UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 891

September Term, 2016

MELVIN CURTIS FARMER

v.

STATE OF MARYLAND

Krauser, C. J.,
Nazarian,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: April 7, 2017

Melvin Curtis Farmer, appellant, was charged, in the Circuit Court for Charles County, with second degree assault and various sex offenses. During Farmer's jury trial, Detective McKenzie, the lead investigator in his case, testified that she did not attempt to collect Farmer's cell phone or the victim's cell phone as part of her investigation, whereupon the following verbal exchange between the State and Detective McKenzie occurred:

> PROSECUTOR: Okay, and why did you not do that?
>
> DETECTIVE: Because [the victim] didn't really know [appellant]. She told me that she had only met him a couple of times.
>
> PROSECUTOR: Okay.
>
> DETECTIVE: That she initially met him . . . and this occurred in 2014, September 2014, that she had initially met him, that he got out of prison sometime in 2013, and that she . . . she doesn't correspond with him that way.

Farmer then objected to Detective McKenzie's testimony that he had been in prison and requested a mistrial, which the trial court granted. When the State sought to re-try Farmer, he moved to dismiss the charges on double jeopardy grounds claiming that Detective McKenzie had either intended to cause a mistrial or recklessly disregarded the potential to cause a mistrial when she testified about his prior incarceration. Although Farmer acknowledged that the prosecutor had not intentionally elicited Detective McKenzie's statement, he asserted that Detective McKenzie's actions should be imputed to the prosecutor because she was a "member of the prosecution team."

Following a hearing, the trial court found that Detective McKenzie's statement was "almost a throw-away line" and that there was no evidence "she would [have been] aware

that maybe the case was getting away from the State," as appellant claimed. It further found that the statement, while "sloppy," was not "some sort of intentional thing to cause a mistrial." and, therefore, it denied Farmer motion to dismiss. Appellant then filed this interlocutory appeal raising a single issue: whether the trial court erred in denying his motion to dismiss on double jeopardy grounds. For the reasons that follow, we affirm.

The protection against double jeopardy is waived by a defendant who successfully moves for a mistrial unless the motion was precipitated by prosecutorial or judicial misconduct, with the specific intent to goad the defendant into making the motion. *See Oregon v. Kennedy*, 456 U.S. 667 (1982); *West v. State*, 52 Md. App. 624 (1982). Without specific intent, neither prosecutorial overreaching nor harassment will bar a retrial. *Kennedy*, 456 U.S. at 676 (citation omitted). To prove the necessary specific intent, the defendant must establish that the prosecutor engaged in misconduct "knowing it to be error, but desiring to 'sabotage' a probable loser either 1) by snatching an unexpected victory from probable defeat if not caught, or 2) by getting caught, thereby provoking the mistrial, averting the probable acquittal and living to fight again another day." *West*, 52 Md. App. at 635.

Appellant concedes that *Kennedy* and *West* only bar a re-trial when the prosecutor or judge engages, with specific intent, in misconduct. He nevertheless urges us to extend the holding of those cases, barring a re-trial, to include the intentional sabotaging of a case by a police witness, because police officers are "professional witnesses" who act as an arm of the prosecution team.

It is not necessary for us to decide this issue, however, because even if we were to adopt such a rule, it would not assist Farmer. Determining Detective McKenzie's intent was a question of fact for the trial court, *see Kennedy*, 456 U.S. at 675, and the trial court ultimately found that she did not intend to provoke a mistrial when she testified about Farmer's previous incarceration. We review the trial court's factual findings under the clearly erroneous standard. *See* Maryland Rule 8-131(noting that this Court will "not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses").

As he did in the circuit court, Farmer claims that Detective McKenzie intended to cause the mistrial because, as an experienced police officer, she should have known that she could not mention a defendant's prior incarceration. However, the ultimate issue was not whether Detective McKenzie should have known her statement was improper but whether she made the statement with the specific intent to goad Farmer into a mistrial. Although Farmer asserts that the trial was not going well for the State, which might have given Detective McKenzie a motive to sabotage the trial, the trial court found that there was no evidence Detective McKenzie, who was subject to a sequestration order, was aware of what was occurring in the trial. Moreover, the trial court had an opportunity to observe Detective McKenzie's testimony and, therefore, it was in the best position to determine her intent in making the statement.

Although Farmer's claim is replete with speculation and conjecture regarding Detective McKenzie's possible motivations, he does not identify any facts that would lead

us to conclude that the trial court's finding regarding her intent was clearly erroneous. Consequently, the trial court did not err in denying Farmer's motion to dismiss.

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT