DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0171
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	
	)	(Not for Publication –
JAMES PATRICK CUNY,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-121925-001 SE

The Honorable Carolyn K. Passamonte, Judge *Pro Tempore*
The Honorable Helene F. Abrams, Judge

CONVICTIONS AND SENTENCES VACATED; REMANDED

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Attorneys for Appellee

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Attorneys for Appellant

W E I S B E R G, Judge

¶1 James Patrick Cuny ("Defendant") appeals from his convictions for possession or use of narcotic drugs, possession

of drug paraphernalia, and the sentences imposed. Defendant alleges that the Fifth Amendment's protection against double jeopardy barred his second trial. We agree and vacate Defendant's convictions and sentences and remand the matter to the trial court to dismiss the charges against him with prejudice.

PROCEDURAL HISTORY

¶2 Defendant was indicted for possession or use of narcotic drugs (heroin), a Class 4 felony, and possession of drug paraphernalia (two balloons), a Class 6 felony. The charges arose when a detective arrested Defendant on an unrelated matter, and in a search incident to arrest, found two balloons containing heroin in his pants' pocket. Defendant claimed that he had borrowed the pants from a friend and did not know the balloons were in the pocket. Defendant's friend testified that the balloons containing the drugs belonged to him.

¶3 While the jury was deliberating during the first trial, Juror No. 6 submitted this written question to Judge *Pro Tem* Passamonte:

> For purposes of demonstration, when I got home last night I had an idea. I wear jeans with the same little side pocket like Mr. Cuny claims he had on. The heroin was described as feeling like hard raisins. I had my jeans on with the little side pocket and I put two raisins in it. When I put my

> hand into the regular pocket I can feel the raisins. Can I have the jurors feel the pocket? It might be a key demonstration to help us render a verdict.

¶4 The court questioned Juror 6 in the presence of counsel and asked her whether she had shared her question with the other jurors. She said she had not done so, but when asked if she had "discussed your question at all with any of the other jurors," she responded that she "did share that with them." The court asked Juror No. 6 if any other juror had seen the question or had just heard her description and she said, "Just verbally." The court then asked, "As best as you can recall, what did you say to them about your concern and your suggestion to the court?" Juror No. 6 responded that "Well, I just thought that it would be helpful [in] rendering a verdict. It's one more piece of evidence I think that might help us in making our decision." Neither counsel had other questions for Juror No. 6.

¶5 Juror No. 6 was excused and the court advised counsel that the alternate juror was available for deliberations. The prosecutor, however, indicated that "the State has some serious concerns that [the juror] did discuss this with the rest of the jury. I think we're towing the line of a mistrial here. I'd be interested in talking to my counter partner to see exactly where we go from here." Defense counsel informed the court that "I think our position is going to be we want to go ahead and have--

we’re not going to move for a mistrial." Counsel requested an additional jury instruction reiterating the previously given instruction that the jurors were not to do independent research, conduct experiments, go to the crime scene or attempt to duplicate events testified to at trial.

¶6 After the prosecutor consulted with his office, but without argument, the State moved for a mistrial. Defense counsel objected, stating,

> I don’t think a mistrial is appropriate. I think that a curative instruction could be given to them. They should disregard that. Apparently they didn’t conduct the experiments themselves. I think it can be resolved. I think that if a mistrial is granted I think Mr. Cuny is prejudiced in a sense. So, I think it can be cured. [Defendant] was prepared for the trial. Had the trial. And the second time around would give—certainly give the State an additional opportunity to try to close some of their holes. Additionally, it would for us as well. I . . . think we’re in worse footing for the second time. On a worse footing. And so I think it can be cured.

The judge did not voir dire the other jurors to discover what Juror No. 6 had communicated to them during deliberations or determine whether they were prejudiced, make any other relevant inquiries or consider possible alternatives to declaring a mistrial. The judge ruled:

> I’m going to grant the State’s request for a mistrial in this case. I think that the danger is too great. That number one, Juror No. 6 has already discussed at least her

> question with the rest of the jury. And her question is in clear violation of the final instructions. Also, that she may have discussed what steps she'd already taken to prepare for the Court's granting of her request to conduct this experiment with the other jurors. And I just think the danger is too great that this jury has been tainted by the actions of Juror No. 6, and that a curative instruction would not address that problem. So, I am going to declare a mistrial in this matter.

