COURT OF APPEALS
DECISION
DATED AND FILED

May 25, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1109-CR **Cir. Ct. No. 2000CF1030**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICKY MCMORRIS,

DEFENDANT-PETITIONER.

APPEAL from an order of the circuit court for Racine County: EMILY S. MUELLER, Judge. *Affirmed and cause remanded.*

Before Anderson, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Ricky McMorris seeks leave to appeal from a circuit court order denying his motion to dismiss on double jeopardy grounds.[1]

[1] We grant the petition.

Because we agree with the circuit court that prosecution of McMorris does not violate the constitutional protection against double jeopardy, we affirm and remand for further proceedings consistent with this opinion.

¶2 In 2000, McMorris was charged with armed robbery while masked as a repeat offender and as a felon in possession of a firearm. McMorris' first trial in 2002 resulted in a mistrial because a witness, Charles McMorris, McMorris' brother and the individual whom the defense suggested actually committed the armed robbery, invoked his Fifth Amendment right in front of the jury. In 2004, the jury in McMorris' second trial convicted him of being a felon in possession of a firearm but could not reach a decision on the armed robbery charge, resulting in a mistrial as to that charge. Thereafter, McMorris moved the circuit court to bar a third trial on the armed robbery charge on double jeopardy grounds. The circuit court denied the motion.

¶3 We begin our double jeopardy analysis with Charles' conduct at McMorris' first trial. McMorris planned to offer as a defense that Charles committed the armed robbery. Charles had been subpoenaed by the State to testify but had not sought counsel. The circuit court instructed Charles about his Fifth Amendment right not to incriminate himself, and Charles indicated that he understood that right, did not intend to invoke it, and intended to answer the questions put to him as a witness. The prosecutor stated that Charles' proposed testimony did not raise the need for a grant of immunity and Charles did not intend to invoke the Fifth Amendment. The court again confirmed with Charles that he intended to testify without invoking the Fifth Amendment.

¶4 Even though he stated he would not do so, Charles responded to the first question put to him (whether his brother is Ricky McMorris) by invoking the

Fifth Amendment. The circuit court excused the jury, and the prosecutor noted that an extensive effort had been made to determine whether Charles would invoke the Fifth Amendment and that he had clearly stated he would not. The court again reviewed Charles' Fifth Amendment right, and Charles reaffirmed and represented that he would not invoke that right. Upon returning to the witness stand, Charles invoked the Fifth Amendment when asked where he was on the afternoon of the armed robbery.

¶5 After sending the jury from the courtroom, the court found that Charles understood how trial would proceed before the jury was present, and then he invoked his Fifth Amendment right once the jury was present. The court found that Charles was "jerking [the court] around" with his antics on the witness stand. The State moved for a mistrial based on Charles' conduct in relation to the invocation of his Fifth Amendment right, his conduct in front of the jury and his loud, disruptive response to the circuit court's decision to hold him in jail overnight to insure his appearance in court the following day.

¶6 The next day, McMorris consented to a mistrial after consulting with counsel and acknowledging that a retrial was possible. In arriving at its conclusion that a manifest necessity required granting the State's mistrial motion, the circuit court found that Charles' conduct had an impact on the jury and a curative instruction would not salvage the trial. Charles invoked the Fifth Amendment on two separate occasions, giving rise to an inference before the jury that he had something to hide. When combined with McMorris' contention in his opening statement that Charles committed the offenses, the jury could have the impression that he was the perpetrator, particularly since Charles declined to answer a question about his whereabouts on the day of the armed robbery. The court declared a mistrial.

¶7 Thereafter, McMorris moved to bar the second trial on double jeopardy grounds. The circuit court denied his motion after reviewing what transpired with Charles at the first trial. The court considered whether the prosecutor's actions gave rise to the mistrial or goaded McMorris into requesting a mistrial. The court evaluated the prosecutor's intent and the efforts of the court and the parties to avoid a mistrial. The court found that the prosecutor and the court made a great effort to avoid a mistrial and found no evidence of intent by either the prosecutor or the court to provoke a mistrial. The court found that Charles' conduct surprised the court, prosecutor and probably the defense. The court declined to bar the second trial.

