "any malicious or any type of untoward behavior on the part of [the assistant prosecutor] as it relates to this particular issue. In fact, it is clear that the page did not go through the portal as evidenced by the officer checking the portal and coming in here and telling us that it did not go to [the assistant prosecutor]." (Tr. 520.)

{¶25} Because there is ample reason to believe the assistant prosecutor's statement to the trial court that she had no knowledge of the handwritten statement before it was discovered by Det. Kirkwood in the midst of trial, we are unable to conclude that this is the rare case where the protections of the Double Jeopardy Clause require the dismissal of Kelly's indictment with prejudice. *See State v. Smith*, 1st Dist. Hamilton No. C-990689, 2000 Ohio App. LEXIS 5082, * 19 (Nov. 3, 2000) (noting the "extremely rare" circumstances where the protections afforded by the Double Jeopardy Clause bar reprosecution following a mistrial). Accordingly, the trial court did not err in denying his motion to dismiss.[1]

---

[1] At the conclusion of his brief, Kelly asserts that, were this court to affirm the trial court's denial of his motion to dismiss, this court should order the state to bear the cost of his defense if the case is to be retried. Kelly failed to present any citations to case law or statutes, as required by

{¶26} Kelly's sole assignment of error is overruled.

III. Conclusion

{¶27} The trial court did not err in denying Kelly's motion to dismiss on double jeopardy grounds.

{¶28} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN T. GALLAGHER, JUDGE

ANITA LASTER MAYS, J., CONCURS;
EILEEN A. GALLAGHER, P.J., DISSENTS WITH SEPARATE OPINION

EILEEN A. GALLAGHER, P.J., DISSENTING:

{¶29} I respectfully dissent from the opinion of my learned colleagues and would find defendant-appellant Kevin Kelly's retrial to be barred by double jeopardy.

App.R. 16(A)(7), to support this contention. Thus, this court will not consider the argument.

{¶30} I am deeply troubled by the flagrant discovery misconduct borne out by the record in this case. While I recognize that pursuant to *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982), the circumstances in which double jeopardy will bar a retrial after a defendant has moved for a mistrial are limited, I would find that the state goaded Kelly into moving for a mistrial under these facts.[2]

{¶31} I begin with the assertion by B.C. that he reviewed his handwritten statement with both the prosecutor who tried the case and Detective Lawrence Kirkwood of the Lakewood Police Department. The witness reiterated this claim several times and only expressed less than complete confidence after repeated questioning on the point. The trial court concluded that the prosecutor at trial had no knowledge of the statement based on the voir dire testimony of Detective Kirkwood, who claimed that his examination into the matter revealed that the statement was never digitally transferred to the prosecutor.

{¶32} We have previously recognized that a trial court's finding regarding whether the prosecuting attorney intended to cause a mistrial is a finding of fact that is to be accorded great deference. *State v. Betts*, 8th Dist. Cuyahoga No. 88607, 2007-Ohio-5533, ¶ 27, citing *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). A reviewing court may consider the following factors in determining whether the required intent to provoke a mistrial existed: (1) whether there was a sequence of overreaching prior to the single prejudicial incident; (2) whether the

---

[2] The term "goad" is defined as "to incite or rouse[.]" *Chambers v. Admr., Ohio Bur. of Workers' Comp.*, 164 Ohio App. 3d 397, 2005-Ohio-6086, 842 N.E.2d 580, ¶ 10 (9th Dist.), citing *Webster's New Collegiate Dictionary* 488 (1980).

prosecutor resisted or was surprised by the defendant's motion for a mistrial; and (3) the findings of the trial court concerning the intent of the prosecutor. *N. Olmsted v. Himes*, 8th Dist. Cuyahoga Nos. 84076 and 84078, 2004-Ohio-4241, ¶ 39, citing *Kennedy*, *supra* (Powell, J., concurring).

{¶33} The finding by the trial court that the assistant prosecuting attorney who tried the case had no actual knowledge of the written statement is nonsensical because that finding is not supported by the voir dire testimony of B.C. that he reviewed the statement "I had written down" with the prosecuting attorney who tried the case during trial preparation.[3] Even if I were to accept that finding, that fact alone would not relieve the state from culpability in this discovery farce.

{¶34} I also find the record to be rife with conduct by the multiple prosecuting attorneys who passed this case between them to be disconcerting and below professional standards. The initial police report prepared by Lakewood patrol officer Frederick Mance detailed the narrative provided by B.C. when he first reported the offenses on June 1, 2011, and unequivocally notes the existence of a "written statement" prepared by B.C. which contained "additional information." Kelly received this police report in discovery and his attorneys documented their efforts to inquire into the existence of the statement prior to trial.

