STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KODY TAYLOR PITRE,

Defendant-Appellant.

UNPUBLISHED
March 18, 2021

No. 353953
Osceola Circuit Court
LC No. 2019-005527-FH

Before: MURRAY, C.J., and M. J. KELLY and RICK, JJ.

PER CURIAM.

Defendant was charged with seven counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b, and one count of second-degree criminal sexual conduct (CSC-II), MCL 750.520c. A mistrial occurred because of improper testimony from an expert witness. Defendant filed a motion to preclude his retrial, contending that the prosecutor intentionally caused the mistrial. The trial court denied his motion. Defendant appeals by leave granted.[1] We affirm.

I. BACKGROUND

For purposes of this appeal, the facts are not at issue. The case proceeded to jury trial in December 2019. In his opening statement, the prosecutor gave the following statement:

> There was an examination done by a doctor [i.e., Dr. Debra Simms]; a physical examination, a vaginal examination. And at that time, understandably, [the victim] didn't want to talk about the abuse. She indicated she was having nightmares and that something bad had happened. At that time, in August, the doctor, although

[1] *People v Pitre*, unpublished order of the Court of Appeals, entered September 29, 2020 (Docket No. 353953).

there was no disclosure specifically, the doctor indicated that the diagnosis was of *suspected pediatric sexual abuse*. [Emphasis added.]

Defense counsel immediately objected and moved for a mistrial pursuant to *People v Thorpe*, 504 Mich 230, 260-261; 934 NW2d 693 (2019), which held "that [the defendant] has established a plain error that affected his substantial rights. Dr. Simms's[2] expert opinion that TH suffered '*probable pediatric sexual abuse*' is contrary to this Court's unanimous decision in *Smith*."[3] (Emphasis added.) Defendant's counsel argued that the prosecutor had "provoked [a] mistrial in his opening statement," but the prosecutor contended that he had accurately portrayed what was in the medical record and that Dr. Simms's report would be admissible as a medical record. He conceded that he had not read *Thorpe*. The trial court was not familiar with *Thorpe* either, and it recessed to examine the case. The trial court denied defendant's motion for a mistrial at that time because it believed a curative jury instruction could alleviate the prosecutor's improper argument. The trial court made clear, however, that it would not allow the diagnosis to "come in" as evidence during the trial.

On the third day of trial, Dr. Simms, who examined the complainant in this case, was called to testify by the prosecutor. Dr. Simms was given her report from her examination of the complainant and was permitted to refresh her recollection with the report. The following exchange occurred that led to the eventual mistrial:

Prosecutor: Were you able to make an overall assessment of [the complainant]?

Dr. Simms: Yes, sir.

Prosecutor: And do you remember what that overall assessment was?

Dr. Simms: Yes, sir.

Prosecutor: Without going into any specific findings, can you identify what the overall assessment was?

Dr. Simms: My overall assessment was *suspected pediatric*—

Prosecutor: Ah—

Defense Counsel #1: Your Honor.

Defense Counsel #2: Judge.

The Court: All right.

[2] This was the same Dr. Simms who testified in the present case.

[3] *People v Smith*, 425 Mich 98; 387 NW2d 814 (1986).

Dr. Simms: I didn't answer—understand—the question. [Emphasis added.]

Defense counsel objected and again moved for a mistrial under *Thorpe*. Moreover, defense counsel contended that the prosecutor had induced the mistrial because "he knew that he could not put that in evidence, and he did." The prosecutor countered that he had explicitly asked Dr. Simms not to give any overall findings and that he was merely asking about her overall assessment without going into her diagnosis. He firmly maintained that his intent was not to elicit the improper testimony. The prosecutor explained that he had been referencing the "top section" of the report, which, according to the prosecutor, had "nothing to do with the diagnosis." The prosecutor argued that the testimony came out accidentally and not through intentional inducement on his part and he asserted that he attempted to caution the witness not to go into any ultimate findings. Defense counsel asserted that, despite being on notice of *Thorpe*, the prosecutor failed to adequately prepare Dr. Simms and inform her that testimony regarding her ultimate diagnosis in this case was prohibited. The trial court listened to the audio recording of the prosecutor's questioning, and it stated that "it doesn't appear—you accused him of misconduct based on his question—his question said, don't go into specific findings. So, I'm not going to find that." However, the trial court declared a mistrial. It reiterated that "I am not saying that the Prosecutor intended for this to happen based on your questioning. I am just saying it came out."

Defendant subsequently filed a motion to preclude retrial on the basis of double jeopardy. He again contended that the prosecutor's actions evidenced an intention to purposefully elicit the testimony and thereby cause the mistrial. He argued that, according to a narrow exception in constitutional law, double jeopardy prevented his retrial. The prosecutor again reiterated that he never intended to elicit the improper testimony and that he had attempted to draw Dr. Simms's attention to a different part of her report. Dr. Simms's report was admitted as an exhibit at the hearing. It contained a paragraph with the header "Overall Assessment." Contained within that paragraph—approximately in the middle—was the sentence: "[Complainant]'s physical examination findings neither rule out or confirm the disclosure of inappropriate sexual contact made to her family or at the forensic interview." The prosecutor contended that it was this portion of the report that he had been trying to elicit from Dr. Simms. At the bottom of the paragraph, there was the following sentence: "In consideration of all the above factors: A diagnosis of suspected Pediatric Sexual Abuse is given." This was the prohibited evidence, and the prosecutor argued that he had been attempting to avoid this portion. The prosecutor asserted that *Thorpe* was not "widely known" at the time of trial and that, although not required, defense counsel did not raise any issue regarding Dr. Simms prior to trial. He also asserted that he did not have "ample opportunity" to talk with Dr. Simms prior to her testifying because she was out of the country the week before trial.

The trial court denied defendant's motion. It found that the prosecutor immediately interrupted Dr. Simms once she began to give the prohibited testimony. The trial court found that the prosecutor subsequently "indicated [to the trial court] that he did not intend for [Dr. Simms] to give a diagnosis, just her overall assessment." The trial court stated: "This Court indicated then and will indicate again, that it did not appear that the Prosecuting Attorney committed misconduct during his questioning." The trial court "note[d] that the questioning of the witness could have been framed in a different manner, but the Court does not find that the Prosecuting Attorney intentionally provoked or goaded the witness to achieve a mistrial."

II. ANALYSIS

A. STANDARD OF REVIEW

This Court reviews de novo a double jeopardy challenge. *People v Lett*, 466 Mich 206, 212; 644 NW2d 743 (2002). However, this Court reviews for clear error the trial court's factual findings regarding whether the prosecutor goaded a defendant into a mistrial. *People v Dawson*, 431 Mich 234, 258; 427 NW2d 886 (1998). Clear error occurs "when the reviewing court is left with the definite and firm conviction that a mistake has been made." *People v Chaney*, 327 Mich App 586, 587 n 1; 935 NW2d 66 (2019) (quotation marks and citation omitted).

B. DOUBLE JEOPARDY

Defendant contends that the trial court's findings regarding the prosecutor's actions were clearly erroneous. We disagree.

"Under both the Double Jeopardy Clause of the Michigan Constitution and its federal counterpart, an accused may not be 'twice put in jeopardy' for the same offense. The Double Jeopardy Clause originated from the common-law notion that a person who has been convicted, acquitted, or pardoned should not be retried for the same offense." *Lett*, 466 Mich at 213. "[T]he Double Jeopardy Clause therefore protects an accused's interest in avoiding multiple prosecutions even where no determination of guilt or innocence has been made." *Id*. at 215. Accordingly, double jeopardy can occur "when the trial judge declares a mistrial, thereby putting an end to the proceedings before a verdict is reached." *Id*. This does not automatically bar a retrial; for example, if a defendant requests a mistrial, then double jeopardy is not implicated. *Id*. However, if "the prosecutor has engaged in conduct intended to provoke or 'goad' the mistrial request," then retrial is not permitted. *Id*. Our Supreme Court has held:

> Where a mistrial results from apparently innocent or even negligent prosecutorial error, or from factors beyond his control, the public interest in allowing a retrial outweighs the double jeopardy bar. The balance tilts, however, where the judge finds, on the basis of the "objective facts and circumstances of the particular case," that the prosecutor *intended* to goad the defendant into moving for a mistrial. [*Dawson*, 431 Mich at 257 (citation omitted; emphasis added).]

However, prosecutorial misconduct standing alone is insufficient to trigger double jeopardy protections. *Oregon v Kennedy*, 456 US 667, 675-676; 102 S Ct 2083; 72 L Ed 2d 416 (1982) ("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."). Therefore, the main inquiry is the intent of the prosecutor, which is an inquiry best suited for the trial court. *Dawson*, 431 Mich at 258 n 57. For example, in *Dawson*, the Court held that retrial was barred by the Double Jeopardy Clause because the prosecutor conceded that it intended to cause the mistrial. *Id*. at 258-259.

