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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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.

MARK U. GRAY, *Appellant*.

No. 1 CA-CR 19-0457
FILED 10-27-2020

Appeal from the Superior Court in Maricopa County
No. CR 2019-001398-001
The Honorable Stephen Hopkins, Judge
The Honorable Geoffrey H. Fish, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Alice Jones
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Cory Engle
Counsel for Appellant

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MEMORANDUM DECISION

Judge Michael J. Brown delivered the decision of the Court, in which Presiding Judge Jennifer M. Perkins and Judge David B. Gass joined.

B R O W N, Judge:

¶1 Mark Gray appeals his conviction and sentence for theft of means of transportation. He argues the superior court violated his right against double jeopardy by ordering a mistrial in his first trial. For the following reasons, we affirm.

BACKGROUND

¶2 The charge at issue arose when Gray was pulled over for speeding and police officers later discovered he was driving a stolen vehicle. After the State rested its case, and outside the presence of the jury, the superior court asked Gray if he believed a conflict of interest existed between him and defense counsel. Gray replied in part he felt like he knew “a whole lot more about this case than” defense counsel, asserting “I already have this case beat.” The court then inquired whether Gray was requesting a new attorney. Gray responded in part: “I request to be up there answering questions for myself like being my own attorney At this time I don’t really have [any] problems with [defense counsel]. I just want to be the man asking [and]. . . answering my own questions.” The court replied that it believed defense counsel has a conflict of interest and stated it would make an “extensive record on this,” at the State’s request.

¶3 The superior court then explained that defense counsel reported he heard from a detention officer that Gray made a physical threat against defense counsel, and that “shanks” had recently been found in Gray’s cell or on his person. Given that disclosure, the court told Gray that defense counsel “has an irreconcilable conflict of interest in continuing to represent you,” which makes “certain issues that come into play such as your sixth amendment right to counsel.” Although neither defense counsel nor the State requested a mistrial, the court stated it would sua sponte order a mistrial, citing various legal authorities.

¶4 When Gray suggested he would prefer to continue with the trial and represent himself, the court explained it might give Gray the right

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to represent himself in the new trial, but that it could not change in the middle of this trial and “go forward as if nothing happened.” The court also stated it had security and safety concerns with finishing the trial based on Gray’s threat to harm defense counsel.

¶5 After the superior court restated its decision to sua sponte order a mistrial, Gray used various expletives in expressing his desire to leave the courtroom. The court told Gray he had the right to remain in the courtroom and encouraged him to do so, but Gray was removed after he continued to insist on leaving. The State opposed the mistrial, contending in part that Gray had always been a safety risk and that other security measures, such as shackles, could be taken to reduce that risk. Defense counsel then commented briefly, stating:

I do believe there is a conflict in myself continuing to represent Mr. Gray based on the ethical rules as well as the irreconcilable differences that we have that [were] just recently created, so I don’t think legally or in good con[science] I should continue to represent Mr. Gray and I will respect the [c]ourt’s ruling.

The court then reconfirmed it was necessary to sua sponte order a mistrial based on defense counsel’s conflict of interest created by Gray’s threat of physical harm.

¶6 The State dismissed the case without prejudice and filed a new charge, alleging Gray violated a different subsection of the same statute governing theft of means of transportation. A jury found Gray guilty and the superior court sentenced him to 11.25 years in prison. This timely appeal followed.

DISCUSSION

¶7 A mistrial negates a defendant’s “valued right to have his trial completed by a particular tribunal.” *United States v. Dinitz*, 424 U.S. 600, 606 (1976). “An improperly declared mistrial is a bar to retrial, provided, however, that it was not declared with the defendant’s consent.” *McLaughlin v. Fahringer*, 150 Ariz. 274, 277 (1986). “In instances where the trial court declares a mistrial *sua sponte*, whether the Double Jeopardy Clause permits retrial without the defendant’s consent depends on whether there is a manifest necessity for the mistrial or whether the ends of public justice will otherwise be defeated.” *Id.* We review claimed double jeopardy violations de novo, see *State v. Moody*, 208 Ariz. 424, 437, ¶ 18 (2004), but we

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review a court's decision to grant a mistrial and its ruling on manifest necessity for an abuse of discretion, *McLaughlin*, 150 Ariz. at 277.

