

No. 1-12-2703

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 22531
	)	
ANDREW FOX,	)	The Honorable
	)	Thomas M. Davy,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HOFFMAN delivered the judgment of the court.  
Justices Cunningham and Delort concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not abuse its discretion in denying defendant's motion to dismiss on double jeopardy grounds where the record does not show the State intended to provoke defendant to move for a mistrial.

¶ 2 Defendant Andrew Fox brings this interlocutory appeal, pursuant to Illinois Supreme Court Rule 604(f) (eff. Feb. 6, 2013)), challenging the trial court's denial of his motion to dismiss on double jeopardy grounds, after the court previously declared a mistrial at defendant's request. Defendant contends the State provoked him into moving for a mistrial, so that further criminal proceedings would subject him to double jeopardy.

¶ 3 At about 4:30 p.m. on November 29, 2009, Chicago police officers arrested defendant after they allegedly observed a handgun tucked into his rear waistband. Defendant was charged with multiple counts of aggravated unlawful use of a weapon (AUUW). We note that some of those counts were based on portions of the statute that were declared unconstitutional by our supreme court in *People v. Aguilar*, 2013 IL 112116. However, defendant was also charged with AUUW based on possession on a firearm without a valid firearm owner's identification card (FOID) card and cases subsequent to *Aguilar* have held that convictions under that section of the statute have not been rendered unconstitutional. See *People v. Campbell*, 2013 IL App (4th) 120635, ¶ 15.

¶ 4 Defendant's jury trial commenced on September 19, 2011. In its opening statement, the State explained that defendant violated Illinois gun possession laws by possessing a loaded handgun outside of his home. The defense theory was that defendant was not guilty of unlawful possession of a firearm because he was on his way to work as a corrections officer at the Stateville penitentiary. Specifically, counsel stated, "Ladies and Gentlemen, part of the law that the State did not tell you about is that keepers of prisons, correctional officers, prison guards, if you will are exempt from prosecution, under the statute, if they are commuting to or from work. That is what he was doing that day, Ladies and Gentlemen." The State did not contemporaneously object.

¶ 5 After its first witness testified, the State objected and moved for a mistrial, explaining defendant had not alleged the commuting corrections officer exemption at any point in the case, and had not provided any information as to this defense. The State also inquired whether jury instructions would be provided to support the defense theory, and if not, requested that the jury be instructed that defendant's theory of exemption is not the law. The State further explained to

the court that since it was just learning about the defense theory, it was awaiting documentation from the Illinois Department of Corrections (IDOC) to show that defendant's scheduled shift was from 7 a.m. to 3 p.m., but he "called in." Defendant did not attend work that day and was not scheduled to work a night shift in the month of November. The defense replied that it had a jury instruction to support the defense and that it provided this defense in its answer to discovery, stating that "defendant will rely on the State's inability to prove him guilty beyond a reasonable doubt under 720 ILCS 5/24-1.6 and 2."

¶ 6 The trial court reviewed defendant's answer to discovery filed on January 18 and stated that it is "not the clearest thing in the world" and that defense counsel could not "just toss a '2' in there." Because the defense had not received any documents, defendant asked the court to preclude the State from using or referring to any documents that were not tendered in discovery. The court denied the State's motion for a mistrial, but allowed the State to introduce evidence of defendant's work hours on the date in question, finding the confusion as to the State's failure to respond to defendant's discovery requests attributable to defendant's vague discovery answer.

¶ 7 The State then proceeded with its next witness, after which it provided the court and defense counsel with a copy of defendant's work schedule showing he was scheduled to work on November 29, 2009, but did not work that day. Defense counsel stated that, if the State were allowed to introduce the work schedule, then he would request a mistrial. The State replied that, if defendant testified that he was commuting to work when he was arrested, then it would rebut this testimony with the prison warden's testimony along with defendant's work schedule showing he did not work as scheduled. The defense formally moved for a mistrial and asked that it be granted with prejudice. Defense counsel argued that the State waited until the middle of trial to produce evidence the defense had previously requested and never received. Counsel explained

that he had not filed a motion to compel discovery because he assumed that, since the State did not produce the documents, they did not exist. The State objected, arguing that: it tendered all evidence in its possession; it was informing the defense of its rebuttal strategy in advance in case defendant testified; and the defense had the same subpoena power as the State, and therefore could have subpoenaed the work schedule that would have supported the defense theory.

¶ 8 The State argued against defendant's request for a mistrial with prejudice, stating it properly responded to defendant's discovery request for any and all documents relating to the prison warden's testimony, that the State intended to only have the prison warden testify that the handgun was not issued by the IDOC and that defendant was not allowed to transport the weapon to and from work. The State did not seek defendant's work schedules until it learned for the first time during defendant's opening statement that he would contend he was exempt from prosecution because he was commuting to work. Therefore, the State argued it was allowed to have the prison warden rebut this contention with defendant's work schedule following defendant's testimony. The court granted the defense's motion for a mistrial, without prejudice.

