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DISTRICT IV

June 13, 2018

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You are hereby notified that the Court has entered the following opinion and order:

2017AP1394-CR State of Wisconsin v. Daniel J. Coughlin (L.C. #2011CF78)

Before Blanchard, Kloppenburg and Fitzpatrick, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Daniel Coughlin appeals from a judgment of conviction for two counts of first degree sexual assault of a child and three counts of second degree sexual assault of a child. A jury found Coughlin guilty after two mistrials, and Coughlin contends that the circuit court should have dismissed the case with prejudice after the first mistrial. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary

disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We reject Coughlin's arguments and affirm.

Coughlin was charged with two counts of first degree sexual assault of a child and three counts of second degree sexual assault of a child after two adult men accused Coughlin of assaulting them when they were young boys working on Coughlin's farm. A jury convicted Coughlin of all charges during his third trial, following two mistrials. The only facts relevant to this appeal arise out of the first mistrial.

Coughlin's defense relied in part on expert testimony from Dr. David Thompson, who testified about how law enforcement interview techniques can influence memory. The prosecution had provided the defense with audio recordings of the victims' interviews, and Dr. Thompson testified that these particular interview techniques have been shown to produce false information. Among other things, Dr. Thompson testified that the interviews did not follow established protocol and that the questions were leading and suggestive. Dr. Thompson further noted that the audio-only nature of the recordings prevented him from analyzing the impact of non-verbal information, which can also be significant. Toward the end of Coughlin's first trial and after Dr. Thompson testified, the prosecutor learned from lead detective Shawn Goyette that there in fact existed video recordings of the victims' interviews.

Coughlin moved for a mistrial and requested dismissal of the case with prejudice. The circuit court determined that Coughlin was prejudiced by the failure to produce the video

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

recordings and declared a mistrial. The court invited the parties to request an evidentiary hearing on whether there was prosecutorial overreaching that would require dismissal with prejudice. Neither party requested a hearing. The circuit court concluded that the record did not establish that the mistrial was caused by prosecutorial overreaching. Specifically, it determined that Goyette had not acted with intent to provoke a mistrial. The jury convicted Coughlin after a retrial, and Coughlin now appeals the circuit court's decision not to dismiss the case with prejudice after the first mistrial.

Coughlin argues that his retrial violated the double jeopardy clause because, in his view, the first mistrial was the result of prosecutorial overreaching. *See* ***State v. Hill***, 2000 WI App 259, ¶11, 240 Wis. 2d 1, 622 N.W.2d 34 ("retrial is barred when a defendant moves for and obtains a mistrial due to prosecutorial overreaching"). Our supreme court has explained the two elements necessary to a finding of prosecutorial overreaching:

> (1) the action that provokes the mistrial is "intentional in the sense of a culpable state of mind in the nature of an awareness that [the] activity would be prejudicial to the defendant"; and
>
> (2) the action is "designed either to create another chance to convict, that is, to provoke a mistrial in order to get another 'kick at the cat' because the first trial is going badly, or to prejudice the defendant's rights to successfully complete the criminal confrontation at the first trial ...."

State v. Copening, 100 Wis. 2d 700, 714-15, 303 N.W.2d 821 (1981). "The burden is on the defendant to establish that prosecutorial … conduct constitutes overreaching and that such

conduct is intentional." ***State v. Harrell***, 85 Wis. 2d 331, 337, 270 N.W.2d 428 (Ct. App. 1978), *abrogated on other grounds by* ***State v. Copening***, 100 Wis. 2d 700, 303 N.W.2d 821 (1981).

"Whether a defendant may be retried without violating his or her right to be free from double jeopardy is a question of law that this court reviews de novo." ***State v. Henning***, 2004 WI 89, ¶14, 273 Wis. 2d 352, 681 N.W.2d 871. "Determining the existence or absence of the prosecutor's intent involves a factual finding, which will not be reversed on appeal unless it is clearly erroneous." ***State v. Jaimes***, 2006 WI App 93, ¶10, 292 Wis. 2d 656, 715 N.W.2d 669.

Here, the circuit court determined that Coughlin had not satisfied his burden of demonstrating prosecutorial overreaching. Specifically, the court determined that the record did not support a finding that the failure to produce the video recordings "was done with a culpable mind or with the knowledge that the failure would prejudice" Coughlin. The court explained that the failure to disclose these recordings "occurred well in advance of trial," making it unlikely that Goyette intentionally withheld the video recordings in order to give the prosecution "another kick at the cat" at trial. Instead, the timeline of the eventual disclosure was consistent with an innocent mistake, because the expert testimony regarding the victim interviews prompted Goyette to review his case file and discover the undisclosed recordings.

Coughlin argues that, as the lead detective assigned to the case, Goyette knew of the existence of these recordings and that "[i]t is not beyond reason to conclude" that Goyette knew that withholding these recordings would prejudice the defense. Coughlin further contends, without evidentiary support, that Goyette intentionally delayed production of these recordings in order to provoke a mistrial, which in turn would allow Goyette to be better prepared to address Dr. Thompson's critiques during his cross-examination at trial. The State responds that

Goyette's motivation is irrelevant unless there is evidence that Goyette colluded with the prosecutor. Coughlin conceded that the prosecutor was blameless.

We need not address this dispute because, even assuming that Goyette's motives can be imputed to the prosecutor, Coughlin's argument that Goyette engaged in overreaching rests entirely on speculation about Goyette's possible motives for intentionally delaying disclosure. Speculation is no substitute for evidence. Given the circuit court's findings on this issue and our deferential standard of review, we see no reason to disturb the circuit court's conclusion that Goyette's conduct in belatedly disclosing the video recordings was not prosecutorial overreaching.

Because we can affirm the judgment of conviction on the ground that there was no prosecutorial overreaching, we need not address the State's remaining arguments in favor of affirmance. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1., 268 Wis. 2d 628, 673 N.W.2d 716 ("As one sufficient ground for support of the judgment has been declared, there is no need to discuss the others urged." (quoted source omitted)).

Upon the foregoing reasons,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals