

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No.: 02-20130 D BRE

v.

MICHAEL ROCHELLE MOORE,

Defendant.

ORDER

Before the court is Defendant's Motion to Dismiss the indictment on double jeopardy grounds. The matter proceeded to trial before a jury on October 21, 2002, on an indictment alleging a violation of 18 U.S.C. § 922(g). In limine, the court excluded, *inter alia*, any testimony regarding threats that Defendant made to the victim. The court determined that the probative value did not outweigh the unfair prejudice. During the trial, the United States elicited testimony regarding Defendant's threatening statements to the victim. Finding that the prejudice could not be cured by a limiting instruction, the court granted the Defendant's motion and declared a mistrial. Subsequently, Defendant filed this motion to dismiss arguing that even though the Defendant moved for mistrial, the mistrial was brought about by the Government's intentional manipulative conduct. The United States has filed a response in opposition to the motion.

The double jeopardy clause of the Fifth Amendment protects a defendant from repeated prosecutions. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *United States v. Dinitz*, 424 U.S. 600 (1976). The double jeopardy clause does not require that every time a Defendant goes to trial,

he is entitled to go free if the trial does not result in a final judgment. *Wade v. Hunter*, 336 U.S. 684, 688 (1949). The court must balance the right of the Defendant to have his trial completed by a particular jury and the public interest in affording the Government the opportunity to prosecute those charged with crimes. *Id.* Thus, where a Defendant moves for a mistrial, only in a narrow instance may the Defendant raise the bar of double jeopardy. *Oregon v. Kennedy*, 102 S.Ct. 2083 (1982). Specifically, it is only where the prosecutor has engaged in intentional, manipulative conduct which provoked the mistrial may the Defendant effectively raise double jeopardy. *Id.* Prosecutorial conduct that might be viewed as harassing or overreaching, even if sufficient to justify a mistrial on Defendant's motion, does not bar retrial absent prosecutorial misconduct. *Id.*

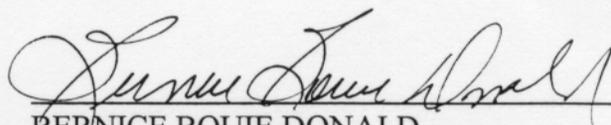
Upon considering the totality of the facts and circumstances in the case at bar, the court does not find that the prosecutor intentionally and in bad faith, goaded Defendant into moving for a mistrial.

Accordingly, the court finds that dismissal is not warranted under the circumstances.

Defendant's motion to dismiss the indictment is **DENIED**.

This matter is set for a Report Date on February 20, 2003, at 9:00 a.m. and is set for trial on the March Rotation Calendar.

IT IS SO ORDERED this 4th day of February 2003.


BERNICE BOUIE DONALD
UNITED STATES DISTRICT JUDGE