¶7 Defendant was convicted in a second trial of the same charges with two prior felony convictions and sentenced to concurrent prison terms of ten years for possession or use of narcotic drugs and 3.75 years for possession of drug paraphernalia. Defendant timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A)(2010).

DISCUSSION

¶8 Defendant claims the trial court committed reversible error by declaring a mistrial during the first trial over Defendant's objection without a showing of manifest necessity. He further alleges that the State violated his Fifth-Amendment right not to be placed in jeopardy twice for the same offense by proceeding with a second trial that resulted in his convictions and sentences. We agree.

Double Jeopardy

¶9 "The Double Jeopardy Clause, U.S. Const. amend. V, protects defendants against both multiple prosecutions and multiple punishments for the same offense." *State v. McGill*, 213 Ariz. 147, 153, ¶ 21, 140 P.3d 930, 936 (2006) (citing *Witte v. United States,* 515 U.S. 389, 391 (1995)). We determine de novo whether the State violated Defendant's right against double jeopardy. *Id.* Even if a defendant raises the issue for the first time on appeal, "a double jeopardy violation constitutes fundamental, prejudicial error." *State v. Ortega,* 220 Ariz. 320, 323, ¶ 7, 206 P.3d 769, 772 (App. 2008)(citing *McGill,* 213 Ariz. at 147, ¶ 21, 140 P.3d at 936)). *See also State v. Millanes,* 180 Ariz. 418, 421, 885 P.2d 106, 109 (App. 1994) (stating that because right against double jeopardy is "fundamental" to the American system of justice, it "must be enforced whenever a violation is determined to exist [and] . . . is not waived by the failure to raise it in the trial court").[1]

¶10 The Double Jeopardy Clause "embraces the defendant's 'valued right to have his trial completed by a particular tribunal.'" *Arizona v. Washington,* 434 U.S. 497, 503 (1978) (quoting *Wade v. Hunter,* 336 U.S. 684, 689 (1949)). This right,

[1]Although Defendant objected to the mistrial, he did not move to dismiss the indictment under Rule 16.1, Arizona Rules of Criminal Procedure, after the trial court reset the matter for a second trial.

however, "must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." *Wade,* 336 U.S. at 689. When a defendant moves for a mistrial, the state generally may retry the defendant "unless the mistrial was the result of prosecutorial misconduct or judicial overreaching." *State v. Aguilar,* 217 Ariz. 235, 238, ¶ 10, 172 P.3d 423, 426 (App. 2007). When the court orders a mistrial over defendant's objection, however, the defendant may be retried without violating his right against double jeopardy only "'if taking all the circumstances into consideration, there is a *manifest necessity* for the act, or the ends of public justice would otherwise be defeated.'" *Jones v. Kiger,* 194 Ariz. 523, 526, ¶ 8, 984 P.2d 1161, 1164 (App. 1999) (quoting *Arizona v. Washington,* 434 U.S. at 506, n. 18)).

Manifest Necessity

¶11 We review a trial court's finding of manifest necessity for an abuse of discretion. *State v. Givens,* 161 Ariz. 278, 279, 778 P.2d 643, 644 (App. 1989). Although the "trial court is usually in the best position to determine whether manifest necessity requires a mistrial, . . . the trial judge must recognize that the defendant has a significant interest in deciding whether to take the case from the jury and 'retains primary control over the course to be followed in the event of such error.'" *Jones,* 194 Ariz. at 526, ¶ 9, 984 P.2d

at 1164 (quoting *United States v. Dinitz,* 424 U.S. 600, 609 (1976)). Thus, when the court errs in determining that manifest necessity exists and *sua sponte* declares a mistrial without the defendant's consent, the Double Jeopardy Clause bars a retrial. *McLaughlin v. Fahringer,* 150 Ariz. 274, 277-78, 723 P.2d 92, 95-96 (1986).

¶12 "'Manifest necessity'" can arise in many different situations and the courts have not attempted to adopt a single, all encompassing definition." *Aguilar,* 217 Ariz. at 239, ¶ 14, 172 P.3d at 427. And, "although absolute necessity is not required, the United States Supreme Court has said there are various 'degrees of necessity and we require a "high degree" before concluding that a mistrial is appropriate.'" *Id.* (quoting *Arizona v. Washington,* 434 U.S. at 506)(citation omitted). The prosecutor has a heavy burden to demonstrate manifest necessity. *Gusler v. Wilkinson,* 199 Ariz. 391, 395, ¶ 18, 18 P.3d 702, 706 (2001). "Indeed, the very term 'manifest necessity' emphasizes the 'magnitude of the prosecutor's burden.'" *Id.* (quoting *Arizona v. Washington,* 434 U.S. at 505).

¶13 A mistrial is not warranted under this strict standard when the court has "the ability to prevent its necessity." *Evans v. Abbey,* 130 Ariz. 157, 159, 634 P.2d 969, 971 (App. 1981). Thus, when a trial court fails to *consider* viable alternatives to declaring a mistrial, manifest necessity has not

been shown. *See United States v. Jorn,* 400 U.S. 470, 486-87 (1971) (trial judge erred by *sua sponte* declaring mistrial based on his belief that government's witnesses not advised of Fifth-Amendment rights, but failed to consider less extreme methods to cure defect such as granting continuance to allow witnesses to consult with counsel); *McLaughlin,* 150 Ariz. at 277-78, 723 P.2d at 95-96 (holding that where prosecutor had referred to possibly inadmissible evidence during opening statement, no manifest necessity shown requiring mistrial where court failed to consider alternative of short recess to resolve evidentiary issue); *Gusler,* 199 Ariz. at 395, 18 P.3d at 706 (finding no manifest necessity to declare mistrial after trial court received ambiguous note from jury indicating impasse on several counts, but failed to described full content of note to counsel, preventing them from taking action, and failed to make specific inquiry to clarify the ambiguity); *Aguilar,* 217 Ariz. at 240-41, ¶¶ 18-21, 172 P.3d at 428-29 (concluding that where prosecutor failed to disclose a ballistics report prior to trial, no showing of manifest necessity to warrant mistrial as court had reasonable alternatives of granting a short continuance to allow the defendant to review the report or granting defendant's motion to preclude evidence as a disclosure violation); *Jones,* 194 Ariz. at 526-27, ¶¶ 10-12, 984 P.2d at 1164-65 (no manifest necessity justifying *sua sponte* mistrial

where State's witness gave inadmissible hearsay testimony and court ignored defense counsel's assertion that the trial was not incurably damaged and failed to consider the alternative of giving curative instruction); *Evans,* 130 Ariz. at 158-160, 634 P.2d at 970-972 (finding court abused its discretion in declaring mistrial where juror engaged in conversation with a witness, but on voir dire, no juror admitted overhearing conversation, and court failed to determine if jury actually prejudiced or to consider alternative of merely dismissing that juror).

¶14 These cases demonstrate that a trial court must make appropriate inquiries, carefully weigh conflicting interests, consider all possible alternatives and scrupulously examine all relevant factors before declaring a mistrial. *See United States v. Bates,* 917 F.2d 388, 395-96 (9th Cir. 1990) (appellate court must consider four factors in evaluating trial court's declaration of mistrial without defendant's consent: hear from both parties; considered alternatives and chose least harmful; acted deliberately; properly found defendant could benefit from mistrial); *Smith v. Mississippi,* 478 F.2d 88, 96 (5th Cir. 1973) (finding no abuse of discretion in declaring mistrial sought by prosecutor because of tainted juror where trial court had fully determined what had actually transpired, was "sensitive to the opposing requirements on his discretion" and had "painstakingly

weighed" all the relevant factors); *United States v. Kanahele,* 951 F. Supp. 928, 941-42 (D. Haw. 1996) (upholding grant of mistrial based on juror misconduct over defendant's objection after extensive inquiry, lengthy consultation with counsel and careful consideration of other alternatives). Here, the trial judge did none of these.

¶15 The trial judge failed to make any inquiry as to what had actually occurred during deliberations. Except for questioning Juror No. 6, she did not voir dire the other jurors to determine with whom Juror No. 6 communicated, what, if anything, they heard and whether or not they were prejudiced by the alleged communication. Even assuming that some or all of the jurors may have been improperly influenced, she did not consider the possibility of attempting to rehabilitate them. Without any factual determination, the court simply made the assumption that Juror No. 6 "discussed the question with the rest of the jury" and that "she may have discussed what steps she'd already taken to prepare for the court's granting of her request to conduct the experiment." She then concluded, again without inquiry, that "the danger is too great that this jury has been tainted by the actions of Juror No. 6."

¶16 The prosecutor did not argue, let alone demonstrate, that other alternatives to a mistrial were not feasible and that manifest necessity required a mistrial. When defense counsel

objected to the mistrial and offered the alternative of a curative instruction, the judge did not seriously explore this option or give weight to counsel's opinion that the error could be cured; rather, she conclusorily opined that "a curative instruction would not address the issue [of prejudice]." Nor did the court discuss with counsel any other possible options short of the drastic remedy of a mistrial. Further, the judge did not appear to give fair consideration to countervailing interests, particularly "the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *Jorn,* 400 U.S. at 486.

¶17 The record shows the trial judge prematurely formed an opinion that the jury was tainted and that the only remedy was a mistrial. She reached this conclusion without investigating the facts, seriously considering any alternatives, taking into account Defendant's interest in proceeding with this trial, and carefully weighing all relevant factors. Under these circumstances, the State did not meet its heavy burden of establishing manifest necessity, and the trial's court's declaration of a mistrial was an abuse of discretion.

¶18 The cases cited by the State are inapposite or distinguishable. Relying on *State v. Miller,* 178 Ariz. 555, 558, 875 P.2d 788, 791 (1994), which held that juror misconduct

warrants a mistrial if there is a showing of "actual prejudice or if prejudice may be fairly presumed from the facts," the State claims that prejudice may be presumed under these facts. But *Miller* involved the discovery after trial of juror misconduct and the defendant, not the State, moved for an evidentiary hearing and a new trial. *Id.* at 557, 875 P.2d at 790. Moreover, the Arizona Supreme Court concluded that the trial court had erred in denying the defendant's request for an evidentiary hearing to determine if juror misconduct had actually tainted the verdict. *Id.* at 559-60, 875 P.2d at 788-89. *See also State v. Reynolds,* 11 Ariz. App. 532, 534-35, 466 P.2d 405, 407-08 (1970)(upholding grant of mistrial over defendant's objection based on juror misconduct only after conducting a hearing and interviewing every juror to determine whether the jurors were prejudiced).

¶19 The State also relies on *State v. Ferreira,* 152 Ariz. 289, 294, 731 P.2d 1233, 1238 (App. 1986), for the proposition that a mistrial was appropriate because of jury experimentation. That case, however, did not involve jury experimentation; rather it involved the jury examining a properly admitted exhibit under various lighting conditions while deliberating and we held that such examination did not constitute impermissible experimentation.

¶20 Finally, we reject the State's argument that the prosecutor was simply "acting consistent with his duty as a minister of justice when he requested a mistrial." This ignores the State's heavy burden to show manifest necessity to justify granting a mistrial over Defendant's objection. Even conceding the prosecutor's good intent, in these circumstances, he should have urged that the trial court first consider viable alternatives to a mistrial.

CONCLUSION

¶21 The trial court abused its discretion in granting the State's motion for mistrial without first considering viable alternatives to such mistrial. Therefore, the Double Jeopardy Clause barred Defendant's second trial. Accordingly, we vacate Defendant's convictions and sentences and remand the matter to the trial court with instructions to dismiss the charges against Defendant with prejudice.

/s/_____
SHELDON H. WEISBERG, Judge

CONCURRING:

_/s/_____
PHILIP HALL, Presiding Judge

_/s/_____
PETER B. SWANN, Judge