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02/25/2019

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: OP 19-0061

IN THE SUPREME COURT OF THE STATE OF MONTANA
OP 19-0061

WILLIAM CURTIS SMALL,

Petitioner,

v.

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

Respondent.

FILED

FEB 25 2019

Bowen Greenwood
Clerk of Supreme Court
State of Montana

**RESPONDENT DISTRICT COURT RESPONSE TO
PETITION FOR WRIT OF SUPERVISORY CONTROL**

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INTRODUCTION

Comes now, the Honorable John W. Larson, District Judge, (Respondent District Court), presiding over Cause No. DC-18-344, *State of Montana v. William Curtis Small*, and responds to Defendant/Petitioner's Petition for Writ of Supervisory Control.

BACKGROUND

Respondent District Court finds the procedural facts relevant to this Petition for Writ of Supervisory Control as the following. On June 4, 2018, the State filed an Information against Defendant William Small for Attempted Sexual Intercourse Without Consent. Defense counsel included the lesser included offense of "sexual assault" in her proposed jury instructions. Defendant's Proposed Jury Instructions, ROA 17. On October 2, 2018, trial in this case began with preliminary jury instructions. On the first day of trial, defense counsel referenced the lesser included charge, "sexual assault of [sic] investigations," when discussing the witness Sergeant Matthew Kazinsky's training. Def. Proposed Jury Instructions (ROA 17); Trial Transcript., p 94:21-25. Defense counsel also made the following reference to the level of offense in front of the jury while questioning witness Sergeant Matthew Kazinsky, "[a]nd sex assault investigations include rape and all the way down to misdemeanor sexual touching." Trial Transcript, pp. 94-95.

At the start of the second day of trial and before the jury was called in to the courtroom, Respondent District Court admonished defense counsel for making mention of the offense level. The Court specifically instructed defense counsel that reference to level of offence was improper. Trial Transcript, pp. 108-109. Later that morning, defense counsel guided the direction of the testimony away from the facts of this case and to other uncharged offenses when she said, “[s]o and as a police officer when you come on a scene like that, there are a number of different ways that the investigation can go, is that correct?” Trial Transcript. p. 123:10-13. In addition to the prior mention of “misdemeanor sex touching,” defense counsel continued to make mention of various lesser charges not charged in this case, such as “public intoxication,” and “disorderly conduct.” Trial Transcript, pp. 123-124. Defense counsel also discussed other unrelated issues such as the time it took to arrest and/or charge Mr. Small. Trial Transcript, p.126:7-9. Defense counsel’s continued discussion of these other matters not charged in this case as well as conversations about “going to jail” and the decision process as well as timing issues leading up to the charged offense. *See* Trial Transcript, p. 122:5-8.

Through her questions, defense counsel opened the door and lead into the eventual discussion by the witness regarding “felony” crimes, where the witness uttered “felony” four times. Trial Transcript, pp.127-128. Even though defense

counsel received the admonishment that morning, defense counsel also referred to this offense as a “felony case.” Trial Transcript, pp. 126-128. Respondent District Court admonished both the witness and defense counsel when mention of the level of offense was raised, stating “[n]ow, folks, you’re both way out of line...And we’re just going to go on to a new area.” Trial Transcript, p. 128: 6-8. Respondent District Court found interrupting counsel the best approach and made every effort to continue to move the case forward after the five utterances of “felony” and other unnecessary excursions. Trial Transcript, p. 128:7-8.

Finally, during the prosecution’s redirect, witness Sgt. Kazinsky again referenced the level of offense, using the word “felony,” and the Court declared a mistrial. Trial Transcript, p. 133-142. The word “felony” was uttered no less than six times by either the defense counsel or the witness before Respondent District Court decided to declare a mistrial. Trial Transcript, pp. 127-128, 133. Upon declaring the mistrial, Respondent District Court noted that in some cases a cautionary instruction only highlights the above inappropriate references. Trial Transcript, p. 140.