¶ 9 On January 27, 2012, defendant filed his motion to dismiss due to double jeopardy violations, and on May 17, 2012, the parties argued the motion. The trial court denied defendant's motion to dismiss the charges, and subsequently denied defendant's motion to reconsider that ruling. In denying the motion to dismiss, the trial court explained that the State was "starting to win" the trial at the point that it granted defendant's request for mistrial because the State had the documentary evidence to rebut the defense theory. Thus, the State did not goad the defense into asking for a mistrial. Defendant appeals the trial court's denial of his motion to dismiss the charges against him on double jeopardy grounds.

¶ 10 We review a trial court's ultimate ruling on a motion to dismiss charges based on double jeopardy for an abuse of discretion. *People v. Bennett*, 2013 IL App (1st) 121168, ¶ 17. "An abuse of discretion occurs only when the trial court's decision is arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it." *Id.*, quoting *People v. Rivera*, 2013 IL 112467, ¶ 37.

¶ 11 The double jeopardy clauses of the United States and Illinois Constitutions protect a criminal defendant from repeated prosecutions for the same offense. U.S. Const., amend. V; Ill. Const. 1970, art. I, § 10. When a defendant moves for a mistrial, double jeopardy concerns are generally not implicated, and the State may retry the defendant. *Oregon v. Kennedy*, 456 U.S. 667, 672 (1982).

¶ 12 A limited exception to this rule exists where the prosecutor intended to "goad" the defendant into moving for a mistrial. *Id.* at 675-76. Even if the prosecutor's conduct was harassing or overreaching, and even if the prosecutor intended to act in the manner that precipitated the mistrial, this conduct will not bar retrial unless the prosecutor's actual intent was to provoke a mistrial. *Id.* The trial court must examine the "objective facts and circumstances" surrounding the prosecutor's conduct and make a "finding of fact" regarding the prosecutor's intent. *Id.* at 673, 675. Because the trial court is in a better position to decide the factual question of the prosecutor's intent, this court will not overturn the lower court's factual findings unless they are against the manifest weight of the evidence demonstrating an abuse of discretion. *People v. Hollins*, 368 Ill. App. 3d 934, 942 (2006).

¶ 13 Defendant argues the State goaded him into moving for a mistrial by disclosing and presenting mid-trial evidence of his work schedule, despite defendant's pretrial discovery request

for the evidence. The State responds that it did not intend to goad defendant into moving for a mistrial because at the time the defendant made the motion, the State was winning the trial.

¶ 14 Our review of the record indicates that the State investigated defendant's work schedule only after defendant introduced his theory that he was exempt from prosecution for unlawful possession of a handgun because he was commuting to work. After obtaining defendant's work schedule, the State sought to introduce it as evidence that would directly rebut the defense's theory.

¶ 15 The trial court determined that the State was winning, and therefore, there would be no reason for the State to want a mistrial. See *People v. Campos*, 349 Ill. App. 3d 172, 177 (2004) (trial court's assessment that the evidence was going favorably for the State was not against the manifest weight of the evidence). Additionally, the State argued vigorously against defendant's motion for a mistrial. See *People v. Nelson*, 193 Ill. 2d 216, 221 (2000) (finding the State did not intend to cause the defendant to seek a mistrial, as evidenced by the State's active opposition to the defendant's motion and the State's belief that the incompetent evidence was actually admissible); *People v. Longoria*, 375 Ill. App. 3d 346, 350-51 (2007) (finding that the record did not demonstrate that the prosecutor's actions intended to provoke the defendant into moving for a mistrial where the prosecutor's case appeared to be going well and the evidence against the defendant was strong).

¶ 16 The record supports the trial court's finding that the State did not intend to goad defendant into moving for a mistrial. Instead, the State's actions show that it intended to win the trial after it was surprised by defendant's commuting corrections officer defense theory. In its surprise, the State was unprepared to meet the defense theory, which resulted in it scrambling for and obtaining "smoking gun" evidence to directly rebut the defense theory. Once it had available

the work schedule and testimony from the prison warden that defendant was scheduled to work but did not, the State was arguably winning the trial. It would have been unreasonable, and indeed nonsensical, for the State to goad the defense into seeking a mistrial. Therefore, the exception to the general rule that double jeopardy does not bar retrial when a defendant requests a mistrial does not apply. As such, the trial court did not abuse its discretion in rejecting defendant's motion for dismissal on the grounds of double jeopardy.

¶ 17 Accordingly, the judgment of the circuit court of Cook County denying defendant's motion to dismiss on double jeopardy grounds is affirmed.

¶ 18 Affirmed.