IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

RAYMOND JENSEN,
Petitioner,

v.

HON. DANIEL A. WASHBURN, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF PINAL,
Respondent,

and

THE STATE OF ARIZONA,
Real Party in Interest.

No. 2 CA-SA 2024-0005
Filed April 18, 2024

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f); Ariz. R. P. Spec. Act. 7(g), (i).

Special Action Proceeding
Pinal County Cause No. S1100CR202002729

JURISDICTION ACCEPTED; RELIEF DENIED

COUNSEL

MayesTelles PLLC, Phoenix
By Mark H. Mendoza and Alejandro Barrientos
Counsel for Petitioner

Kent Volkmer, Pinal County Attorney
By Thomas C. McDermott, Deputy County Attorney, Florence
Counsel for Real Party in Interest

MEMORANDUM DECISION

Vice Chief Judge Staring authored the decision of the Court, in which Chief Judge Vásquez and Judge Eppich concurred.

S T A R I N G, Vice Chief Judge:

¶1 In this special action, petitioner Raymond Jensen challenges the respondent judge's denial of his motion to dismiss charges against him, arguing dismissal is required by the Double Jeopardy clauses of the United States and Arizona Constitutions. For the following reasons, we accept special action jurisdiction, but deny relief.

Facts and Procedural Background

¶2 Jensen was charged in November 2020 with three counts: Count 1, molestation of a child; Count 2, continuous sexual abuse; and Count 3, sexual conduct with a minor. Each of the charges listed J.N., nine years old at the time of the offenses, as the victim. Counts 1 and 3 each listed September 1, 2019 to September 18, 2020 as the offense date. Count 2 provided September 1, 2020 to September 18, 2020 as the offense date.

¶3 On the first day of trial, the respondent judge pointed out to the state that Count 2, charging continuous sexual abuse, alleged a "very short time period" in view of the statutory definition that requires a period of three months or more. *See* A.R.S. § 13-1417(A). The prosecutor stated that he had discussed the matter with defense counsel weeks earlier and that the dates were "a clerical error." Noting that the indictment was "not clear that it's in the alternative" as required by § 13-1417(D), the prosecutor also orally moved to amend the indictment by moving Count 2 to Count 1 and charging the new Count 1 (the continuous sexual abuse charge) "in the alternative" to the new Count 2 and Count 3.

¶4 Defense counsel stated he did not object to amending the inadvertently incorrect dates, but argued that § 13-1417(D) barred charging other offenses from the same time period and that the continuous sexual

conduct charge was insufficient because it did not specify the alleged acts. The respondent judge ordered the date amended and further concluded that reorganizing the counts and charging them in the alternative was not a "substantive change" and ordered the indictment amended on that basis as well. *See* Ariz. R. Crim. P. 13.5(b); *see also State v. Bolivar*, 250 Ariz. 213, ¶¶ 46-47 (App. 2020) (concluding amendment to charge in the alternative permissible under Rule 13.5(b)).

¶5 The case proceeded to trial on a continuous sexual abuse of a minor count and, in the alternative, one count each of molestation and sexual conduct with a minor. At trial, J.N. testified that Jensen had touched her vagina. When asked if this had happened "[m]ore than one time," she answered, "Yes." She also agreed that Jensen had "put his fingers inside" her vagina. The prosecutor asked if Jensen had "ever put his penis in [her] vagina," and J.N. again answered, "Yes," and indicated this had happened more than once.

¶6 After this testimony, the prosecutor stated, "So . . . far we've talked about three different incidents," and asked if they had happened during J.N.'s "third-grade year." She agreed they had. When asked if she remembered "the very first time this started," she answered, "No." The prosecutor also questioned J.N. about oral sex, and she testified Jensen "tried to put his penis in [her] mouth," but that she had moved to avoid it. The prosecutor then asked J.N., "[D]o you remember . . . did this occur all at the same time or were there . . . times between it?" The prosecutor then withdrew that question and asked, "[D]o you recall, did this happen Monday, Tuesday, Wednesday in a row, or did it happen over a period of time?" J.N. answered, "I don't remember."

¶7 After the close of the state's evidence, Jensen moved for a judgment of acquittal on all counts. For Count 1, the continuous sexual abuse charge, Jensen argued the state had not established the events took place over a period of three months or more as required under § 13-1417. The state conceded that the victim had not been "able to provide a date range" and that the state had therefore not "met its burden" as to that element of Count 1. The respondent judge granted Jensen's motion pursuant to Rule 20, Ariz. R. Crim. P., dismissing Count 1 with prejudice.

¶8 The respondent judge "indicated he was flabbergasted at the government at what they had just argued and what they had just conceded in open court." The judge then questioned the prosecutor about which acts were the basis for Counts 2 and 3, "because those were not specified in the indictment" and the state had now presented evidence of multiple different

acts to the jury. Arguing that Jensen could have moved to challenge the indictment based on the lack of alleged specific acts as to Counts 2 and 3, the state proposed those counts be further amended to specify digital and penile penetration respectively. Any evidence of additional acts could then have been properly admitted under Rule 404(c), Ariz. R. Evid.

¶9 Jensen argued that, given the dismissal of Count 1 with prejudice, the jury had been presented with evidence it should not have been given for Counts 2 and 3 and no jury instruction could cure the problem. He further asserted the state "knew or should have known what their evidence [wa]s," while he was limited to what had been disclosed because he could not interview J.N. Based on that disclosure, he argued there had been no evidence to support the three-month period. Jensen further observed that the prosecutor could have "asked questions of the victim" to establish the necessary facts.

¶10 The prosecutor responded he had "had [a] good . . . faith belief that [J.N.] would testify" to the time frame. When J.N. had not so testified, he conceded the Rule 20 motion because "she did not provide that information" and he "ha[d] no other way of getting in that information." The prosecutor later explained he had wanted the victim "to spen[d] as little time up there as possible" and was therefore "not going to force this little girl to tell me that it occurred over a three-month period of time" or "badger her."

¶11 The respondent judge denied Jensen's Rule 20 motion as to Counts 2 and 3, but granted his motion for mistrial. He reasoned that there was no way the jury could differentiate the evidence that had been presented "and conclude on a specific count." And he determined that allowing the state to amend the indictment after it rested in its case in chief would be prejudicial to Jensen. He granted the mistrial, however, without prejudice to the state refiling a corrected indictment.

¶12 When the state later filed a corrected indictment, Jensen moved to dismiss, arguing the state's conduct was intentional conduct it knew to be improper. He premised this argument largely on the lack of evidence in the disclosure he had received to support a finding the abuse had taken place over three months or more. He asserted that because the state had apparently proceeded on the charge without evidence to support each of its elements, it had acted with indifference to the risk of a subsequent mistrial.

¶13 The state responded that there had been "a good faith basis to go forward with each count" of the indictment. The grand jury had found probable cause for each count and that the prosecutor had also met with the victim, who agreed the charges "were accurate." The state argued the problem had only arisen as a result of the victim failing to testify to the full extent of her pretrial statements. The state asserted, as it does in its response to the petition for special action, "When asked about how long this occurred, the victim testified that she did not remember. When asked if it occurred over many months, the victim testified that she did not remember." On that basis, the state contended it had "asked the appropriate questions," but the victim had simply been unwilling to answer. It asserted the prosecutor's conduct therefore had not been improper.

¶14 The respondent judge denied Jensen's motion to dismiss in March 2023, determining that the prosecutor's actions had not been "more than just legal error, negligence, mistake or insignificant impropriety." The ruling clarified that the judge having said he was "'flabbergasted,' did not mean [he] thought the State had acted improperly," but instead was a "poor attempt . . . for clarification from the State." He accepted that it was "not the State's fault" that the victim "could not remember certain things previously alleged." And he explained that he had declared a mistrial because allowing the state to "select the strongest allegations made by the victim" and leave the remaining allegations as evidence under Rule 404(c), Ariz. R. Evid., would have given the state an unfair advantage.[1] This petition for special action followed.

Jurisdiction

¶15 "A special action [is] an appropriate vehicle for raising double jeopardy claims" because when a claim is not raised until appeal, the defendant will have endured "some of the harms of a double jeopardy violation," including "the strain, embarrassment, and expense of an

[1] In June 2023, Jensen filed a motion for an evidentiary hearing, pointing to the state's assertion in its response about the victim having affirmed the charges in a meeting with the prosecutor. The respondent judge denied the motion. At oral argument in this court, the state equivocated about what the victim had told the prosecutor, but essentially conceded the victim had not disclosed anything beyond what was in disclosure provided to Jensen. In rebuttal, Jensen argued that remand for an evidentiary hearing was therefore now inappropriate.

unlawful trial." *State v. Felix*, 214 Ariz. 110, ¶ 11 (App. 2006). This is true even though a defendant does not waive a double jeopardy claim for purposes of appeal if it is not raised by special action. *Id.* ¶ 14.

¶16 The state argues that we should decline special action jurisdiction because the claim is not one of first impression or statewide importance. Problematically, it also urges us to decline because Jensen has not shown "the matter is likely to occur again" in a retrial. As Jensen points out, this disregards the harms noted in *Felix*. Although the problem likely will not recur as to the introduction of Rule 404(c) evidence, the state ignores the harm caused by the fact of a second trial. In view of that harm, special action review is appropriate, and we accept special action jurisdiction.

Discussion

¶17 Jensen argues the respondent judge should have granted his motion to dismiss with prejudice and asks this court to bar the state from retrying him on double jeopardy grounds. "Whether double jeopardy bars retrial is a question of law, which we review de novo." *State v. Moody*, 208 Ariz. 424, ¶ 18 (2004). We review a trial court's findings of fact, however, to determine if they are "clearly erroneous." *State v. Lamar*, 205 Ariz. 431, ¶ 45 (2003).

¶18 Double jeopardy ordinarily does not bar retrial after a trial court grants a defendant's motion for a mistrial. *State v. Rasch*, 188 Ariz. 309, 312 (App. 1996). But, in *Pool v. Superior Court*, our supreme court held "that jeopardy attaches under art. 2, § 10 of the Arizona Constitution when a mistrial is granted" under specific conditions:

> 1. Mistrial is granted because of improper conduct or actions by the prosecutor; and
>
> 2. such conduct 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 conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial.

139 Ariz. 98, 108-09 (1984) (emphasis added).

¶19 Later, our supreme court emphasized that it had drawn "an important distinction between simple prosecutorial error, such as an isolated misstatement or loss of temper, and misconduct that is so egregious that it raises concerns over the integrity and fundamental fairness of the trial itself." *State v. Minnitt*, 203 Ariz. 431, ¶ 30 (2002). It determined that because the prosecutor had been "aware that his actions would deprive Minnitt of a fair trial," a retrial was "barred by the double jeopardy clause of the Arizona Constitution." *Id.* ¶¶ 44, 45.

¶20 Our supreme court has explained that its decision in *Pool* was a rejection of the majority decision in *Oregon v. Kennedy*, 456 U.S. 667 (1982). *See State v. Jorgenson*, 198 Ariz. 390, ¶ 5 (2000). In *Oregon*, the Supreme Court had limited the double jeopardy bar to cases in which "the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial." 456 U.S. at 676. The *Pool* court, however, determined that when the government's conduct meets the three-part test set forth above, "the burden of another trial cannot be attributed to defendant's preference to start anew rather than 'completing the trial infected by error' and is, rather, attributable to the 'state's readiness, though perhaps not calculated intent, to force the defendant to such a choice.'" 139 Ariz. at 109 (quoting *State v. Kennedy*, 666 P.2d 1316, 1326 (Or. 1983)). Thus, applying "minimum standards of legal knowledge and competence," the *Pool* court concluded that the prosecutor had "intentionally engaged in conduct which he knew to be improper, that he did so with indifference, if not a specific intent, to prejudice the defendant," and that double jeopardy barred retrial. *Id.*

¶21 Jensen argues retrial is barred by double jeopardy in his case because the state caused the mistrial "after pursuing charges for which . . . it never had any evidence, despite the obvious risk that doing so would taint the trial with volumes of backdoored Rule 404(c) evidence." He contends the "first and third prongs of *Pool* were decided . . . when the trial court declared a mistrial" and urges us to conclude the prosecutor's actions satisfied the second prong as well.

¶22 The *Pool* test first requires that the mistrial be granted due to "improper conduct or actions by the prosecutor." 139 Ariz. at 108. In his ruling on Jensen's motion to dismiss, the respondent judge stated that he

had granted the mistrial not due to "misconduct" by the state, but because J.N. had "testified that she could no longer remember dates or time frames" and because allowing the trial to proceed on the remaining two charges would have unfairly benefited the state. But as detailed above, the victim was asked only generally about whether the events had taken place "over a period of time" and was not specifically asked about the three-month time frame or asked other questions that might have established such a time frame. Likewise, the state did not seek to establish the time frame through other evidence or witnesses, conceding it had failed to prove the continuous sexual abuse charge.

¶23 The respondent judge's ruling and the state's argument conflate the first requirement of the *Pool* test with the second requirement. The second requirement addresses the nature of the state's conduct and whether it amounts to misconduct; the first merely requires that the mistrial be granted due to the state's action. *See Pool*, 139 Ariz. at 108-09. Were that not the case, there would be no reason to include the first requirement as an independent condition. *Cf. Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, ¶ 28 (2020) (in interpreting constitutional or statutory provisions, court gives meaning to each part). This reading is also consistent with the *Pool* court's explanation of the test, in which it describes the danger it seeks to avoid—forcing the defendant to choose between starting over or continuing with an unfair trial. *See Pool*, 139 Ariz. at 107, 109; *see also Rasch*, 188 Ariz. at 312 (retrial allowed when defendant seeks mistrial for reasons other than prosecutor's conduct). We conclude Jensen has met the first *Pool* requirement.

¶24 We also agree with Jensen that the third *Pool* requirement is met because the prosecutor's actions caused him prejudice that could not "be cured by means short of a mistrial." *Pool*, 139 Ariz. at 109. Relying on past decisions by this court, *State v. Korovkin*, 202 Ariz. 493 (App. 2002), and *State v. Trani*, 200 Ariz. 383 (App. 2001),[2] the state argues Jensen was required to show that the prosecutor had "been motivated to provoke a

[2]In *Korovkin*, our discussion of prejudice was undertaken in dicta and was addressed specifically to the facts in that case, in which a mistrial was granted based on a comment in opening statement, "before any witnesses had testified." 202 Ariz. 493, ¶ 9. In *Trani*, this court did not separately address the third requirement. *See* 200 Ariz. 383, ¶¶ 7-15. Indeed, the portion of that decision on which the state relies discusses the second requirement. *See id.* ¶¶ 11-12.

mistrial intentionally." But this argument again conflates two prongs of the *Pool* test—the third and the second requirements. *See Pool*, 139 Ariz. at 109. The state further maintains that any prejudice resulting from the admission of the other act evidence was "cured by the trial court's grant of a mistrial." But in doing so, the state ignores the harm caused by the very fact of a second trial, *see Pool*, 139 Ariz. at 107, 109, and essentially admits that the prejudice caused to Jensen in the first trial could only have been cured by a mistrial to avoid the taint of the other act evidence.

¶25 Because Jensen has shown *Pool*'s first and third requirements, we turn to *Pool*'s second requirement, which we conclude is dispositive here. Jensen argues the prosecutor's conduct was intentional, improper, and prejudicial, based on the state's having charged him with an offense it could not prove and thereafter proceeding to trial. Jensen maintains that in doing so, the prosecutor knew or should have known that a great deal of evidence would be presented to prove the continuous sexual abuse charge. And he contends the prosecutor could not have failed to realize that introducing such evidence, which would otherwise have had to be admitted under Rule 404(c), Ariz. R. Evid., "carrie[d] a high risk of mistrial."

¶26 We agree with Jensen that the prosecutor must be assumed to have known that if the continuous sexual abuse charge were dismissed, a mistrial would become a near certainty due to the introduction of evidence that would be admitted without evaluation under Rule 404(c). *See Pool*, 139 Ariz. at 107 ("The law cannot reward ignorance; there must be a point at which lawyers are conclusively presumed to know what is proper and what is not."). The state argues that the prosecutor would not "have been motivated to provoke a mistrial" because an acquittal was not imminent and the other act evidence would have been admissible under Rule 404(c). But this overlooks that Rule 404(c) allows admission of other act evidence only if the court has made certain findings. *See State v. Ferrero*, 229 Ariz. 239, ¶ 11 (2012) (other act evidence relating to same victim and similar offenses generally subject to Rule 404(c) analysis). Importantly, the state must prove by clear and convincing evidence that the defendant committed the other act. *State v. LaBianca*, 254 Ariz. 206, ¶ 16 (App. 2022). In contrast, evidence of the charged offenses, offered in a proper form, may generally be admitted so long as it is relevant. *See* Ariz. R. Evid. 402. We cannot ignore the possibility that a prosecutor could seek to take advantage of the alternative charging structure of § 13-1417 to introduce evidence that might not otherwise be admissible in relation to a single charge in the context of child sexual offenses. *Cf. State v. Ramsey*, 211 Ariz. 529, ¶ 26 (App. 2005)

(noting "special difficulties of proving individual underlying criminal acts" with child victims); *see also State v. Copeland*, 253 Ariz. 104, ¶¶ 10-15 (App. 2022).

¶27 In this case, however, Jensen has not shown that the respondent judge erred in finding that the prosecutor had not committed the kind of misconduct required to meet the second requirement of the *Pool* test. *See Lamar*, 205 Ariz. 431, ¶ 45. The respondent judge implicitly accepted that the prosecutor's actions had been based on a good-faith belief as to how J.N. would testify. Contrary to Jensen's claim that "*nothing* in discovery indicate[d] the State had a basis" to bring the continuous sexual abuse charge, the record provided contains evidence to support the respondent's finding as to the prosecutor's belief.

¶28 J.N. reported the abuse in September 2020. The Department of Child Safety (DCS) reported in its investigation that Jensen had abused J.N. "[d]uring 2019 and 2020." In a forensic interview, family members reported that Jensen had been left alone to watch J.N. beginning in September 2019, when J.N. was in third grade. J.N. told the forensic interviewer that Jensen had put his fingers in her "private spot" three times, and although she could not remember when this had first happened, "it was during third grade." J.N.'s mother told DCS investigators that J.N. had said it "happened a few times while she was in the [fourth] grade." In the grand jury, the testifying detective affirmed that Jensen had been alone with J.N. "at various times . . . from September of 2019 through September of 2020." He also agreed that J.N. had not been "able to provide specific dates of events" and she had "said it was during when she was in third grade" and the abuse had happened multiple times.

¶29 Jensen argues that J.N.'s statement that the abuse took place "during" third grade "says nothing about whether the alleged conduct" spanned three months or more. But the word "during" can mean either "throughout the duration of" or "at a point in the course of." *During*, Merriam-Webster, https://merriam-webster.com (last visited Apr. 3, 2024). This ambiguity in meaning went directly to the credibility of the prosecutor's claim as to his belief about J.N.'s potential testimony. That dispute was for the trial court to resolve, and because we cannot say its resolution is clearly erroneous, we will affirm it. *See Lamar*, 205 Ariz. 431, ¶ 45.

¶30 Thus, we cannot say the second *Pool* requirement has been met. *See Pool*, 139 Ariz. at 108-09 (requiring conduct beyond "legal error, negligence, mistake, or insignificant impropriety" that "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"). In view of the respondent judge's finding that J.N.'s statements before trial supported bringing the continuous sexual abuse charge, the prosecutor's choice to bring that charge, although negligent, was not for an improper purpose. *Id.* We therefore conclude that double jeopardy does not bar the state from retrying Jensen on the two remaining charges, and the respondent judge therefore properly denied the motion to dismiss.

Disposition

¶31 We accept special action jurisdiction, but deny relief.