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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

MICHAEL ARTHUR MARSH, *Appellant*.

No. 1 CA-CR 15-0257
FILED 4-25-2017

Appeal from the Superior Court in Maricopa County
No. CR2010-048075
The Honorable Steven P. Lynch, Judge
The Honorable Karen A. Mullins, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Adele G. Ponce
Counsel for Appellee

Brown & Little, P.L.C., Tempe
By Matthew O. Brown
Counsel for Appellant

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MEMORANDUM DECISION

Judge Patricia K. Norris delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Paul J. McMurdie joined.

NORRIS, Judge:

¶1 Appellant Michael Arthur Marsh appeals from his convictions and sentences for two counts of misconduct involving weapons (the “weapons charges”), class 4 felonies. On appeal, Marsh argues the superior court violated his double jeopardy rights by granting a mistrial in his first trial because “manifest necessity” did not require the court to do so. Marsh also argues the superior court should have barred the State from retrying him under double jeopardy principles because the mistrial had been caused by prosecutorial misconduct. Under the circumstances presented, Marsh’s first argument is not properly before us and his second argument is not supported by the record. Thus, we affirm Marsh’s convictions and sentences for the weapons charges.

FACTS AND PROCEDURAL BACKGROUND

¶2 Marsh’s first trial for the weapons charges began in November 2012. During direct and cross-examination, Marsh acknowledged he possessed two guns although he was a convicted felon, but testified he was taking the guns to their owner after “kids” attempted to burglarize the owner’s house. Shortly before 11:00 AM on the second day of the jury’s deliberations, the jury took a break. During the break, the prosecutor in the case entered a crowded courthouse elevator and spoke to a colleague about the case. After the break, the court was notified that a juror, Juror No. 11, had overheard the prosecutor talking about the case in the elevator. With counsel and Marsh present, the court then questioned Juror No. 11, who told the court she had overheard the prosecutor telling a colleague that:

Mr. Marsh had confessed or agreed that he had possession . . . that they [the jury] should just be selecting guilty

(the “elevator statement”).

¶3 Juror No. 11 then told the court she had told the other jurors about the elevator statement. The court asked Juror No. 11, “[D]o you think

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that would affect your ability to treat either side fairly?" and she said, "no." Juror No. 11 also told the court she was the only person from the jury in the elevator at the time, and she had been wearing her juror badge.

¶4 With the agreement of defense counsel, the court began to question each individual juror, starting with Juror No. 1. The court asked Juror No. 1: "Do you think [the elevator statement is] going to affect your ability to be fair in any way?" Juror No. 1 replied, "I don't think I have a firm answer for you." After Juror No. 1 left the courtroom, the court told the parties it was "inclined" to grant a mistrial given Juror No. 1's response. Defense counsel informed the court he was not "willing to waive any issue," including a mistrial. Defense counsel said he "[did not] want to lose this jury," but he understood Juror No. 1 could not give a firm answer on whether the elevator statement would affect his ability to be fair and impartial. When the court asked defense counsel whether it should grant a mistrial, defense counsel refused to give the court a straight answer, and instead responded, "I don't want to—I am not asking for one, but I am also not waiving . . . If the court does it, I understand." The court declared a mistrial and set an evidentiary hearing to allow the parties to address whether the case should be dismissed with prejudice for prosecutorial misconduct.

¶5 Before the evidentiary hearing, Marsh moved to dismiss the weapons charges under double jeopardy principles. At the evidentiary hearing, the prosecutor told the court he had not known the jury was on break when he made the elevator statement and had not known the juror was in the elevator when he made the elevator statement. The prosecutor also acknowledged that making the elevator statement had been a mistake. Defense counsel did not seek permission to question the prosecutor under oath, and instead essentially argued the prosecutor had acted recklessly.

¶6 The court denied the motion:

[I]n this particular case, while I think all of us would agree that it's never a good practice to discuss a trial in an elevator, I cannot find that [the prosecutor] acted to intentionally cause a mistrial. In addition I find that there's no evidence to support the contention that he was telling his colleague in the elevator for some type of improper purpose.

The State retried Marsh on the weapons charges in April 2014, and the jury convicted him as charged.

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DISCUSSION

¶7 Marsh argues the superior court should have barred the State from retrying him because “manifest necessity” did not require the court to declare a mistrial. This issue is not properly before us.

¶8 Double jeopardy attaches when the jury is sworn in and the proceedings commence. *Jones v. Kiger*, 194 Ariz. 523, 526, ¶ 7, 984 P.2d 1161, 1164 (App. 1999) (citation omitted). Double jeopardy does not bar retrial after a trial court grants a mistrial when the defendant consents to the mistrial. *State v. Henderson*, 116 Ariz. 310, 314, 569 P.2d 252, 256 (App. 1977) (citation omitted). While this court does not infer consent from mere silence or failure to object, silence taken with other circumstances can indicate consent. *Id.* (when defense counsel actively participates in the discussion about declaring a mistrial and is given an opportunity to object to the mistrial, but fails to do so, consent is implied).

