FILED BY CLERK
SEP 11 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ARTURO DURAZO, Petitioner, v. HON. TERESA GODOY, Judge Pro Tempore of the Superior Court of Arizona, in and for the County of Pima, Respondent, and THE STATE OF ARIZONA, Real Party in Interest.	2 CA-SA 2012-0052 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

SPECIAL ACTION PROCEEDING

Pima County Cause No. CR20102783001

JURISDICTION ACCEPTED; RELIEF GRANTED

Lori J. Lefferts, Pima County Public Defender
By Kevin M. Burke and Sarah Bullard
Tucson
Attorneys for Petitioner

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Real Party in Interest

B R A M M E R, Judge.

¶1 In this special action, petitioner Arturo Durazo seeks relief from the respondent judge's denial of his motion to dismiss the indictment and bar retrial on charges of possession of marijuana, possession of a narcotic drug, and possession of drug paraphernalia. He argues retrial would violate double jeopardy principles because the respondent declared a mistrial sua sponte without his consent and absent manifest necessity. "The denial of a motion to dismiss that is based on a claim of double jeopardy is properly reviewed by special action." *Jones v. Kiger*, 194 Ariz. 523, ¶ 1, 984 P.2d 1161, 1163 (App. 1999); *see also State v. Moody*, 208 Ariz. 424, ¶ 22, 94 P.3d 1119, 1133 (2004) (special action review of denial of motion to dismiss based on double jeopardy preferred to appeal after retrial "[b]ecause the Double Jeopardy Clause guarantees the right to be free from subsequent prosecution, [and] the clause is violated by the mere commencement of retrial"). Accordingly, we accept jurisdiction.

Background

¶2 Based on the limited record before us, the state alleged the following facts in support of the charges against Durazo. In July 2010, Tucson police officers responded to 9-1-1 calls, including one made by Durazo, reporting that shots had been fired into Durazo's home. Officer John Murphy was the first to respond, and he found Durazo and his female companion both had been shot. Durazo, who had suffered a relatively minor injury, declined medical care. Murphy then conducted a protective sweep of the home and found no perpetrators or other victims, but noticed multiple bullet holes in the walls. He told a responding detective that he also had seen marijuana and drug paraphernalia in

the home and, after the detective obtained a search warrant, officers found marijuana and cocaine. Durazo was charged with possession of marijuana for sale, possession of a narcotic drug, and possession of drug paraphernalia.[1] Before trial, the respondent suppressed the statements Durazo had made to two detectives, finding they had been taken in violation of *Miranda*,[2] and granted Durazo's motions in limine.

¶3 In its opening statement, the state explained the police had responded to multiple 9-1-1 calls and detailed the officers' discoveries during the protective sweep and the ensuing investigation. Defense counsel emphasized that the house had been sparsely furnished and had contained few personal belongings. She also told the jury the evidence would show that, after Murphy had told the detective about the evidence of drugs, the police had "shifted their focus to the drug case instead" of the shooting incident and had failed to "follow up and do certain things," such as fingerprint the containers in which the marijuana and cocaine had been found or "follow up" on "the other [9-1-1] call that came in about this shooting."

¶4 Murphy, the state's first witness, testified about the protective sweep and stated that, after it had been completed, he spoke briefly with Durazo, "to identify him and get just brief descriptions of what possibly could have happened, [or] any suspect

[1]After Murphy had testified he had seen marijuana in one of the bedrooms, Durazo moved for a mistrial on the ground this evidence had been precluded by the trial court's ruling on a motion in limine. The respondent judge denied the motion, finding the evidence was "not . . . extraordinarily prejudicial," and Durazo declined to have the testimony stricken.

[2]*Miranda v. Arizona*, 384 U.S. 436 (1966).

information," but Durazo said only "that he didn't know of anybody [who] would want to shoot him or his house." Murphy said this conversation had taken place while he was waiting to be relieved by another officer so Murphy could continue with his investigation, which would include checking on footprints and other evidence observed in back of the house and determining whether there were any witnesses to the shootings.

¶5 During cross-examination, defense counsel asked Murphy about a 9-1-1 call one of Durazo's neighbors had made, describing having seen a man running from Durazo's house and leaving the area in a red sport utility vehicle (SUV). When counsel asked Murphy whether he had looked for the red SUV, Murphy explained he had not, although he or another officer had broadcast an "attempt to locate" the vehicle based on the description provided. After questioning Murphy extensively about the condition of the home's interior, counsel began to ask him about his investigation in the backyard and, specifically, the "footprints leading up to [and away from] the back door."

¶6 At this point in Murphy's testimony, the respondent judge asked to speak with counsel and held the following bench conference:

> THE COURT: I guess I'm concerned because I don't know how far you're going to go into the nature of the investigation. I'm concerned about—if counsel is going to get into the investigation of the aggravated assault, what concerns me is that Mr. Durazo, he wasn't very cooperative in giving them information about the nature of this investigation.
>
> I think not being able to get into his statement might be unfair to the State. If you're going to attack the nature of that investigation, it's unfair that the State can't present any evidence that they tried to get information from Mr. Durazo to

assist in this investigation. And he wasn't exactly cooperative.

So I don't know where you're going. I just wanted to let counsel know that that is one of my concerns, so—and if you are going to present a defense that they didn't investigate the aggravated assault, I'm not so sure that that's relevant, and I may be inclined to let the State bring in the interview of Mr. Durazo; that they tried to get him to assist in the investigation, and he didn't help them.

So I'm just letting you know that so that you can make some informed choices about what you want to do. I don't know where you're going, but I just wanted to let you know what my concerns were.

[DEFENSE COUNSEL]: Well, maybe we can have a discussion off the record.

THE COURT: Sure. I just wanted to let you know what my concerns are now.

[DEFENSE COUNSEL]: Okay.

THE COURT: If it gets too far into the nature of the investigation and your theory of the case is that they didn't do a good investigation, he can touch on what they did or they didn't do with the aggravated assault.

[DEFENSE COUNSEL]: But it's not the nature of the investigation of the aggravated assault. It's the—

THE COURT: You can investigate and explore all you want the investigation as it pertains to this case. I'm just concerned that there is some unfair disadvantage that the State is going to be put in if you get into the fact that there is some investigation they didn't do as to the aggravated assault. That's not the case before this jury.

And number two, the jury is not going to have information about what Mr. Durazo may or may not have to say about it because it's in the statement. I just think it's a

> difficult position for the State to be in, to be able to rebut what they tried to do with this investigation, because, frankly, they tried. Mr. Durazo was—I read the statement, and he wasn't very cooperative in providing information concerning certain aspects of the investigation.
>
> So I'm just letting you know what my concerns are so you can make decisions. You don't need to make them right now. You can take a minute to think about it. You can do some research and bring in some cases and we can discuss them in the morning, but I wanted to bring that to your attention. So those are just the concerns that I have right now.

¶7 Defense counsel finished her cross-examination of Murphy, eliciting testimony that the backyard had not been landscaped and contained no lawn furniture and that he had left the scene before any arrests were made. On redirect questioning, Murphy testified he had seen the shoe prints in the backyard only briefly and that, as a matter of standard procedure, officers broadcast an attempt to locate a suspect vehicle "en route to the call itself." He also stated that Durazo had indicated to him that it was his house and had told him that "he didn't have any enemies," and "didn't know why anybody would want to shoot at him or his house." When asked if Durazo was otherwise "cooperating in the investigation to find the shooter," Murphy stated he had asked only initial questions, which Durazo had answered, and he "didn't see anything that made [him] think [Durazo] wasn't going to cooperate."

¶8 The jury then was excused for the day, and the respondent judge asked if counsel wished to take up anything before the evening recess. With respect to the earlier sidebar, defense counsel suggested the respondent's ruling—that questions regarding whether the police had shifted their focus from the shooting investigation to the drug

investigation could "open the door" to admission of Durazo's statements—was based on the assumption that "because . . . Durazo can't name a person or point to a certain person that he is somehow not helping the officers as much as he can." Counsel argued the victim's inability to identify his assailant "does not imply that that person is not being cooperative" and admission of Durazo's statement would not be warranted because defense assertions the police had failed to follow through on the shooting incident were not related to "Durazo's noncooperation, but rather [based] on the police not talking to the neighbor who . . . made the phone call, not following up on the footprints and all these different aspects."

¶9 The respondent judge replied,

> All right. Well, if—if I gave counsel the impression that it was—if I—that he was not cooperating, I didn't mean to. Anything that he said during his statement is information that the police could use or not use to follow up on an investigation. He is denying that there w[ere] drugs in the house. He gets to do that. But part of what the police would do, I'm assuming, is that if he says, yeah, this could have been a drug rip, is investigate that aspect of it.
>
> Here is my concern as well. I don't think it's relevant at all what sort of investigation was done into the aggravated assault. I think that that just confuses the issues. And I would sustain, frankly, objections about what sorts of investigation was done into the aggravated assault. Any statements that Mr. Durazo made with regard to that are necessarily things that police would use to investigate that, and I think because the Court suppressed the statement on *Miranda* violations, the State is not going to be able to get into that, and that is unduly—that's very unfair to the State. The jury is going to be left with this impression of what you want them to know about the investigation, but there is a whole other aspect

> of it that was suppressed by the Court for reasons that the jury doesn't even know about.
>
> So the fact that you want to get into the nature of that investigation, anything that the police did, I think, with regard to that investigation, regardless of the sorts of answers that Mr. Durazo gave or didn't give, would be relevant to what sort of investigation that they could do.
>
> So I think it's fundamentally unfair, having that statement suppressed, and then the defense getting into an area that, well, they didn't do a good investigation into the other offense. It's not relevant what sort of information they did as to that offense.
>
> And if you want to make it relevant, then I'm going to let the State get into the fact that they tried to explore those things with Mr. Durazo; that they asked him questions about it; that they asked about whether or not it could have been a drug rip, I mean, to get into all the different things that they attempted to explore which are relevant in how they would conduct an investigation.
>
> I just—I think it's unfair to have something suppressed and then build a defense around something that the State has no way to be able to give a complete picture of. But, frankly, I don't think it's relevant at all, and I would sustain objections as to the relevance of that. I just think it is a red herring. It confuses the issue, and I just don't think it's relevant. So that's where I'm at.

¶10 After some further discussion, the respondent judge ruled she would "preclude any other information about what investigation was done into the aggravated assault case unless it overlaps somehow into the investigation into the drug case." The respondent cited "two reasons" for her ruling, stating,

> That investigation is just not relevant. And even if it was relevant, we're getting into an area where the State is basically at a disadvantage. You know, they can't present the type of

> investigation they did unless they can bring in the information about the investigation that they did, and that would necessarily include the information that they attempted to get from Mr. Durazo.
>
> So I just don't think it's relevant. That investigation has absolutely no probative value. It's certainly outweighed by the danger of unfair prejudice to the State, and the State gets to have a fair trial, too.

Before concluding proceedings for the day, the respondent invited counsel to provide any research that might cause her to revisit her ruling before the jury returned the following day.

¶11 The next morning, defense counsel restated her position. The respondent judge stated she knew neither side had contemplated the issue before trial and recognized defense counsel had made an opening statement and questioned Murphy "in good faith." "[A]nd," she continued, "a great deal of information is now before [the jury] that—I can't unring that bell." She added that she did not "want to put counsel in an unfair position" of having "to change courses midstream" and told defense counsel, "[I]f you wanted a mistrial, I would probably grant a mistrial." Defense counsel then asked, "If we don't ask for a mistrial and we go forward, is [Durazo's] statement coming in or would it stay out as long as we don't go back to the investigation of the aggravated assault?" The respondent answered, "No. I have precluded all of the information about the investigation into the aggravated assault, so there would be no reason why the State would need to, at this point, I believe, bring in anything potentially from his statement."

¶12 Rejecting the state's suggestion that it be permitted to ask the detective, generally, whether Durazo had been "able to provide any helpful information," without "getting into any specific statements that he made," the respondent judge then stated, "[T]he more we talk about this, it just doesn't seem like there is going to be any good way to unring the bells that have been rung," adding, "I just don't know that there is any good way to deal with that proceeding with this trial. But, [defense counsel], I'll hear any other thoughts that you have." Defense counsel again argued the merits of her position that the aggravated assault investigation was relevant and did not open the door to the admission of Durazo's statements. When the respondent asked if there was "any other record that [defense counsel] wanted to make on the mistrial," counsel responded, "We're not going to ask for a mistrial at this point."

¶13 Before the respondent judge spoke again, the state suggested that if it could question one of the detectives about evidence collected related to the shooting, "that would be sufficient to rebut the insinuation made by [the defense] in her opening statement." The respondent did not respond directly to this suggestion; instead, the record reflects the following:

> THE COURT: So you know what? I know, counsel, you're not asking for it, but I think if the Court finds that there is a manifest injustice that just simply can't be dealt with, I think the Court, on its own—and I'm going to declare a mistrial at this point. There is just no good way to cure what's gone on with this case.
>
> You know, [the prosecutor] is right. I mean, it's a struggle for him to deal with what he's going to do with Detective Peña on the stand, especially in light of the fact that

> other things have come out and the bell has been rung and there is just no good way to unring it. So I'm going to go ahead and declare a mistrial. We'll bring the jury in, and then we can figure out a new trial date.
>
> THE BAILIFF: The jury is entering.

¶14 Two days later, defense counsel filed a motion to dismiss the indictment and bar any retrial, citing the Double Jeopardy Clauses of the United States and Arizona Constitutions. At the hearing that followed, the respondent judge stated she was denying Durazo's motion because (1) Durazo had not objected to her ordering the mistrial, but had simply "informed the Court that [he] wouldn't be requesting one"; (2) the respondent had discussed alternatives to a mistrial with counsel but "every time we were discussing a potential option, [she] found that it just wasn't going to deal with what had occurred"; and (3) without "casting any aspersions," the mistrial had been required because "the defense chose to raise a defense that the State would absolutely not be able to respond to because the Court had suppressed, based on the defense motion, statements that would have demonstrated everything that the State did, or at least the police did, to investigate aspects of an investigation . . . into the aggravated assault." The respondent then reaffirmed her finding of manifest necessity for a mistrial and denied Durazo's motion.

Discussion

¶15 The Double Jeopardy Clause of the Fifth Amendment "protects a defendant from being tried multiple times for the same criminal offense and is applicable to the states through the Fourteenth Amendment." *State v. Aguilar*, 217 Ariz. 235, ¶ 8, 172 P.3d 423,

426 (App. 2007). The Arizona Constitution also provides protection against double jeopardy. *See* Ariz. Const. art. II, § 10. These provisions are based on the principle that

> the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957). Because jeopardy attaches as soon as a jury is empaneled, *Aguilar*, 217 Ariz. 235, ¶ 8, 172 P.3d at 426, "the constitutional protection also 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 is "not absolute," however, *State v. Minnitt*, 203 Ariz. 431, ¶ 28, 55 P.3d 774, 780 (2002), and "is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury." *Washington*, 434 U.S. at 498, 505, 515 (no abuse of discretion in granting state's motion for mistrial "predicated on improper and prejudicial comment during defense counsel's opening statement").

¶16 Generally, double jeopardy does not bar retrial "if the defendant successfully moves for or consents to a mistrial." *Minnitt*, 203 Ariz. 431, ¶ 28, 55 P.3d at 780. But when the court orders a mistrial sua sponte, without a defendant's consent, "the defendant may be retried without violating the Double Jeopardy Clause 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*, 194 Ariz. 523, ¶ 8, 984 P.2d at 1164

(emphasis omitted), *quoting Washington*, 434 U.S. at 506 n.18; *see also United States v. Jorn*, 400 U.S. 470, 484-85 (1971) (defendant deprived of valued right to particular tribunal where "judge, acting without the defendant's consent, aborts the proceeding"); *McLaughlin v. Fahringer*, 150 Ariz. 274, 277, 723 P.2d 92, 95 (1986) ("An improperly declared mistrial is a bar to retrial . . . [if] it was not declared with the defendant's consent."). Under such circumstances, the "doctrine of manifest necessity stands as a command to trial judges" to avoid declaring a mistrial "until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." *Jorn*, 400 U.S. at 485.

¶17 Although "we review the [respondent judge's] decision to declare a mistrial for an abuse of discretion," *Aguilar*, 217 Ariz. 235, ¶ 7, 172 P.3d at 426, "the degree of deference a reviewing court should accord the [respondent] depends on the circumstances that gave rise to the mistrial," *id.* ¶ 13. Where the defense has engaged in improper conduct that may have given rise to jury bias, "we accord the highest degree of respect to the [respondent's] evaluation" that jurors may have been prejudiced. *Washington*, 434 U.S. at 511. Ultimately, "[w]hether double jeopardy bars retrial is a question of law, which we review de novo." *Moody*, 208 Ariz. 424, ¶ 18, 94 P.3d at 1132.

The Question of Consent

¶18 To the extent the respondent judge denied Durazo's motion to dismiss based on his failure to object to her sua sponte declaration of a mistrial, we conclude she has misapplied the law. Although a defendant's consent to a mistrial may be inferred in some

circumstances, *State v. Henderson*, 116 Ariz. 310, 314, 569 P.2d 252, 256 (App. 1977), his "mere silence or failure to object to the jury's discharge is not such consent as will constitute waiver of a former jeopardy plea," *State v. Fenton*, 19 Ariz. App. 274, 276, 506 P.2d 665, 667 (1973). The circumstances here were not such that Durazo had "every opportunity to register the spirit if not the letter of objection" to a mistrial. *Henderson*, 116 Ariz. at 314, 569 P.2d at 256. Rather, the circumstances here more closely resemble those in *Jorn*, where "the trial judge acted so abruptly in discharging the jury that, had the prosecutor been disposed to suggest a continuance, or the defendant to object to the discharge of the jury, there would have been no opportunity to do so." *Jorn*, 400 U.S. at 487. We conclude Durazo's consent to a mistrial may not be inferred under these circumstances, particularly because his counsel had so recently informed the court that she would not be requesting such relief.[3] *See Weston v. Kernan*, 50 F.3d 633, 637 (9th Cir. 1995) (defendant's consent to mistrial may be inferred "'only where the circumstances positively indicate a defendant's willingness to acquiesce in the mistrial order'"), *quoting Glover v. McMackin*, 950 F.2d 1236, 1240 (6th Cir. 1991).

[3]Although not addressed by the parties, we reach this conclusion notwithstanding Durazo's request for a mistrial earlier in the trial. *See supra* note 1. A trial court's denial of a defendant's motion for a mistrial made earlier in the trial, which has not been renewed or has been withdrawn, has been found insufficient to constitute consent to the court's sua sponte declaration of a mistrial on different grounds. *See, e.g., United States v. Byrski*, 854 F.2d 955, 961 n.10 (7th Cir. 1988) (different grounds); *United States v. Mastrangelo*, 662 F.2d 946, 949-50 (2d Cir. 1981) (effectively withdrawn).

Manifest Necessity

¶19 The concept of manifest necessity "abjures the application of any mechanical formula." *Illinois v. Somerville*, 410 U.S. 458, 462 (1973). Thus, that some judges might find cautionary jury instructions sufficient to remedy prejudicial remarks by defense counsel does not render a trial judge's declaration of mistrial an abuse of discretion. *Washington*, 434 U.S. at 511. Nonetheless, a mistrial is warranted only by a "high degree" of necessity, *id.* at 506, and, in order to retry a defendant, the state bears the "heavy" burden of justifying a mistrial declared without the defendant's consent, *id.* at 505. *See also Gusler v. Wilkinson*, 199 Ariz. 391, ¶¶ 18, 21, 18 P.3d 702, 705-06 (2001) (same; no manifest necessity for sua sponte declaration of mistrial; court's failure to disclose content of jury's note deprived defendant of opportunity to object). Indeed, our supreme court has cautioned that mistrial "is 'the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged.'" *State v. Dann*, 205 Ariz. 557, ¶ 43, 74 P.3d 231, 244 (2003), *quoting State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983). And this court has stated that "[a] mistrial is not warranted when the court ha[s] the ability to prevent its necessity." *Evans v. Abbey*, 130 Ariz. 157, 159, 634 P.2d 969, 971 (App. 1981).

¶20 Moreover, reviewing courts must "satisfy themselves that . . . the trial judge exercised 'sound discretion' in declaring a mistrial." *Washington*, 434 U.S. at 514, *quoting United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824). To do so "we focus on the procedures employed by the judge in reaching his [or her] determination . . . [and]

consider whether the [trial] court '(1) heard the opinions of the parties about the propriety of the mistrial, (2) considered the alternatives to a mistrial and chose[] the alternative least harmful to a defendant's rights, [and/or] (3) acted deliberately instead of abruptly.'" *United States v. Chapman*, 524 F.3d 1073, 1082 (9th Cir. 2008), *quoting United States v. Bates*, 917 F.2d 388, 396 (9th Cir. 1990) (alterations in *Chapman*).

¶21 At oral argument, the state conceded the respondent judge's declaration of a mistrial had not been based on manifest necessity and seemed premature. We agree. Even with the deference required, we see nothing in the record supporting the respondent's finding of manifest necessity. *See McLaughlin*, 150 Ariz. at 276, 277, 723 P.2d at 94, 95 (prosecutor's opening reference to possibly inadmissible hearsay did not "rise to the level of manifest necessity" required for mistrial). Although defense counsel had questioned Murphy about the shooting investigation, none of Murphy's answers appears to have supported the defense's theory that the police investigation of that offense was inadequate. We agree with the respondent that such evidence would have been irrelevant. But she could have remedied that concern by precluding any further evidence about that investigation, as she originally had suggested. Or the respondent could have instructed the jury that evidence of the shooting investigation was irrelevant and should be disregarded, a remedy in which courts "routinely express confidence," *Jones*, 194 Ariz. 523, ¶ 12, 984 P.2d at 1165, and which the respondent appears to have dismissed out of hand. As the respondent recognized, Durazo was the party who might have suffered prejudice from these alternatives, because defense counsel might have lost credibility by

failing to "follow through" on her opening statement.[4] But it appears Durazo would have preferred such remedies to a mistrial.

¶22 In *Jones*, we recognized that, although "[t]he 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. 523, ¶ 9, 984 P.2d at 1164, *quoting United States v. Dinitz*, 424 U.S. 600, 609 (1976). Thus, we concluded the trial court had "failed to give sufficient deference to defense counsel's assessment" that the prejudice his client might suffer from retrial by a new jury would outweigh any prejudice caused by the improper testimony he had elicited from a witness.[5] *Id.* ¶¶ 10-11.

---

[4]We fail to see how the state was prejudiced by being precluded from introducing multiple statements by Durazo that he had no information to provide to police personnel investigating the shooting. That he had provided no useful information already was in evidence through Murphy's testimony. The jury certainly could have inferred the investigation had been influenced by this fact. Evidence that Durazo also had told two detectives he knew nothing about the shooting appears merely cumulative.

[5]To the extent the respondent judge suggested a different approach may have been permitted because Durazo's line of inquiry gave rise to her consideration of a mistrial, we first note Durazo's conduct did not violate any pretrial order or engender any objection by the state. Her ruling thus is distinguished from a mistrial urged by the state and "predicated on improper and prejudicial comment during defense counsel's opening statement." *Washington*, 434 U.S. at 498, 510-11. Moreover, the analysis in *Jones* was not affected by the fact it was the defendant's examination of a witness that arguably gave rise to the trial court's declaration of a mistrial. *Jones*, 194 Ariz. 523, ¶ 10, 984 P.2d at 1164. *But cf. State v. Givens*, 161 Ariz. 278, 282, 778 P.2d 643, 647 (App. 1989) (retrial not barred when defense requested competency examination after jury impaneled). We conclude our statement in *Givens*—that "the *sua sponte* declaration of a mistrial by the trial court, over defendant's objection, does not bar reprosecution on double jeopardy grounds

¶23 Here, neither Durazo nor the state had complained that Murphy's testimony had caused any prejudice, and neither party had requested a mistrial or appeared to believe one was required. To a large extent, the prosecutor and defense counsel were "in the best position to evaluate" possible prejudice and to suggest alternatives. *Id.* ¶ 10. But, although the respondent judge had offered defense counsel an opportunity to move for a mistrial, an opportunity counsel declined, she never told the parties in a clear or direct manner that she was considering declaring a mistrial sua sponte before abruptly doing so. As a result, she never afforded the defense an opportunity to argue against that action or to suggest alternatives. Under these circumstances, the respondent's declaration of a mistrial was premature, and we cannot say she exercised sound discretion in finding manifest necessity justified a mistrial. *See McLaughlin*, 150 Ariz. at 277, 723 P.2d at 95 (manifest necessity not shown where court failed to consider alternatives before sua sponte order of mistrial); *Gusler*, 199 Ariz. 391, ¶ 23, 18 P.3d at 706 (no manifest necessity to declare mistrial without clarifying note from jury or disclosing contents to counsel); *Aguilar*, 217 Ariz. 235, ¶¶ 18-21, 172 P.3d at 428-29 (no manifest necessity when court failed to investigate whether short continuance feasible); *Jones*, 194 Ariz. 523, ¶¶ 10-12,

---

where defendant's own conduct gave rise to the declaration of mistrial," *id.*—is limited to those circumstances in which a defendant has made a request that will require a trial continuance. *See, e.g., State v. Reynolds*, 131 S.W.2d 552, 554 (1939) ("[W]hen a defendant asks a continuance after the jury is sworn, and the application is granted, he undoubtedly has consented to the discharge of the jury."). In *Givens*, 161 Ariz. at 280, 778 P.2d at 645, the court relied on *United States v. Scott*, 437 U.S. 82, 92-94 (1978), in which the Supreme Court held a defendant's motion to dismiss, like a defendant's motion for a mistrial, barred any claim of double jeopardy on retrial. We do not find the analogy applies in a case such as this.

984 P.2d at 1164-65 (no manifest necessity where court failed to consider curative instruction); *Evans*, 130 Ariz. at 158, 634 P.2d at 970 (court abused discretion in declaring mistrial without investigation of jury prejudice or consideration of dismissing single juror); *cf. Washington*, 434 U.S. at 515-16 (sound discretion exercised when trial judge "did not act precipitately" in granting prosecutor's mistrial request but "gave both defense counsel and the prosecutor full opportunity to explain their positions on the propriety of a mistrial").

Disposition

¶24 For the forgoing reasons, we grant relief and order the indictment against Durazo dismissed and retrial barred.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge