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DISTRICT II

August 12, 2020

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

2019AP587-CR

State of Wisconsin v. Dennis J. Brantner (L.C. #2015CF176)

Before Neubauer, C.J., Gundrum and Davis, 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).

Dennis Brantner appeals from a judgment of conviction for second-degree reckless homicide. He argues his conviction is a violation of the Double Jeopardy Clause. 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 (2017-18).¹ We affirm.

Brantner was charged with first-degree intentional homicide. A jury trial on that charge ended in a mistrial due to a hung jury. Brantner subsequently moved for a directed verdict and an order precluding the State, based upon Double Jeopardy grounds, from retrying him. The circuit denied the motion, and Brantner entered an *Alford*² plea to the amended charge of second-degree reckless homicide, was convicted of that charge, and was sentenced.

Brantner appeals, arguing that his “conviction for second-degree reckless homicide should be vacated and he should be granted a judgment of acquittal because the evidence presented during his jury trial was insufficient to allow the jury to conclude [he] had committed the offense of first-degree intentional homicide.” He insists the circuit court erred in not dismissing this case following the hung jury and mistrial declaration at the trial on the first-degree intentional homicide charge because, he contends, the evidence presented at trial that he committed that offense was insufficient. Brantner is mistaken.

“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.

As the State expresses in its response brief, long-established, controlling case law holds that “double jeopardy does not prohibit the continued prosecution of a defendant after a mistrial [is] declared on a hung jury even if the trial evidence was insufficient.” This is so, as the State

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

² *North Carolina v. Alford*, 400 U.S. 25 (1970).

also notes, because in such a circumstance, a defendant's jeopardy has not terminated with the hung jury and mistrial declaration.

Richardson v. United States, 468 U.S. 317 (1984), controls Brantner's case. As the *Richardson* Court stated it, Richardson asserted "that if the Government failed to introduce sufficient evidence to establish his guilt beyond a reasonable doubt at his first trial, he may not be tried again following a declaration of a mistrial because of a hung jury." *Id.* at 322-23. Referring to its prior decision in *Burks v. United States*, 437 U.S. 1 (1978), the *Richardson* Court added, "Where, as here, there has been only a mistrial resulting from a hung jury, *Burks* simply does not require that an appellate court rule on the sufficiency of the evidence because retrial might be barred by the Double Jeopardy Clause." *Richardson*, 468 U.S. at 323. Concluding, the *Richardson* Court held:

[W]e reaffirm the proposition that a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy to which petitioner was subjected. The Government, like the defendant, is entitled to resolution of the case by verdict from the jury, and jeopardy does not terminate when the jury is discharged because it is unable to agree. Regardless of the sufficiency of the evidence at petitioner's first trial, he has no valid double jeopardy claim to prevent his retrial.

Id. at 326. Because *Richardson* controls, we affirm.

THEREFORE,

IT IS ORDERED that the judgment is summarily affirmed. *See* 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