¶9 Under the circumstances presented here, we believe Marsh, through counsel, impliedly consented to the mistrial. Similar to *Henderson*, Marsh’s trial counsel actively participated in the mistrial discussion and was given an opportunity to object before the superior court granted the mistrial. The superior court directly asked defense counsel whether he thought it should grant a mistrial. Although defense counsel refused to give the superior court a straight answer, he stated he “understood” if the superior court granted a mistrial. Further, the record reflects a strategic attempt by defense counsel to engineer the superior court into declaring a mistrial but in such a manner as to attempt to avoid the consequences of asking for a mistrial. Marsh cannot, however, escape the consequences of counsel’s strategy. Accordingly, we hold double jeopardy did not bar the State from retrying Marsh based on the superior court’s decision to grant a mistrial.

¶10 Marsh also argues the superior court should have prohibited the State from retrying him under double jeopardy principles because the mistrial had been caused by prosecutorial misconduct. In general, a mistrial caused by prosecutorial misconduct does not bar retrial. *State v. Trani*, 200 Ariz. 383, 384, ¶ 6, 26 P.3d 1154, 1155 (App. 2001) (citation omitted). But double jeopardy will bar retrial after a mistrial resulting from prosecutorial misconduct when:

1. [The] [m]istrial is granted because of improper conduct or actions by the prosecutor;
and

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2. such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal; and

3. the conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial.

Pool v. Superior Court In & For Pima Cty., 139 Ariz. 98, 108–09, 677 P.2d 261, 271–72 (1984). Double jeopardy will also bar retrial if the mistrial was granted because of intentional prosecutorial misconduct aimed at preventing an acquittal. *State v. Jorgenson*, 198 Ariz. 390, 391, ¶ 4, 10 P.3d 1177, 1178 (2000). Whether double jeopardy bars a retrial is a question of law, which we review de novo. *State v. Moody*, 208 Ariz. 424, 437, ¶¶ 17-18, 94 P.3d 1119, 1132 (2004).¹

¶11 Exercising de novo review, we agree with the superior court the prosecutor’s conduct here did not rise to the level of misconduct prohibiting the State from retrying Marsh on the weapons charges. The record contains no evidence the prosecutor was trying to avoid an acquittal by causing a mistrial. And, the record contains no evidence the prosecutor made the elevator statement to intentionally cause a mistrial.² At the hearing, the prosecutor acknowledged the elevator statement was a mistake and asserted (without contradiction) that he did not know the juror was in the elevator. We agree the prosecutor made a mistake, but as the supreme

¹In *Moody*, the Arizona Supreme Court held the defendant failed to preserve the double jeopardy issue when he did not move for a mistrial or seek relief through a special action. 208 Ariz. at 437-38, ¶¶ 21-23, 94 P.3d at 1132-33. Marsh did not move for a mistrial or file a special action. But the State does not argue that Marsh did not preserve this issue; thus, we address it.

²Marsh argues the court should have taken testimony before rejecting his double jeopardy argument based on prosecutorial misconduct. But, as noted above, Marsh, through counsel, did not ask to examine the prosecutor under oath.

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court recognized in *Pool*, negligent and mistaken conduct, without more, does not trigger double jeopardy.

¶12 Finally, contrary to Marsh’s argument, the facts in this case are not similar to those presented in *Pool*. In that case, the prosecutor’s improper conduct when cross-examining the defendant, despite objections and an admonition, barred retrial. *Pool*, 139 Ariz. at 107–09, 677 P.2d at 270–72. The improper conduct included obtaining multiple defective indictments and egregiously inappropriate remarks while cross-examining the defendant.³ *Id.* at 100–11, 677 P.2d at 263–74. The court reasoned the prosecutor’s misconduct was so egregiously improper that it could not be negligence or a mistake. *Id.* at 109, 677 P.2d at 272. In contrast, here the prosecutor made an inappropriate statement to a colleague in an elevator not knowing a juror was also in the elevator. The elevator statement was a single, isolated incident, not egregious misconduct that continued throughout, despite objections and an admonition.

CONCLUSION

¶13 For the foregoing reasons, we affirm Marsh’s convictions and sentences on the weapons charges.



AMY M. WOOD • Clerk of the Court
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³The egregiously inappropriate remarks included: calling the defendant a “cool talker;” asking the defendant about other people’s intoxication when it was not relevant to the case; asking questions that seemed to imply other bad acts; and asking questions under the guise that it was something the defense counsel had stated, when defense counsel had not made such statements. *Pool*, 139 Ariz. at 110–11, 677 P.2d at 273–74.