---

[3] I am aware that pursuant to Detective Kirkwood's voir dire testimony the assistant prosecuting attorney who tried may not have possessed the physical file, which contained the original statement, but there is no dispute that the prosecutor's office did have possession of the file for several months in 2012.

{¶35} The record reflects that on June 29, 2012, Kelly's attorney emailed the prosecutor then assigned to the case seeking the statement based on the reference in the police report. There is no record of what actions, if any, the prosecutor took to investigate the matter in response to this inquiry. What we do know is that Detective Kirkwood testified that in the two years prior to trial, no member of the prosecutor's office called him to ask if there was a written statement from B.C. in the police file. Furthermore, Detective Kirkwood testified that he provided the physical police file that contained the original statement to the prosecutor's office "for review" two months after the defense inquiry, and the file remained with the prosecutor's office from September 2012 until December 2012. Despite the fact that the record reflects that the file was not voluminous and that the statement was undisputably in the file attached to the original police report while it was in the possession of the prosecutor's office, there is no reasonable explanation as to why the prosecutor's review of the file failed to uncover the statement a mere two to three months after the defense brought the matter to the state's attention.

{¶36} The prosecutor's office, once alerted to the possibility of a missing victim statement, failed to undertake, in my view, any effort to investigate the matter and resolve the patent discrepancy in the police report. Following the above events, the case was eventually transferred to the assistant prosecuting attorney who eventually tried the case. Kelly's attorney again raised the issue of the missing statement at a pretrial, and the state denied its existence.

{¶37} The record reflects that the prosecutor who tried the case never examined the physical file personally, and instead, directed a general inquiry to Detective Kirkwood asking if they (the prosecutor) possessed everything in his (the Detective's) file. There is no explanation as to why none of the multiple prosecutors involved with this case examined or asked Detective Kirkwood to examine the original police report that referenced B.C.'s statement. Had any of the prosecutors bothered to examine the original police report they would have immediately discovered the missing evidence. In fact, this is precisely what happened when the statement was uncovered in the middle of Kelly's trial.

{¶38} Finally, I note with great consternation that even if the statement had been truly lost or difficult to locate, which it was not, the state failed to take the de minimis step of simply asking B.C. if he had made a statement. B.C. readily affirmed as much when Kelly's counsel inquired at trial. By the same token, it seems clear that the state did not bother to ask patrol officer Mance about the discrepancy in his report.

{¶39} The record reveals what appears to be, in my view, an effort by the prosecutor to evade responsibility for this discovery failure and shift the blame to the investigating officers. And, indeed, I take issue with the actions of the Lakewood police officers involved in this case. Detective Kirkwood testified that four different law enforcement officers with the Lakewood Police Department, including himself, would have reviewed B.C.'s written statement but blamed the failure to disclose the document in discovery on a digital imaging disconnect between the police and the prosecutor's office.

The mysterious disappearance of B.C.'s written statement in this case raises grave concerns regarding what I perceive to be a disturbing pattern or practice of discovery misconduct by the Lakewood Police Department. *See also State v. Russell*, 8th Dist. Cuyahoga No. 94345, 2011-Ohio-592 (new trial granted where defense counsel made three written Ohio Public records requests to the Lakewood Police Department before exculpatory evidence was turned over after defendant's conviction).

{¶40} In any event, the prosecutor is responsible for knowing what is in the police file. *Id*. at ¶ 37; *State v. Benford*, 9th Dist. Summit No. 25298, 2011-Ohio-564, ¶ 10; *State v. Wiles*, 59 Ohio St. 3d 71, 78, 571 N.E.2d 97 (1991). The prosecutor's inaction in the face of what should have been alarming notice that the victim's statement was missing demonstrates an omission of duty, an intentional neglect, and a disdain for the discovery process that directly impeded Kelly's ability to have a fair trial and left him with no choice but to move for a mistrial. Specifically, in regards to evidence of the intent of the prosecutor to goad a mistrial, I find that it strains the limits of plausibility that when the prosecutor met with B.C. in the week prior to trial, it never occurred to the prosecutor to inquire about the existence of the statement despite the fact that the defense had twice alerted the state to its reported existence and was certain to raise the matter at trial. Under these facts I would find that the state goaded Kelly into moving for a mistrial.