On November 29, 2018, defense counsel filed a Motion to Dismiss, and on January 7, 2019, Respondent District Court denied the Motion to Dismiss and set another jury trial in this matter to commence on February 1, 2019. In Defendant’s

Motion to Dismiss briefing, defense counsel concedes that she used the word “misdemeanor” once and the word “felony” once during cross examination of the officer. Def. Brief Motion to Dismiss, p. 9. Defense counsel also concedes that “[a]fter this Court instructed counsel not to refer to offense levels at trial the next day...the undersigned used the term inadvertently in response during cross-examination.” Def. Brief Motion to Dismiss, p. 12. Defense counsel acknowledges that she had been admonished to not use the term. Def. Brief Motion to Dismiss, p. 12. In denying Defendant’s Motion to Dismiss, Respondent District Court observed that the level of offense is absent from any instruction adopted by the Montana Supreme Court Commission on Criminal Jury Instructions. Opinion and Order Denying Def.’s Motion to Dismiss, p. 4:14-18.

ARGUMENT

I. Supervisory Control Not Applicable.

Article VII, Section 2(2) of the Montana Constitution grants this Court “general supervisory control over all other courts.” The Montana Supreme Court has exercised its supervisory control authority with caution, due in part to the Supreme Court’s deference to the district courts’ ability to manage their own dockets pursuant to the Montana Rules of Civil Procedure. Unless a mistake of law has been established, “which, if left uncorrected, would cause a significant injustice for which there is no adequate remedy of appeal,” the Supreme Court

does not exercise supervisory control. *Lohmeier v. Montana Eighteenth Judicial Dist.*, 2007 Mont. LEXIS 197, ¶ 4 (citations omitted). “Supervisory Control is sometimes justified by circumstances of an emergency nature, as when a cause of action or a right has arisen under conditions making the consideration in the trial courts and due appeal to this Court an inadequate remedy.” *State ex rel. Thompson v. Thirteenth Judicial Dist.*, 2007 Mont. LEXIS 107, ¶ 2 (citing M.R.App.P., Rule 17(a)). The Montana Supreme Court has been cautious in granting applications for writs of supervisory authority, limiting exercise of this remedy to extraordinary circumstances and the need to prevent an injustice. *Martz v. Montana Sixth Judicial Dist. Court*, 2007 Mont. LEXIS 196, ¶ 2 (citations omitted). Writs have been granted on the basis that “if the district court proceeded based upon mistake of law, the course of discovery, the cost of preparation, and the trial itself would be adversely affected.” *Truman v. Montana Eleventh Judicial District*, 2003 MT 91, ¶ 15, 315 Mont. 165, 68 P.3d 654 (citing *Plumb v. Fourth Judicial Dist. Court, Missoula Co.*, 279 Mont. 363, 370, 927 P.2d 1011, 1016 (1996)).

In this instance, there are no urgent or emergency factors which make a normal appeal process inadequate, as the Respondent District Court never completed the first trial and will conduct another trial with a new jury panel.

Because the Court's declaration of a mistrial was intended to prevent prejudice to Mr. Small, the State and Mr. Small will not suffer significant injustice. Mr. Small and the State will be allowed another opportunity to have a jury empaneled that will not be prejudiced by the mention of the felony offense level or the other unnecessary excursions outside the charged offense.

II. Respondent District Court's Decision to Declare a Mistrial Supported by Applicable Law.

The Fifth Amendment of the United States Constitution and Article II, Section 25 of the Montana Constitution prohibit an individual from being twice put in jeopardy for the same offense. *State v. Carney*, 219 Mont. 412, 416, 714 P.2d 532, 534 (1986). Retrial is not automatically barred by double jeopardy in instances of a mistrial where the merits of the charge were not resolved. *Arizona v. Washington*, 434 U.S. 497, 505 (1978). When a mistrial has been declared, a second trial may proceed when "manifest necessity" exists. *Id.* The constitutional protection against double jeopardy bars a second criminal trial "unless there was a 'manifest necessity' to terminate the trial or defendant acquiesced in the termination." *Carney*, 714 P.2d at 535. The *Arizona* Court specifically stated the following:

[b]ecause of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the

trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury.

