IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No.

WILLIAM CURTIS SMALL,

Petitioner,

v.

MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY, THE HONORABLE JOHN W. LARSON, PRESIDING,

Respondent.

PETITION FOR WRIT OF SUPERVISORY CONTROL AND REQUEST FOR IMMEDIATE STAY

APPEARANCES:

CHAD WRIGHT
Appellate Defender
KOAN MERCER
Assistant Appellate Defender
Office of the Public Defender
Appellate Defender Division
555 Fuller Avenue
P.O. Box 200147
Helena, MT 59620-0147
kmercer@mt.gov
(406) 444-9505

ATTORNEYS FOR
PETITIONER

HONORABLE JOHN W.
LARSON
District Court Judge
200 West Broadway
Missoula, MT 59802

RESPONDENT

William Small petitions this Court to issue a writ of supervisory control directing the Honorable John W. Larson to grant Mr. Small's motion to dismiss the criminal charge against him as a violation of his constitutional right against double jeopardy. The district court has incorrectly denied the motion.

Pursuant to Mont. R. App. P. 14(7)(c), Mr. Small asks this Court to stay the re-trial currently set for February 1, 2019, pending this Court's review of his petition.

FACTUAL AND PROCEDURAL BACKGROUND

This petition for supervisory control arises from *State v. Small*, DC-18-344, a criminal prosecution currently pending before the Fourth Judicial District Court, Missoula County. The following facts and procedural history are primarily taken from the trial transcript and from pleadings in the case and appear to be uncontested.

The State charged Mr. Small with Attempted Sexual Intercourse Without Consent. The jury trial commenced on October 2, 2018. A partial transcript of the trial (omitting voir dire) is attached to this Petition as Exhibit A.

On the first day of trial, following empaneling and swearing of the jury, opening statements by both counsel, and the testimony of two civilian witnesses, the prosecution called Missoula Police Sergeant Matthew Kazinsky to the stand. During cross examination of Sgt. Kazinsky, defense counsel asked the officer about his training and experience conducting investigations:

> Q: And you've had training in sex assault of [sic] investigations, is that correct?
> A: Correct.
> Q: And sex assault investigations include rape and all the way to like misdemeanor sex touching, right?
> A: Yes.

(Ex. A at 94–95.)

On the second day of trial, before continuing Sgt. Kazinsky's testimony, the district court informed defense counsel that the word "misdemeanor" had been used during cross examination and indicated that it was not proper to reference offense level at trial:

> The Court: So yesterday, Ms. Hammond, during your examination of the first officer you made reference to misdemeanor sex touching. It's inappropriate in a case to reference the level of offense. Do you want to see your transcript?
> Ms. Hammond: Sure. Maybe it was in his training?
> The Court: Yes.
> Ms. Hammond: Okay.

The Court: But you still mentioned misdemeanor touching and given this type of case and what the issues are—I understand people can make mistakes and this isn't your hundredth trial so but you know you can't mention the level of the offense.

Ms. Hammond: Okay.

The Court: Okay.

Ms. Hammond: Okay. Thank you.

(Ex. A at 108–09.)

Later that morning, the following cross examination occurred between Sgt. Kazinsky and defense counsel:

Q: Okay. So there was some discussion among you and other law enforcement officers about what to do that evening, is that correct?

A: Yeah. So typically several things to consider on a felony, in progress felony case like this or any type of felony case that's gonna be a little bit more in depth, i.e., a sex crime. It was a weekend, it was a Sunday so we have on duty detective that are on call every weekend. And so something like that there's things to consider. I don't have all of the answers. Detectives have typically more expertise in certain types of crimes based on their assignment.

So it's not uncommon for us to either call an on duty detective to just give them a heads up because inevitably they're going to get the case—being a felony, they're gonna get the case to do follow up. And it's not a bad idea for supervisors or any other officers investigating a felony case to just touch bases to make sure that everything is being covered.

Q: Okay.