In *Thorpe*, the Court held that Dr. Simms—the same witness as the instant case—testified impermissibly and that the defendant Harbison was entitled to a new trial.[4] *Thorpe*, 504 Mich at 260-261. Dr. Simms gave similar testimony in *Thorpe* as she was poised to give in the instant case. She testified that, in her expert opinion, the complainant "suffered 'probable pediatric sexual abuse.' " *Id*. Dr. Simms explained that, although the complainant "showed no physical evidence of an assault," her opinion "was based solely on her own opinion that [the complainant]'s account of the assaults was 'clear, consistent, detailed and descriptive.' " *Id*. at 261-262. The Court held that this was in clear violation of its prior "holding that an examining physician cannot give an opinion on whether a complainant had been sexually assaulted if the 'conclusion [is] nothing more than the doctor's opinion that the victim had told the truth.' " *Id*. at 262 (alteration in original), quoting *People v Smith*, 425 Mich 98, 109; 387 NW2d 814 (1986). See also *People v Del Cid (On Remand)*, 331 Mich App 532, 550; 953 NW2d 440 (2020) (holding that *Thorpe* and *Smith* precluded Dr. Simms's testimony about "probable sexual abuse"). In this case, the prosecution does not dispute that Dr. Simms's testimony was improper. The prosecution disputes whether the prosecutor's questioning was purposefully meant to goad defendant into a mistrial.

In the instant case, the trial court found that the prosecutor did not commit misconduct during the questioning of Dr. Simms, did not intentionally try to cause Dr. Simms to testify as she did, and did not intentionally cause the mistrial. Although the prosecutor's words were perhaps unartfully chosen, the trial court found no ill intent. We believe the evidence supported the trial court's findings.

The prosecutor told the trial court that a mistrial was never his intention. The prosecutor stated that he was attempting to elicit testimony from Dr. Simms about the inconclusiveness of the physical findings. He explained that he had been referencing the "top section" of the overall assessment and not the "very bottom" of the report. The report includes a sentence about the inconclusiveness of the physical findings and that it was contained closer to the "top" than the diagnosis at the "bottom." The prosecutor also immediately stopped Dr. Simms when she attempted to give the prohibited testimony. The transcript reflects that the prosecutor in fact prevented her from saying "sexual abuse." The prosecutor also argued *against* a mistrial, unlike in *Dawson*, in which the prosecutor conceded that a mistrial was warranted. Moreover, the prosecutor in this case stated that he had discussions with defense counsel about redacting the diagnosis from Dr. Simms's report and simply admitting it as an exhibit. The trial court found the prosecutor's explanation to be credible, and due "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). The trial court was able to hear the audio recording of the prosecutor's questions and was in the best position to judge the prosecutor's actions.

Defendant alternatively contends that the prosecutor's actions were so negligent and so egregious that retrial should be barred. Defendant asks this Court to adopt a standard that does not require prosecutorial intent to cause the mistrial. However, our Supreme Court has *explicitly* held that the prosecutor's conduct must be *intentional*. *Dawson*, 431 Mich at 257. Defendant asks this

[4] *Thorpe* involved two defendants from two consolidated cases: Thorpe and Harbison. Relevant to this appeal was the Court's holding regarding Harbison, not Thorpe.

Court to adopt a different standard; however, we are bound by our Supreme Court's prior decisions and cannot deviate. *Paige v Sterling Heights*, 476 Mich 495, 524; 720 NW2d 219 (2006).

Although the prosecutor may have been unaware of recently decided case law, failed to adequately prepare Dr. Simms as a witness, and poorly worded his question, we conclude that the record supports the trial court's finding that the prosecutor did not intentionally goad defendant into a mistrial, and we are not left with a definite and firm conviction that a mistake has been made. However, in giving deference to and affirming the trial court, we are in no way endorsing any attorney's failure to properly prepare their witnesses in advance of trial or a lack of knowledge of precedential case law. Parties are presumed to know the law, see *Adams Outdoor Advertising v City of East Lansing*, 463 Mich 17, 27 n 7; 614 NW2d 634 (2000), and ignorance of the law is no excuse, *People v Lockett (On Rehearing)*, 253 Mich App 651, 655 n 1; 659 NW2d 681 (2002).

Affirmed.

/s/ Christopher M. Murray
/s/ Michael J. Kelly
/s/ Michelle M. Rick