



IN THE COURT OF APPEALS OF THE STATE OF NEVADA

HECTOR ROMERO,
Petitioner,
vs.
THE SECOND JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
WASHOE AND THE HONORABLE
CONNIE J. STEINHEIMER, DISTRICT
JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 92423-COA

ORDER DENYING PETITION

This is an original petition for a writ of mandamus or prohibition challenging a district court order granting a mistrial without prejudice.

Petitioner Hector Romero was charged with several crimes in connection with a robbery and assault that occurred in a casino parking garage. The State alleged Romero committed the robbery and assault with the use of a deadly weapon and with the intent to promote or assist a criminal gang. The district court bifurcated consideration of the gang enhancements from the guilt phase of trial. On the second day of trial, Romero renewed a motion for mistrial based on several instances of prosecutorial misconduct. In particular, Romero alleged that (1) the prosecutor, L. Valencia, failed to inform a witness, V. Cordi, of the district court's ruling that witnesses were not to reference gangs in their testimony and that Cordi subsequently made two references to the "gang unit" of the Reno Police Department in relation to the investigation of the crimes; and (2) Valencia elicited testimony from another

witness, A. Patton, regarding other acts—specifically, that Romero had a gun on him prior to his arrest nine days after the crimes were committed—without filing a motion, requesting a *Petrocelli*¹ hearing, or otherwise disclosing the evidence before trial. The parties filed briefs on the matter, and the district court granted the mistrial and held an evidentiary hearing to determine whether the mistrial should be granted with or without prejudice. Thereafter, the district court entered a written order declaring a mistrial without prejudice.

In the instant petition, Romero contends that his renewed prosecution by the State following the mistrial violates the Double Jeopardy Clause of the United States and Nevada Constitutions, and he requests that this court direct the district court to dismiss his case. A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, NRS 34.160, or to control a manifest abuse or arbitrary or capricious exercise of discretion, *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). A writ of prohibition may issue to arrest the proceedings of a district court exercising its judicial functions when such proceedings are in excess of the jurisdiction of the district court. NRS 34.320. Neither writ will issue if the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. NRS 34.170; NRS 34.330. Because a direct appeal from a final judgment does not provide an adequate remedy with which to redress a double jeopardy violation following a mistrial, we elect to consider Romero’s petition on the merits. *See Granada-Ruiz v. Eighth Jud. Dist. Ct.*, 134 Nev. 474, 477, 422 P.3d

¹*Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985), *superseded in part by statute as stated in Thomas v. State*, 120 Nev. 37, 44-45, 83 P.3d 818, 823 (2004).

732, 736 (2018); *Thomas v. Eighth Jud. Dist. Ct.*, 133 Nev. 468, 471, 402 P.3d 619, 623-24 (2017); *see also Glover v. Eighth Jud. Dist. Ct.*, 125 Nev. 691, 701, 220 P.3d 684, 692 (2009) (stating “[a] writ of prohibition will issue to interdict retrial in violation of a defendant’s constitutional right not to be put in jeopardy twice for the same offense”). “Petitioners carry the burden of demonstrating that extraordinary relief is warranted.” *Pan v. Eighth Jud. Dist. Ct.*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

Under the United States and Nevada Constitutions, the State may not put a defendant in jeopardy twice for the same offense. U.S. Const. amend. V; Nev. Const. art. 1, § 8. However, “a defendant’s motion for, or consent to, a mistrial generally removes any double jeopardy bar to reprosecution.” *Thomas*, 133 Nev. at 472, 402 P.3d at 624. In *Thomas*, the Nevada Supreme Court adopted a three-part test for determining whether reprosecution following the grant of a defendant’s motion for mistrial violates the Nevada Constitution’s double jeopardy clause.² *See id.* at 475, 402 P.3d at 626-27. In particular, this test requires the court to consider, among other things, whether

[the improper conduct or actions of the prosecutor] 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.

²We note that the Nevada Constitution’s double jeopardy clause provides broader protection than its federal counterpart. *See Thomas*, 133 Nev. at 475, 402 P.3d at 626.

Id. at 475, 402 P.3d at 626 (emphasis added) (quotation marks omitted). “[W]hether a prosecutor ‘knows’ or ‘intends’ his conduct to be improper and prejudicial should generally be measured by objective factors”; however, a court may consider “the prosecutor’s own explanations of his ‘knowledge’ and ‘intent’ to the extent that such explanation can be given credence in light of the minimum requirements expected of all lawyers.” *Id.* at 476, 402 P.3d at 627 (quotation marks omitted). Although the question of whether double jeopardy bars reprosecution is a question of law reviewed de novo, we give deference to the district court’s findings of fact unless clearly erroneous and not based on substantial evidence. *Id.* at 471, 402 P.3d at 624.

At the evidentiary hearing, Valencia testified that none of her acts which led to the mistrial were intentional. Regarding her failure to inform Cordi of the district court’s ruling that witnesses were not to reference gangs in their testimony, Valencia testified that she did not do so because (1) she did not have any reason to believe Cordi would bring up anything related to gangs since Cordi was the senior surveillance and investigations manager for the casino in which the crimes occurred and his role in this matter was limited to reviewing and collecting pertinent surveillance video from the night of the crimes; and (2) she was concerned that, if she told Cordi not to make any mention of gangs, he would start thinking of gangs and inadvertently make a reference to gangs. She also testified that she did not intend to elicit an improper response from Cordi, that she was surprised when Cordi referenced the “gang unit” of the Reno Police Department, and that she did not ask any follow-up questions because she did not want to bring attention to the improper references.

Regarding her failure to disclose Patton’s inconsistent statements or to file a motion or request a hearing regarding the same, Valencia testified

she had a pretrial meeting with Patton wherein Patton informed her that Romero had a gun in his possession prior to his arrest on July 7, 2024; that Patton believed this was the same gun Romero had during the commission of the crimes on June 28, 2024; that Romero threw the gun out of the car window before the police made contact with him; and that Patton went back to area to look for the gun but could not find it. Valencia testified that she did not believe she had to disclose this evidence or request a hearing because she believed the evidence was inculpatory and was not germane to the issues that were in contention regarding Romero's arrest.³ She further testified that she did not recognize this information could potentially be used to impeach Patton. Finally, Valencia testified that, although the court ordered her to turn over any information regarding Patton's statements to Romero during a recess at trial, she did not do so because the district court subsequently held a hearing outside the presence of the jury wherein Patton testified to the above information.

The district court found Valencia's testimony credible, and we will not "evaluate the credibility of witnesses because that is the responsibility of the trier of fact." *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). Moreover, we agree with the district court that Valencia "offered plausible explanations for the errors" such that her explanations could be given credence. In light of Valencia's testimony, and having reviewed the record, we conclude Romero fails to demonstrate that Valencia's misconduct, taken as a whole, amounted to intentional conduct which she knew to be improper and

³Romero was arrested after he, Patton, and a codefendant engaged in a high speed car chase with law enforcement. Prior to trial, the district court ordered that the State could not discuss the fact Romero had attempted to elude the police on July 7, 2024, or that Romero and his codefendant were on probation or parole.

prejudicial. Accordingly, Romero fails to demonstrate that extraordinary relief is warranted, and we

ORDER the petition DENIED.

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Bulla, C.J.

A handwritten signature in black ink, appearing to be 'Gibbons', with a horizontal line extending to the right.

Gibbons, J.

A handwritten signature in black ink, appearing to be 'Westbrook', with a horizontal line extending to the right.

Westbrook, J.

cc: Hon. Connie J. Steinheimer, District Judge
Ristenpart Law
Washoe County District Attorney
Second District Court Clerk