A: And I, as a supervisor I also have to consider like manpower issues, two supervisors are on a scene, we can't be tied up for extensive amount of time so we will on occasions call in detectives and have them literally come in and take

over the investigation so we stay in contact with on duty detectives when it's needed.

Q: That process wouldn't happen in every felony case?

The Court: Now, folks, you're both way out of line. You know it. And we're just gonna go on to a new area.

Ms. Hammond: Okay. I'll move on, I apologize, Your Honor.

(Ex. A at 126–28.)

During the State's subsequent redirect examination of Sgt. Kazinsky, the following exchange occurred between Sgt. Kazinsky and the prosecutor:

Q: And what was your reason for calling a detective in this case?

A: Just like I mentioned before, just various reasons go through my head when we come across an in progress felony crime—

The Court: You know, sir, I'm gonna have to declare a mistrial.

Members of the jury, it's inappropriate for attorneys and witnesses to be talking about the level of offenses in this trial. And I regret all of the inconvenience that you've had to go through. And I don't like to do this, but it's error for us to go on much further about ten times felony mentioned here. That's the rules of the game that are, from my standpoint, I've just got to call it off.

(Ex. A at 133.) Without consulting either party, the district court immediately discharged the jury. (Ex. A. at 134.) The district court admonished Sgt. Kazinsky not to say "misdemeanor" or "felony" in future trials and then adjourned court. (Ex. A at 134–36.)

Defense counsel sought to object to the *sua sponte* mistrial:

> Ms. Hammond: Yes, your Honor. And I just want to put it on the record, if I could. I just want to make a motion objecting to the mistrial.
>
> The Court: Well, what basis do you have to go on with the trial where the level of the offense—do you have any case authority for that, Ms. Hammond?
>
> Ms. Hammond: I don't off the top of my head. I'm just making sure—
>
> The Court: You can certainly file a brief.
>
> Ms. Hammond: Okay. I just want to put the objection on the record so that it is—
>
> The Court: And why is that so?
>
> Ms. Hammond: Because I think that it's something that possibly could have been cured with a curative instruction. I also would note and I believe that in reading the offense that he's charged with, the jury is on notice that he is charged with a felony offense.
>
> The Court: There's not. There's nothing in the instruction. You know, both, you know, I'm an old dog and I've been in this longer than you both have. And I should've, you know, I'm assuming responsibility for it, but I can't cure the air when I have it mentioned ten times. And you're the one that started it because you mentioned misdemeanor. But I can't put the rabbit back in the hat and I should've recognized that this happened to me before, where, you know, they come off the street and they're doing all this work and they've got all these protocols and all of these issues and all of this education—but they don't get much experience in here. And they don't have the different rules in the courtroom.
>
> And I've got all these protocols you're taking them through, but when I walk through the door in here got a whole different set. And it's unfortunate but, you know, I'm gonna put it on for trial on the 27th.

(Ex. A at 136–37.) The district court announced that it noted and overruled Mr. Small's objection to the mistrial. (Ex. A at 140.)

Mr. Small filed a motion to dismiss, arguing that continued prosecution violated his right against double jeopardy. (Ex. B.) The State responded, asserting that the district court had found manifest necessity for a mistrial because of defense counsel's deficient performance in using the word "misdemeanor" once on the first day of trial and saying "felony" once on the second day of trial during cross examination of Sgt. Kazinsky. (Ex. C.) Mr. Small submitted a reply brief, noting that the district court had declared the *sua sponte* mistrial during the State's re-direct examination of Sgt. Kazinsky and pointing out that there is no categorical prohibition against using the words "misdemeanor" or "felony" during trial. (Ex D.)

On January 7, 2019, the district court denied Mr. Small's motion to dismiss and reset this case for trial on February 1, 2019. (Ex. E.) The district court concluded that because "the offense level was uttered repeatedly by both defense counsel and the witness," it "was concerned that there was a reasonable possibility that the utterances might have contributed to Defendant's conviction" and that it declared the mistrial

"to protect Defendant's interests from his counsel's mistakes." (Ex. E at 7–8.) This writ follows.