Under the “manifest necessity” standard a district court’s decision to grant or deny a motion for mistrial must be based on whether the defendant has been denied a fair and impartial trial. *State v. Bollman*, 2012 MT 49, ¶ 33, 364 Mont. 265, 272 P.3d 650 (citations omitted). The “manifest necessity” standard cannot be applied mechanically or without attention to the particular problem confronting the trial judge. *Arizona*, ¶ 506. The *Arizona* Court also observed that “the overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge’s evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment.” *Arizona*, ¶ 511. Further, trial judges must have the power to declare a mistrial in appropriate cases. *Arizona*, ¶ 513. “If a trial judges’ decision to order a mistrial was made to protect a defendant’s constitutional interest, that decision will receive a high degree of deference on review.” *State v. Moran*, 231 Mont. 387, 389, 753 P.2d 333, 335.

The charging of a defendant is a matter for the county prosecuting attorney. It is the county attorney that determines when to prosecute a case and when the facts of a case support a possible charge of more than one crime, making the issue

of whether a crime is to be charged a matter solely of prosecutorial discretion. *See State v. Matt*, 2005 MT 9, ¶ 11, 325 Mont. 340, 106 P.3d 530. The defendant may not attempt to elicit testimony that the case should have been charged differently. *State v. Beavers*, 1999 MT 260, 296 Mont. 340, 987 P.2d 371. In *State v. Beavers*, the Montana Supreme Court determined that because the charging a defendant is a prosecutorial function, the defendant had no basis for his line of questioning the officer on the grounds of other potential charges. *Id.*, ¶ 36.

In this case, defense counsel's comments to the witness about other charges, the charging process, and jailing the Defendant were also impermissible. Defense counsel went well beyond the scope of her proposed lesser included charge, sexual assault, during her questioning of the witness about "misdemeanor sex touching," "public intoxication," and "disorderly conduct." Respondent District Court found that defense counsel's questioning diverted focus away from the facts of this case to charging decisions. Charging decisions are fully within the purview of the prosecutor, and it is not the purpose of trial to evaluate the charging process or protocols. The charging level of felony or misdemeanor also is relevant to the determination of subject matter jurisdiction. There is no question that this case was appropriately situated in district court based on the charge. Mention of the charge in front of the jury is not relevant to matters at trial because the charge

level is examined only at the outset by the county prosecutor or at the time of sentencing by the sentencing judge.

In fact, parties often move *in limine* to limit improper comment or questioning regarding the charges. Respondent District Court commonly rules that a defendant should not be entitled to refer to the charges as felonies, the potential penalties, or any other emotion-based attempt to persuade the jury that prosecution of the charges are “unfair.” MCJI 1-102 specifically provides that the jury must make its decision uninfluenced by “mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.” In Respondent District Court’s opening instructions regarding presumption of innocence in this case, Respondent District Court specifically instructed, “[n]either the Information nor the charge(s) contained therein is to be taken by you as any indication, evidence or proof that he is guilty of any offense.” *See* Preliminary Instructions; Opinion and Order, p. 5.

In this case, none of the preliminary instructions mentioned the level of the offence. Respondent District Court takes great effort to prepare these instructions to specifically omit the level of the offense in the preliminary instruction and charging instructions. Defense counsel clearly violated the Court’s direct admonition to not mention the level of the offense when counsel began a line of

questioning designed to challenge the State's charging determination and directly lead to discussions about the level of the offense. Respondent District Court had to warn defense counsel a second time to move on to a different area of question.

While Respondent District Court declared a *sua sponte* mistrial and there was no motion for mistrial made by either party, the Court, nevertheless, had "manifest necessity" to cease the case given the six times "felony" had been improperly uttered and to prevent an unfair trial. Defense counsel's line of questioning, discussing other lesser offenses not charged in this case shows a calculated effort to discuss a range of specific crimes ranging from misdemeanor to felony in defiance of Respondent District Court's order limiting mention of the offense level.

