

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 06/21/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 11-0118
)
Appellee,) DEPARTMENT E
)
v.) MEMORANDUM DECISION
)
JULIUS TURNER LAMBERT,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-006009-001 DT

The Honorable Joseph Kreamer, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Matthew H. Binford, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Lindsay P. Abramson, Deputy Public Defender
Attorneys for Appellant

J O H N S E N, Judge

¶1 Julius Turner Lambert appeals his conviction for resisting arrest, a Class 1 misdemeanor. For the reasons that follow, we affirm Lambert's conviction and the resulting imposition of probation.

FACTS AND PROCEDURAL BACKGROUND

¶2 Sheriff's deputies responded to a reported incident between Lambert and another person.¹ Lambert allegedly refused to obey the commands of one deputy and struggled with him. During the struggle, Lambert allegedly choked the deputy. He also resisted attempts to place him under arrest. The State charged Lambert with aggravated assault of the deputy pursuant to Arizona Revised Statutes ("A.R.S") section 13-1204(A)(8)(a) (2009) (assault of a peace officer engaged in official duties). The offense was charged as a Class 5 felony rather than a Class 6 because the State alleged Lambert caused physical injury to the deputy. See A.R.S. § 13-1204(B)-(C).

¶3 Just prior to trial, the superior court granted Lambert's motion *in limine* to exclude evidence that before the deputies arrived, Lambert had choked the person who called 911. The court held the State could introduce evidence that there was a dispute between Lambert and the other person and that the

¹ "We construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998).

other person called 911 because of the dispute. The court warned that if the State introduced evidence that Lambert attacked or assaulted the person who called 911, the court likely would grant a mistrial.

¶14 Seven sentences into her opening statement, the prosecutor told the jury that while en route to the scene, the deputy "learned that he had a lawful basis to arrest [Lambert]." Lambert moved for a mistrial, arguing the statement violated the court's ruling on the motion *in limine*. The superior court found the statement violated its ruling and was irrelevant and prejudicial. The court observed that a curative instruction would not be sufficient; therefore it declared a mistrial.

¶15 Less than four hours after the court granted the mistrial, the State obtained a second indictment of Lambert based on the same incident. While the State again charged Lambert with aggravated assault of the deputy pursuant to A.R.S. § 13-1204(A)(8)(a), it did not allege Lambert caused physical injury to the deputy, rendering the offense a Class 6 felony. See A.R.S. § 13-1204(B). The State further charged Lambert with resisting arrest pursuant to A.R.S. § 13-2508(A)(1) (2009), also a Class 6 felony. The superior court later dismissed the first case and the parties proceeded to trial on the second case.

¶16 At the completion of the second trial, the jury acquitted Lambert of aggravated assault but found him guilty of

resisting arrest. The superior court designated the offense a Class 1 misdemeanor pursuant to A.R.S. § 13-604(A) (2009), placed Lambert on six months' unsupervised probation and allowed him to return to his home in Texas. Lambert now appeals. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1), 13-4031 and -4033 (West 2012).²

DISCUSSION

A. The Motion to Dismiss Based on Double Jeopardy.

¶7 Lambert first argues the superior court erred when it denied his motion to dismiss the second case based on double jeopardy. Lambert argues the prosecutor intentionally violated the ruling on the motion *in limine* during the first trial so that she could reindict Lambert and add the charge of resisting arrest. Lambert argues the prosecutor did this to punish him for declining a plea offer and because the prosecutor realized she had a weak case.

¶8 We review questions of double jeopardy *de novo*. *State v. Moody*, 208 Ariz. 424, 437, ¶ 18, 94 P.3d 1119, 1132 (2004). "As a general rule, if the defendant successfully moves for or consents to a mistrial, retrial is not barred on double jeopardy grounds." *State v. Minnitt*, 203 Ariz. 431, 437, ¶ 28, 55 P.3d

² Absent material revision after the date of an alleged offense, we cite a statute's current version.

774, 780 (2002). Double jeopardy will bar a retrial, however, if (1) the mistrial is the result of improper conduct by the prosecutor, (2) the conduct was "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 prosecutor's conduct causes prejudice that can be cured only by a mistrial. *Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984). The prosecutor's conduct must be "so egregious that it raises concerns over the integrity and fundamental fairness of the trial itself." *Minnitt*, 203 Ariz. at 438, ¶ 30, 55 P.3d at 781.

¶19 The superior court did not err by denying the motion to dismiss based on double jeopardy. When a court grants a mistrial based on the actions of a prosecutor, double jeopardy does not bar retrial when the record demonstrates the prosecutor did not engage in intentional misconduct or demonstrates that the defendant was not subjected to "harassment or oppression." *Pool*, 139 Ariz. at 105, 677 P.2d at 268 (quoting *State v. Wright*, 112 Ariz. 446, 450, 543 P.2d 434, 438 (1975)). The superior court in this case found the prosecutor did not act intentionally or purposefully. The court further found the

prosecutor's actions were not part of any "agenda" to obtain a mistrial and reindict Lambert, but were, at most, negligent. The superior court is in the best position to judge the circumstances surrounding a mistrial, see *State v. Koch*, 138 Ariz. 99, 101, 673 P.2d 297, 299 (1983), and the credibility of the prosecutor's explanations was a matter for that court to decide, see *Pool*, 139 Ariz. at 108 n.9, 677 P.2d at 271. The record does not clearly demonstrate the court erred in its assessment.

¶10 Further, the record does not show the State subjected Lambert to "harassment or oppression." Again, the court found the prosecutor did not act intentionally. Further, the State abandoned the charge of aggravated assault as a Class 5 felony and reindicted Lambert for aggravated assault as a lesser Class 6 felony. Reducing a charge after a mistrial is not "harassment or oppression." Regarding the new charge of resisting arrest, Lambert knew months before the first trial the State might add resisting arrest to the charges he faced if he did not accept the State's plea offer. To follow through with a threat to bring additional charges if a defendant does not accept a plea offer does not violate the defendant's due-process rights. *Bordenkircher v. Hayes*, 434 U.S. 357, 364-65 (1978).

B. The Motion to Dismiss Based on Vindictive Prosecution.

¶11 Lambert also contends the superior court erred when it denied a second motion to dismiss based on vindictive prosecution. Lambert again argues the State reindicted him to punish him for declining a plea offer and was, therefore, acting vindictively. We review the decision of whether to dismiss a case for vindictive prosecution for abuse of discretion. *State v. Mieg*, 225 Ariz. 445, 447, ¶ 9, 239 P.3d 1258, 1260 (App. 2010).

¶12 Due process prevents a prosecutor from subjecting a defendant to more severe charges as punishment for exercising his constitutionally protected rights. *Id.* at ¶ 10. A presumption of vindictiveness arises if the defendant shows the circumstances establish a "realistic likelihood of vindictiveness." *Id.* at 447-48, ¶ 11, 239 P.3d at 1260-61 (quotation omitted). To determine whether this presumption applies, the court must consider all relevant circumstances. *Id.* at 448, ¶ 15, 239 P.3d at 1261. If the defendant makes a *prima facie* showing that a prosecutor's decision was "more likely than not attributable to vindictiveness," the State must overcome the presumption by presenting objective evidence that justified the prosecutor's action. *Id.* at ¶ 12 (quotations omitted).

¶13 The superior court did not abuse its discretion by denying Lambert's motion. There is no objective evidence the prosecutor sought to punish Lambert for refusing a plea and invoking his right to a trial. After the mistrial, the prosecutor did not subject Lambert to more severe charges, but abandoned the more serious offense and indicted Lambert for a lesser Class 6 felony. Although the State added the charge of resisting arrest, Lambert knew months before trial that the State might do so if he rejected the plea offer and, as noted above, the State could do so without violating due process. See *Bordenkircher*, 434 U.S. at 364-65. As for the presumption of vindictiveness, "The possibility that a prosecutor would respond to a defendant's pretrial demand for a jury trial by bringing charges not in the public interest that could be explained only as a penalty imposed on the defendant is so *unlikely* that a presumption of vindictiveness certainly is not warranted." *United States v. Goodwin*, 457 U.S. 368, 384 (1982).

¶14 Further, the State is entitled to respond to pretrial rulings and other changes in the procedural posture of a case by reevaluating its case and changing strategy. *Mieg*, 225 Ariz. at 449, ¶ 19, 239 P.3d at 1262. Here, the prosecutor explained to the superior court that the State reevaluated the case after the mistrial and concluded that the lesser offense was an appropriate charge based on the evidence. Further, the

prosecutor explained that the State did not add the count of resisting arrest prior to the first trial because plea negotiations were ongoing. She explained the State chose to correct this "mistake" prior to retrial. "[I]t would ill-serve the public good to penalize the state when a prosecutor chooses not to bring all conceivable charges at the outset." *Id.* at ¶ 18.

¶15 Finally, Lambert argues the superior court improperly "intertwined" the double jeopardy and vindictiveness doctrines discussed above when it found that if the prosecutor did not intentionally cause the mistrial, a court "cannot" find the prosecutor later acted vindictively. When read as a whole and in context, however, the court's comments do not demonstrate it held that, as a matter of law, vindictiveness may not exist when the prosecutor has not acted intentionally. Further, the record demonstrates the court knew otherwise and correctly applied the law. At the hearing on the motion to dismiss for vindictiveness, the court explained it would consider the State's conduct as a whole, including the State's "post mistrial conduct." The court further noted it could find vindictiveness based solely on conduct that occurred after the prosecutor caused the mistrial.³

³ Lambert also argues the superior court erred when it refused to give a *Willits* instruction regarding missing

CONCLUSION

¶16 We affirm Lambert's conviction and the resulting imposition of probation.

/s/

DIANE M. JOHNSEN, Judge

CONCURRING:

/s/

MAURICE PORTLEY, Presiding Judge

/s/

PHILIP HALL, Judge

photographs of the deputy's injuries. See *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964). We need not address this argument because Lambert's acquittal on the aggravated assault charge renders this issue moot.