SUMMARY OF THE ARGUMENT

Mr. Small did not acquiesce to the district court's *sua sponte* mistrial declaration nor was there a manifest necessity to declare a mistrial. The use of the words "felony" and "misdemeanor" as part of general references to Sgt. Kazinsky's investigative procedures did not deprive Mr. Small of a fair trial or invite improper jury consideration of punishment. Neither party objected to or expressed any concern of prejudice from these "felony" references. Nor is there any reason to believe that a cautionary instruction would not have cured any potential prejudice. Because the *sua sponte* mistrial was unnecessary and without Mr. Small's consent, a second trial of Mr. Small will violate constitutional protections against double jeopardy.

ARGUMENT

I. Supervisory control is the appropriate mechanism to prevent violation of Mr. Small's constitutional right against double jeopardy.

This Court has supervisory control over all other Montana courts. Mont. Const. art. VII, § 2(2). The Court exercises that authority, in

part, through writs of supervisory control. A writ of supervisory control is appropriate "when urgency or emergency factors exist making the normal appeal process inadequate, when the case involves purely legal questions, and when . . . [t]he other court is proceeding under a mistake of law and is causing a gross injustice . . . ." Mont. R. App. Pro. 14(3)(a).

This Court has specifically recognized that supervisory control is warranted to prevent an individual from being tried a second time when doing so would violate constitutional protections against double jeopardy. *Keating v. Sherlock*, 278 Mont. 218, 224, 924 P.2d 1297, 1300 (1996) (holding that if the constitutional guarantees against being twice placed in jeopardy "are to have any significance, they require that the prohibition must be given effect prior to, not after, the second trial"); *see also State v. Burton*, 2017 MT 306, ¶ 22, 389 Mont. 499, 407 P.3d 280 (noting that a petition for supervisory control is available to assert a pre-trial double jeopardy challenge); *City of Billings ex rel. Huertas v. Billings Mun. Ct.*, 2017 MT 261, ¶ 2, 389 Mont. 158, 404 P.3d 709 (accepting supervisory control over a pretrial double jeopardy claim).

II. Double jeopardy protects Mr. Small from being tried again following the district court's *sua sponte* mistrial declaration.

The Fifth Amendment of the United States Constitution and Article II, Section 25 of the Montana Constitution protect individuals from being placed twice in jeopardy for the same offense. *Huertas*, ¶ 17. Once the jury was impaneled and sworn at the start of Mr. Small's trial, jeopardy attached. *Huertas*, ¶ 18. The United States and Montana Constitutions bar a second trial after a mistrial, "unless there was a manifest necessity to terminate the trial or the defendant acquiesced in the termination." *Huertas*, ¶ 19 (quotation omitted).

A. Mr. Small did not acquiesce in the district court's *sua sponte* mistrial declaration.

A second trial is allowed "when the defendant's affirmative conduct, combined with the totality of the circumstances, demonstrates a waiver of the right to object to the termination of trial proceedings." *Huertas*, ¶ 23. Such acquiescence to a mistrial requires affirmative defense conduct and cannot be inferred from mere silence or failure to object. *Huertas*, ¶ 23.

Mr. Small did not request a mistrial, was not consulted in advance of the mistrial's declaration, and explicitly objected to the mistrial. (Ex.

A at 133–36.) *Sua sponte*, the district court declared a mistrial during the State's questioning of a State witness. (Ex. A at 133.) Trial had been proceeding favorably to Mr. Small as the State appeared to be having difficulty locating a critical witness. (Ex. A at 107–08.) As in *Huertas*, ¶¶ 25–27, nothing in Mr. Small's conduct or the totality of the circumstances demonstrated an affirmative waiver of his right to be free from double jeopardy.

B. Use of the words "misdemeanor" and "felony" in describing the officer's investigations did not create a manifest necessity to terminate Mr. Small's trial.

Mistrial is a disfavored and exceptional remedy. *Huertas*, ¶ 19. Declaring a mistrial is justified only when "particular circumstances manifest a necessity for so doing, and when failure to discontinue [the trial] would defeat the ends of justice." *Huertas*, ¶ 19 (quotation omitted). "Where there are only technical errors or defects that do not affect the substantial rights of the defendant a mistrial is inappropriate." *Huertas*, ¶ 19 (quotation omitted). This Court has also stressed that "a more stringent manifest necessity standard applies when a trial court considers declaring a mistrial without the defendant's request or consent." *Huertas*, ¶ 20 (quotation omitted). In

Huertas, ¶ 21, this Court held that the trial court's findings that the jury had been "poisoned" by a prosecution witness's unexpected testimony "d[id] not demonstrate manifest necessity to terminate the proceeding, particularly when remedial measures were available."

While a jury generally should not consider possible punishment in determining guilt, *e.g.*, *Shannon v. United States*, 512 U.S. 573, 579 (1994); *State v. Brodniak*, 221 Mont. 212, 226–27, 718 P.2d 322, 332 (1986), Sgt. Kazinsky's and defense counsel's references to "misdemeanor" and "felony" investigations did not invite jurors to do so and did not necessitate a mistrial.

Defense counsel's initial use of "misdemeanor" had nothing to do with the level of the Attempted Sexual Intercourse Without Consent charge for which Mr. Small was on trial. Counsel merely solicited the range of Sgt. Kazinsky's training in sexual assault investigations: from "rape and all the way to like misdemeanor sex touching." (Ex. A at 94–95.) Counsel was using "rape" versus "misdemeanor" as shorthand for the spectrum of complexity in sexual assault investigations. Counsel went on to establish that through his national and local sexual assault

investigation training, Sgt. Kazinsky had specific training in preserving evidence and interviewing witnesses. (Ex. A at 95–96.)

The next day defense counsel sought to examine Sgt. Kazinsky about the quality of his investigation leading to Mr. Small's arrest. Counsel asked Sgt. Kazinsky whether he had discussed how to proceed with other officers. (Ex. A at 126–27.) Sgt. Kazinsky explained that, yes, because this was a felony investigation, he had consulted with the detectives on duty, both to take advantage of the detectives' greater experience and to give them a heads up that the case might be coming their way. (Ex. A at 127.) Sgt. Kazinsky also explained that detectives might sometimes be called to the scene to free up patrol supervisors, such as Sgt. Kazinsky. (Ex. A at 127–28.) When defense counsel sought to clarify whether that process of calling in detectives would happen in every felony case, the district court interjected that counsel and Sgt. Kazinsky were "both way out of line." (Ex. A at 128.)

During redirect, the State again raised the topic of patrol officers, such as Sgt. Kazinsky, referring cases to officers in the detective unit. (Ex. A at 133.) Asked why he called in a detective for Mr. Small's particular case, Sgt. Kazinsky explained, "Just like I mentioned before,

just various reasons go through my head when we come across an in progress felony crime—" (Ex. A at 133.) At that point the district court interjected and declared a mistrial. (Ex. A at 133.)

Sgt. Kazinsky was discussing how patrol officers handle felony investigations and when and why they might call in officers from the detective unit. Neither party objected to this topic nor to Sgt. Kazinsky's answers. In this context, Sgt. Kazinsky's use of "felony" was in reference to the type of case "that's gonna be a little bit more in depth," such as a sex case. (Ex. A at 127.) The "felony" description was about complexity and the unremarkable idea that such cases might require the more specialized experience of detective officers rather than patrol officers. No one mentioned sentencing or potential punishments.

