IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

TY COLTON MORENO,
Appellant.

No. 2 CA-CR 2015-0322
Filed March 10, 2017

Appeal from the Superior Court in Pima County
No. CR20131195001
The Honorable Kenneth Lee, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
By David A. Sullivan, Assistant Attorney General, Tucson
Counsel for Appellee

Steven R. Sonenberg, Pima County Public Defender
By Rebecca A. McLean, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Staring and Judge Espinosa concurred.

M I L L E R, Judge:

¶1 After his first trial ended in a mistrial, Ty Moreno was retried and convicted of criminal damage, endangerment, third-degree burglary, theft of a means of transportation, and two counts of aggravated assault with a deadly weapon or dangerous instrument.[1] His concurrent and consecutive sentences total 26.5 years. On appeal, he argues the trial court erred by denying his motion to bar retrial on double jeopardy grounds. We affirm for the reasons that follow.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the verdicts. *State v. Siddle*, 202 Ariz. 512, ¶ 2, 47 P.3d 1150, 1152 (App. 2002). In November 2012, Arizona Department of Public Safety Detective David Ball came across a parked minivan that had been reported stolen. He decided to track the vehicle using a GPS[2] device and contacted a fellow member of the interagency "Arizona Vehicle Theft Task Force" to bring one. That other member happened to be his brother, Tucson Police Detective Kasey Ball. The GPS device was attached to the minivan.

¶3 The next day, the device sent an alert to David that the minivan was on the move. Several law enforcement agents from the task force, including David and Kasey, responded in unmarked vehicles to the parking lot of an apartment complex where the

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[1]Other charges were dismissed without prejudice at the state's request.

[2]Global Positioning System.

minivan had stopped. A person later identified as Moreno came out of an apartment and entered the minivan. The officers moved in, attempting to block the minivan in with their vehicles. To evade the officers, Moreno collided with other vehicles and drove at the officers, committing endangerment against David, aggravated assault against Kasey and another officer, and criminal damage.

¶4 The officers did not pursue the minivan, instead using the GPS device to track its movements. Officers later located the minivan in a deserted drainage area behind another apartment complex. A search of the minivan revealed a flathead screwdriver, a tool commonly used to defeat vehicle ignition locks, particularly those of that make and model of minivan. Later testing revealed Moreno's DNA[3] on the screwdriver as well as the minivan's steering wheel.

¶5 At Moreno's first trial in December 2014, the state called David Ball. On direct examination, he testified about many of the events, including his relationship with Kasey. David explained that after the incident in the parking lot, the task force had gotten a lead suggesting that Moreno had been the driver of the minivan. However, he did not mention that the lead had come from T.S., a witness who had picked Moreno out of a photo lineup, but who was unavailable for trial. David testified that after Moreno had become a person of interest, David showed Kasey a photo lineup, and Kasey picked Moreno's photo out of the lineup as the driver of the minivan.

¶6 On cross-examination, defense counsel asked David numerous questions about whether he had gone to several different specific locations after the incident to look for witnesses. On redirect examination, the following exchange occurred:

> [Prosecutor]: And [defense counsel] mentioned that you and your brother spoke to some witnesses back at the scene of [the collisions] afterwards, right?

[3]Deoxyribonucleic acid.

> [David]: Yes, we did.
>
> [Prosecutor]: And in fact, one of those witnesses led you to the defendant, right?
>
> [David]: Yes, they did.
>
> [Prosecutor]: And one of those witnesses actually picked him out of a lineup, didn't he?

¶7 Defense counsel objected based on the Confrontation Clause and moved for a mistrial because T.S. was unavailable to testify about that lineup.[4] The state acknowledged the question was improper and suggested a limiting instruction, but the trial court determined that remedy would be inadequate and declared a mistrial, reasoning there was no way to "unring that bell."

¶8 In March 2015 Moreno moved to bar retrial on double jeopardy grounds, citing *Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984). The state responded and, after a hearing, the trial court denied the motion. Moreno was retried in April 2015 and was convicted and sentenced as described above. He now appeals. We have jurisdiction pursuant to A.R.S. §§ 13-4031 and 13-4033(A)(1).

Availability of Appellate Review

¶9 The state argues Moreno's double jeopardy argument is "procedurally defaulted" because he was required to raise it in a special action rather than on direct appeal. Although our supreme court has expressed a "preference" for special action review of a denial of a motion to bar retrial, *State v. Moody*, 208 Ariz. 424, ¶ 22, 94 P.3d 1119, 1133 (2004), "no case has ever held that a special action petition is the exclusive vehicle for raising such a claim," *State v. Felix*, 214 Ariz. 110, ¶ 8, 149 P.3d 488, 489 (App. 2006). "We can see no reason" to prevent a defendant from raising a properly

[4]*See generally Crawford v. Washington*, 541 U.S. 36, 42 (2004).

preserved[5] double jeopardy claim on appeal "merely because our law also provides the option of raising that claim at an earlier stage in the proceedings" via special action. *Id.* ¶¶ 10-13.

¶10 The state argues we should decline to follow *Felix*. It notes that since that case was decided, Division One of this court has accepted special action jurisdiction to review a double jeopardy claim. *See Milke v. Mroz*, 236 Ariz. 276, ¶ 2, 339 P.3d 659, 662 (App. 2014). But the fact that *Milke* proceeded as a special action does nothing to undermine *Felix*, which stands for the proposition that such a claim may be raised by special action or on direct appeal. *See Felix*, 214 Ariz. 110, ¶ 11, 149 P.3d at 490. The state also contends our supreme court's statement that "a petition for special action is the appropriate vehicle for a defendant to obtain judicial appellate review of an interlocutory double jeopardy claim," *Moody*, 208 Ariz. 424, ¶ 22, 94 P.3d at 1133, *quoting Nalbandian v. Superior Court*, 163 Ariz. 126, 130, 786 P.2d 977, 981 (App. 1989), necessarily means it is also the exclusive vehicle for double jeopardy review. We squarely rejected this argument in *Felix*, 214 Ariz. 110, ¶¶ 8-13, 149 P.3d at 489-91, and the state has not articulated a persuasive reason to depart from our prior analysis. Moreno's claim is properly before us on appeal.

Double Jeopardy

¶11 Moreno argues the trial court erred in ruling that the double jeopardy clauses of the United States and Arizona Constitutions did not bar retrial. U.S. Const. amend. V; Ariz. Const. art. II, § 10. We review de novo whether double jeopardy bars retrial. *Moody*, 208 Ariz. 424, ¶ 18, 94 P.3d at 1132. Because Moreno timely moved for a mistrial and brought a motion to bar the second trial before it began, the issue is preserved for harmless error review. *See State v. Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d 601, 607 (2005). Even under this standard, however, Moreno "must first establish

[5]A defendant's motion for a mistrial at the appropriate time will preserve trial error purportedly amounting to a double jeopardy violation. *See Felix*, 214 Ariz. 110, ¶ 9, 149 P.3d at 490, *citing Moody*, 208 Ariz. 424, ¶ 23, 94 P.3d at 1133.

that some error occurred." *State v. Diaz*, 223 Ariz. 358, ¶ 11, 224 P.3d 174, 176 (2010).

¶12 Double jeopardy ordinarily does not bar retrial after the court grants the defendant's motion for a mistrial. *State v. Rasch*, 188 Ariz. 309, 312, 935 P.2d 887, 890 (App. 1996). This is generally true even when prosecutorial misconduct caused the mistrial. *State v. Trani*, 200 Ariz. 383, ¶ 6, 26 P.3d 1154, 1155 (App. 2001). However, jeopardy attaches when the defendant's mistrial motion is granted and the following factors are present:

> 1. The mistrial was caused by the prosecutor's improper conduct or actions;
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> 2. The misconduct 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 misconduct causes prejudice to the defendant that can only be cured by a mistrial.

State v. Lamar, 205 Ariz. 431, ¶ 45, 72 P.3d 831, 840 (2003), *quoting Pool*, 139 Ariz. at 108-09, 677 P.2d at 271-72.

¶13 Moreno has not shown that the trial court erred in its implicit determination that the prosecutor's improper question was the result of negligence or mistake rather than intentional misconduct. *See State v. Korovkin*, 202 Ariz. 493, ¶ 8, 47 P.3d 1131, 1133 (App. 2002) (court of appeals defers to trial court's finding as to whether prosecutor intentionally engaged in improper conduct). The prosecutor did not mention T.S.'s lineup identification on direct examination, but instead only on redirect examination in response to defense counsel's questions to determine if officers had been able to

locate other witnesses who had identified Moreno. Although clearly objectionable, the question was isolated and there was no suggestion of pervasive misconduct. Furthermore, when the court apologized to the jurors for having to go through a trial that ended with a mistrial, it added, "[T]hese things happen on occasion and it's really nobody's fault." After the jury left, the prosecutor apologized, saying he had not been "thinking properly" and had realized soon after asking the improper question that it was one he "shouldn't have asked." The court replied, "Those things happen. Don't feel too bad." The court's statements are not consistent with intentional prosecutorial misconduct, a very serious matter that decidedly is the prosecutor's "fault," not something that merely "happen[s]" about which one should not "feel too bad."

¶14 Nor does the record indicate that the prosecutor pursued the line of questioning for an improper purpose. The situation before us is unlike that in *Pool*. 139 Ariz. at 107, 677 P.2d at 270. In that case, the prosecutor intentionally engaged in repeated improper conduct in order to force the defendant to seek a mistrial and give the state a chance to fix its various charging and trial missteps. *Id.* In this case, however, the state's case was extremely strong and the prosecutor would have had little incentive to sabotage the trial. *Cf. Trani*, 200 Ariz. 383, ¶ 12, 26 P.3d at 1157 (unlike in *Pool*, prosecutor was not in situation "where a mistrial caused by his misconduct would markedly improve the state's position"). Notably, the DNA from the screwdriver and the minivan steering wheel matched Moreno's and the crime lab technician's report estimated the accuracy of the match to a virtual certainty.[6] Thus, T.S.'s lineup identification was far from essential to the state's case.[7]

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[6]The lab report estimated the frequency of the screwdriver DNA profile in the United States population at about one in thirty quintillion Caucasians, one in twenty-eight sextillion African Americans, and one in one quintillion Southwestern Hispanics.

[7]Moreno further argues the prosecutor intentionally withheld the fact that the detectives were brothers until trial in another instance of misconduct. But the record gives no indication that the sibling relationship or any alleged bad-faith concealment thereof

Disposition

¶15 Moreno has not shown the trial court erred in finding retrial was not barred under *Pool*. We affirm his convictions and sentence.

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was a cause of the mistrial. The court declared the mistrial solely based upon the improper lineup question.