Respondent District Court determined that a curative instruction was insufficient given the number of times the level of charge was uttered, stating "I can't put the rabbit back in the hat." Trial Transcript, p. 137:8-9. While Respondent District Court could have instructed the jury to disregard the mention of the charge after the first utterance of "misdemeanor," Respondent District Court found admonishing counsel the least obtrusive method to move the case forward. Moreover, the *Arizona* Court noted that disciplining counsel "...will not necessarily remove the risk of bias that may be created by improper argument."

Arizona, ¶ 513.

The public's interest in fair trials designed to end in just judgments must prevail over the defendant's right to have his trial concluded before the first jury impaneled. *Arizona*, ¶ 516. "Manifest necessity to discontinue a trial exists when 'particular circumstances manifest a necessity for so doing and when failure to discontinue would defeat the ends of justice.'" See *City of Billings ex rel Huertas v. Billings Mun. Court*, 2017 Mont. 261, ¶ 19, 389 Mont. 158, 404 P.3d 709.

Respondent District Court's decision to order a mistrial was made in Mr. Small's sole interest by not permitting the continued use of the term "felony," which has the effect of labeling Mr. Small a felon before the case was submitted to the jury. The Respondent District Court's decision was motivated by the Court's concern for Mr. Small's constitutional right to a fair and impartial jury. Respondent District Court should not have to sit idly by while Defendant's counsel prejudices his case. As such, Respondent District Court found Mr. Small's interest in proceeding to a verdict in front of the jury empaneled in the first case was outweighed by the competing and equally legitimate demand for public justice. Under the circumstances of this case, the possibility of bias justified the mistrial, and the Respondent District Court found the declaration necessary to a fair trial. Therefore, the mistrial order was supported by the high degree of necessity

required.

III. Respondent District Court Exercised Sound Discretion Under Trial Administration Authority.

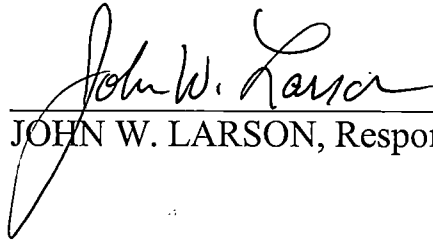
Deferential standards of review are reserved for matters such as determinations of fact and trial administration. *State v. Davis*, 2016 MT 102, 383 Mont. 281, 371 P.3d 979. District courts have wide latitude with trial administration. “There are compelling institutional considerations militating in favor of appellate deference to the trial judge's evaluation of the significance of possible juror bias.” *Arizona*, ¶ 513. A mistrial generally is appropriate when a reasonable possibility exists that inadmissible evidence might have contributed to the conviction. *State v. Partin*, 287 Mont. 12, 18, 951 P.2d 1002, 1005 (1997) (citations omitted). Given the number of admonishments that the Court gave defense counsel and cautioned the witness, Respondent District Court exercised sound discretion in handling the problem of possible juror bias created by the improper comments.

CONCLUSION

Respondent District Court respectfully submits that under the circumstances of this trial, declaring a mistrial was reasonable and in conformity with the law.

As such, the relief sought by Mr. Small should be denied.

RESPECTFULLY SUBMITTED this 20th day of February, 2019.



JOHN W. LARSON, Respondent

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 11(4)(c) and 14, M.R.App.P., the Respondent Montana Fourth Judicial District Court, Missoula County, the Honorable John W. Larson, Presiding Judge, hereby provides a Certificate of Compliance. This response brief to Petitioner's Petition for Writ of Supervisory Control was created as follows:


- Double-spaced
- Proportionally Spaced Times New Roman test typeface of 14 point typeface
- Does not exceed 4,000 words (Word Count: 3,210, excluding tables and certificates)

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing document, postage prepaid, to the following address:

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