¶8 No rigid formula exists for determining whether manifest necessity requires a mistrial. *State v. Dickinson*, 242 Ariz. 120, 124, ¶ 16 (App. 2017). The United States Supreme Court has noted, however, that the power to declare a mistrial "ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes." *Wade v. Hunter*, 336 U.S. 684, 690 (1949). A trial judge is generally in a superior position to determine when manifest necessity demands that a mistrial be declared. *Klinefelter v. Super. Ct.*, 108 Ariz. 494, 496 (1972).

¶9 When prosecutorial misconduct causes a mistrial, we apply the strictest scrutiny to determine if a mistrial was necessary. *Dickinson*, 242 Ariz. at 124, ¶ 18. In contrast, if a mistrial arises from conduct by the defendant or defense counsel, we owe great deference to the superior court's decision because the defendant should not benefit from his own misdeeds. *Id.* Here, defense counsel alerted the superior court that he believed he could no longer represent Gray given the conflict of interest created by Gray's threat of violence. Because Gray was responsible for creating the conflict, we accord substantial deference to the superior court's decision to declare a mistrial.

¶10 Gray argues there was no manifest necessity for the superior court's mistrial ruling because the court failed to conduct a proper inquiry as to whether the threats were substantiated. Although Gray seemed to contest the allegation that he made a threat, he did not dispute that shanks were found in his cell or on his person. Defense counsel asserted that an irreconcilable conflict of interest existed and did not suggest that any inquiry into the credibility of the threat would diminish that conflict. It was within the court's discretion to determine whether further inquiry was needed. *See State v. Davis*, 110 Ariz. 29, 31 (1973) (explaining that counsel is in the "best position professionally and ethically" to decide whether a conflict of interest exists and "[t]he trial court should give great weight to a representation by counsel that there is a conflict").

¶11 The record demonstrates the superior court did not hastily reach its final decision about declaring a mistrial. The court relied on and cited multiple sources of legal authority indicating that a conflict arising from threats made by a client against his or her attorney creates an impermissible conflict for continued representation, including the Journal of Legal Professional Ethics, *United States v. Moore*, 159 F.3d 1154 (9th Cir. 1998), and *State v. Hampton*, 208 Ariz. 241 (2004). Applying those

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authorities, the court concluded that continuing the trial was not possible because if defense counsel continued to represent Gray it would result in an impermissible conflict of interest.

¶12 Gray argues the superior court failed to seriously consider the option of allowing him to proceed without counsel for the remainder of the trial, either with or without appointing advisory counsel. Gray had previously been allowed to represent himself but several months before trial he changed his mind. Specifically, Gray said he “really [didn’t] understand what’s going on with th[e] case or in th[e] courtroom.” The court did not abuse its discretion in concluding that finishing the trial was not a viable option given the court’s reasonable reluctance to reinstate Gray to self-represented status in the middle of the trial, particularly when Gray admitted in previous court proceedings he was unable to properly represent himself.

¶13 Gray also argues the superior court should have considered a trial continuance to allow time for addressing its concerns. The court considered a continuance but reasoned that the jurors had been told they would receive the case that day and changes midtrial would present a “problem.” The court then reiterated that its primary concern was the “impermissible conflict of interest” between Gray and defense counsel and the inability to proceed with the trial “as if nothing happened.” Gray has not shown the court abused its discretion by failing to continue the trial.

¶14 Finally, Gray argues no legitimate safety concern existed because he did not act out during the trial or previous hearings. While discussing the mistrial issue, Gray informed the court he was wearing a shock belt and that they could shock him “at any given moment.” The court first explained that safety concerns were ancillary to the main concern about Gray having no attorney to complete the trial. The court then considered the possibility of using shackles but determined based on caselaw that shackles should be reserved for when there is no other alternative. Moreover, after the court announced its mistrial ruling, Gray’s conduct demonstrated why the court’s safety concern was valid, as Gray threatened there would be an “issue” if his request to leave the courtroom was not granted. Because the court was informed that Gray made a threat against his attorney and had shanks in his cell or on his person, and given Gray’s outburst in court when he demanded to leave the courtroom, the court acted within its discretion in deciding a mistrial was necessary. *See State v. Givens*, 161 Ariz. 278, 281 (App. 1989) (recognizing that a superior court judge acts within his discretion in rejecting possible alternatives and in

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granting a mistrial even if reasonable judges could differ about the proper disposition).

CONCLUSION

¶15 We affirm Gray's conviction and the resulting sentence.



AMY M. WOOD • Clerk of the Court
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