¶8 After the second trial resulted in a deadlocked jury on the armed robbery charge and a mistrial as to that count, McMorris again moved to dismiss on double jeopardy grounds. The circuit court denied the motion, noting that the issue had been previously decided. McMorris sought leave to appeal this circuit court order.

¶9 On appeal, McMorris argues that the circuit court, instead of relying on the transcript of the first trial, should have held an evidentiary hearing on his claim that the prosecutor intentionally caused a mistrial by presenting Charles to testify, resulting in the invocation of his Fifth Amendment right in front of the jury.[2] McMorris speculates that the prosecutor provoked a mistrial because the

[2] McMorris also claims that the prosecutor knew that Charles would invoke his Fifth Amendment right. McMorris relies upon an affidavit of Ronnie McMorris. However, McMorris does not advise us where in the appellate record this affidavit may be found. This is required by WIS. STAT. RULE 809.19(1)(e) (2003-04). We will not sift the record to locate facts to support counsel's contentions. ***Keplin v. Hardware Mut. Cas. Co.***, 24 Wis. 2d 319, 324, 129 N.W.2d 321 (1964).

defense had made inroads into the State's case on the issues of identification and reasonable doubt.[3]

¶10 We agree with the State that the circuit court properly relied on the transcript of the first trial to dispose of McMorris' double jeopardy motion. The transcript speaks for itself.

¶11 We turn to the merits of McMorris' claim that his retrial is barred on double jeopardy grounds. "[D]ouble jeopardy bars a retrial when the defendant has successfully moved for a mistrial, if the prosecutor acted with intent to gain another chance to convict or to harass the defendant with multiple prosecutions." ***State v. Hill***, 2000 WI App 259, ¶12, 240 Wis. 2d 1, 622 N.W.2d 34. Although McMorris did not request a mistrial in this case, he consented to the State's request, putting him in a position analogous to that of a defendant who requests a mistrial. We analogize from this rule and apply the following standards of review:

> Whether constitutional double jeopardy protections apply is a question of law we review de novo. Whether a prosecutor intended to provoke a mistrial in order to gain another chance to convict or harass the accused is a question of fact; thus, a trial court's determination that the prosecutor acted with intent to provoke a mistrial will not be overturned unless it is clearly erroneous.

State v. Lettice, 221 Wis. 2d 69, 77, 585 N.W.2d 171 (Ct. App. 1998) (citations omitted).

[3] McMorris had to offer something other than his speculation to warrant an evidentiary hearing on his double jeopardy motion. *Cf.* ***State v. Saunders***, 196 Wis. 2d 45, 51, 538 N.W.2d 546 (Ct. App. 1995) (need to make "factual-objective" allegations in order to have evidentiary hearing).

¶12 Whether a manifest necessity existed is a fact-intensive question. ***State v. Moeck***, 2005 WI 57, ¶37, No. 2003AP2-CR. The circuit court's findings regarding the circumstances surrounding Charles' conduct are not clearly erroneous. The court found that the State was surprised and the jury tainted by Charles' conduct, giving rise to a manifest necessity—"a 'high degree' of necessity,"—***State v. Seefeldt***, 2003 WI 47, ¶19, 261 Wis. 2d 383, 661 N.W.2d 822 (citation omitted), for a mistrial. The circuit court properly exercised its discretion in granting a mistrial. *See* ***State v. Thurmond***, 2004 WI App 49, ¶10, 270 Wis. 2d 477, 677 N.W.2d 655.

¶13 McMorris also argues that the circuit court erred in requiring him to proceed pro se at various points in the proceedings and that his trial counsel was ineffective. We decline to address these issues as part of this interlocutory double jeopardy review. McMorris may raise these claims on direct appeal if he is aggrieved by the outcome of further proceedings in the circuit court.

¶14 We conclude that a retrial of McMorris is not barred on double jeopardy grounds. We affirm the circuit court and remand for further proceedings consistent with this opinion.

By the Court.—Order affirmed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).