Furthermore, as in *Huertas*, ¶ 22, Sgt. Kazinsky was the State's witness, not Mr. Small's. If the State had concerns about Sgt. Kazinsky's word choice in describing his investigation, the State could easily have addressed that with Sgt. Kazinsky before he testified. Inadvertent word choice by the State's own witness is not a persuasive justification for granting a mistrial without a defense request. *See Huertas*, ¶ 22.

In *State v. Bollman*, 2012 MT 49, 364 Mont. 265, 272 P.3d 650, a DUI defendant moved for a mistrial because a law enforcement witness had referred to "felony DUIs" when discussing transport procedures. This Court held that despite violating an order in limine prohibiting reference to the charge as a felony, the reference to "felony DUIs" did not require a mistrial because it was an inadvertent remark by the witness and did not directly inform the jury of any prior bad acts by the defendant. *Bollman*, ¶¶ 34–35. Similarly, here, Sgt. Kazinsky's unsolicited characterization of a "felony" investigation did not inform the jury of potential sentences or invite any improper consideration of punishment. Any claim of prejudice from Sgt. Kazinsky's "felony" reference also depends upon the implausible notion that, but for Sgt. Kazinsky's reference, jurors would not have recognized an Attempted Sexual Intercourse Without Consent trial in district court as a serious matter. While it is inappropriate for jurors to "give weight to the possible punishment in reaching their verdict," this Court has held that even directly labeling the greater and lesser included charges on the verdict form as felonies and misdemeanors can be harmless and not

deprive a defendant of a fair trial. *Brodniak*, 221 Mont. at 227, 718 P.2d at 332.

Additionally, as this Court noted in both *Huertas*, ¶ 21, and *Bollman*, ¶ 36, the availability of cautionary instructions and other remedial measures demonstrates that declaring a mistrial was not a manifest necessity. Despite this Court's repeated directive that "remedial action short of a mistrial is preferred unless the ends of justice require otherwise," *Huertas*, ¶ 19 (quotation omitted), the district court gave no consideration to such remedial measures before summarily declaring a mistrial and adjourning court. (Ex. A at 133–35.) As the district court itself later observed, it could have instructed jurors that the question of possible punishment "should not enter into or influence your deliberations in any way" and that they "should weigh the evidence in the case and determine the guilt or innocence of the defendant based only on the evidence, without any consideration of the matter of punishment." (Ex. E at 6.) Such a cautionary instruction would have cured any potential prejudice from Sgt. Kazinsky's description of "felony" investigation procedures. *See, e.g.*, *State v. Long*, 2005 MT 130, ¶ 25, 327 Mont. 238, 113 P.3d 290 ("[W]here the trial

judge withdraws or strikes improper testimony from the record with an accompanying cautionary instruction to the jury, any error committed by its introduction is presumed cured.").

CONCLUSION

Because there was no manifest necessity to declare a mistrial and Mr. Small did not acquiesce to a mistrial, retrying Mr. Small would violate his constitutional right to be free from double jeopardy. Mr. Small asks this Court to reverse the district court's order denying his motion to dismiss and to order that DC-18-344 be dismissed with prejudice.

Respectfully submitted this, the 24th day of January, 2019.

OFFICE OF THE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
555 Fuller Avenue
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ Koan Mercer
KOAN MERCER
Assistant Appellate Defender

EXHIBITS

CERTIFICATE OF SERVICE

I, Gem Koan Mercer, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ - Supervisory Control to the following on 01-25-2019:

Kirsten H. Pabst (Prosecutor)
200 W. Broadway
Missoula MT 59802
Representing: State of Montana
Service Method: eService

Timothy Charles Fox (Prosecutor)
Montana Attorney General
215 North Sanders
PO Box 201401
Helena MT 59620
Representing: State of Montana
Service Method: eService

John W. Larson (Respondent)
200 W. Broadway
Missoula MT 59802
Representing: Self-Represented
Service Method: E-mail Delivery

Electronically signed by Pamela S. Rossi on behalf of Gem Koan Mercer
Dated: 01-25-2019