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ELIZABETH A. BROWN
CLERK OF SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, Appellant, vs. MATTHEW DAVID KRIEGER, Respondent.	No. 90177

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing the underlying criminal case with prejudice. Sixth Judicial District Court, Humboldt County; Hon. Michael Montero, Judge.

This matter arises from a police chase in which respondent Matthew David Krieger was a passenger. The State alleges that Krieger held the driver, Hugo Lopez-Trujillo, at gunpoint and ordered Lopez-Trujillo to continue driving, while Krieger threw contraband, including firearms, out the window of the car. Krieger was ultimately bound over to the district court on three counts: kidnapping with the use of a deadly weapon, assault with a deadly weapon, and being a felon in possession of a firearm. Prior to trial, the district court excluded all testimony relating to a separate incident in which Krieger allegedly threatened his wife, Terri Krieger, with a firearm. The district court also stated that the State need not prove ownership of the guns in order to convict Krieger of possessing one. Nevertheless, at trial, the State asked Lopez-Trujillo whether he owned the firearms allegedly thrown from his car during the chase. Krieger moved for a mistrial, and the district court granted the motion and dismissed the case with prejudice, barring retrial. This appeal followed. The State argues that the district court improperly granted a mistrial with prejudice under *Thomas v. Eighth Judicial District Court*, 133 Nev. 468, 475 402 P.3d 619, 626-27 (2017). Because we hold that the district

court did not abuse its discretion in applying the *Thomas* test, we affirm the district court's order dismissing the case with prejudice.

This court reviews a district court's determination to grant a mistrial for abuse of discretion. *Rudin v. State*, 120 Nev. 121, 142, 86 P.3d 572, 586 (2004). Whether renewed prosecution by the State following an initial mistrial violates the Double Jeopardy Clause of the United States and Nevada Constitutions "presents a question of law that this court reviews de novo." *Thomas*, 133 Nev. at 471, 402 P.3d at 624. When a defendant moves for a mistrial, double jeopardy attaches if "a prosecutor intentionally proceeds in a course of egregious and improper conduct that causes prejudice to the defendant which cannot be cured by means short of a mistrial." *Id.* at 475, 402 P.3d at 626. This court considers three factors in evaluating a double jeopardy claim under this standard: (1) whether a mistrial is granted because of a prosecutor's improper conduct, (2) whether the misconduct was intentional and pursued with indifference to a significant danger of prejudice and the possibility of a mistrial, and (3) whether the prejudice this misconduct caused to the defendant can "be cured by means short of a mistrial." *Id.* at 475, 402 P.3d at 626-27. Although these questions of law are reviewed de novo, "this court will not disturb the district court's findings of fact unless those findings are clearly erroneous and not based on substantial evidence." *Id.* at 471, 402 P.3d at 624 (citation modified).

The first consideration under the *Thomas* test is whether the mistrial was granted because of improper conduct or actions by the prosecutor. *Id.* at 475, 402 P.3d at 626. Here, the district court identified five instances of prosecutorial misconduct that warranted dismissal, including that the State (1) filed an untimely notice of witnesses, (2) improperly included Terri Krieger as a potential witness, (3) failed to read the district court's orders excluding

certain prejudicial evidence, (4) elicited perjured testimony from Lopez-Trujillo, and (5) failed to disclose the criminal histories and driving records of the State's witnesses despite Krieger's requests for discovery. The State does not contest the district court's findings of prosecutorial error. Therefore, we conclude that the district court did not abuse its discretion in finding that the first prong of the *Thomas* test was satisfied.

The second prong of the *Thomas* test requires a showing that a prosecutor "knows" or "intends" the conduct at issue to be improper and prejudicial. This intention is measured by objective factors, such as the overall circumstances, "the evidence of actual knowledge and intent and," if credible, "the prosecutor's own explanations." *Id.* at 476, 402 P.3d at 627. Generally, it is not sufficient to show simple errors, isolated misstatements, or a short loss of temper. *Id.* Instead, the misconduct at issue must be egregious enough that it "raises concerns over the integrity and fundamental fairness of the trial itself." *Id.* (citation modified). Here, the district court identified several instances where the prosecutor's misconduct persisted despite warnings, suggesting a disregard for the court's authority.

First, the district court determined that the State violated its order excluding testimony on several occasions. For example, the State noticed Terri Krieger as a witness three judicial days before trial was scheduled to begin. At a pretrial hearing, the prosecutor admitted to not reading the district court's order prohibiting the parties from eliciting testimony related to Krieger's alleged attack of his wife. Although these infractions could individually be forgiven as simple mistakes, taken together, they reveal a pattern of disregard for the court's orders.

Second, sufficient evidence supports the district court's determination that the State purposefully withheld material *Brady* evidence

from the defense. *See Brady v. Maryland*, 373 U.S. 83 (1963) (requiring disclosure of evidence favorable to the defense when material to guilt or to punishment); *see also Mazzan v. Warden*, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000) (stating that withheld evidence must be material to warrant reversal). Although the State has no affirmative obligation to create or obtain criminal histories for each of its witnesses, witness background reports, if created, will generally be considered *Brady* material triggering disclosure. *See Mazzan*, 116 Nev. at 67, 993 P.2d at 37 ("Evidence . . . must be disclosed if it provides grounds for the defense to . . . impeach the credibility of the state's witnesses . . . ."). Here, Krieger requested criminal histories for all the State's witnesses. The State denied creating any but indicated that it would readily disclose any qualifying prior convictions it discovered. But Krieger noted several pieces of evidence discovered by a private investigator that should have been disclosed, including the fact that Lopez-Trujillo's driver's license had been revoked for eluding police on a prior occasion and that, on the day of the incident, Lopez-Trujillo was out on bail for a separate offense. Krieger also noted that despite the State's repeated claims that it does not run background checks on witnesses, Krieger observed paper copies of witness background reports on the State's counsel table during trial.

Third, the district court determined that a mistrial was warranted by finding that the State elicited perjured testimony from Lopez-Trujillo regarding his ownership and knowledge of the guns recovered from the scene. The district court came to this conclusion after listening to Lopez-Trujillo's testimony and comparing pictures of one of the guns discarded during the pursuit with pictures taken days before of Lopez-Trujillo holding a similar

black gun.[1] Both pictures came from the State's own discovery materials. We decline to disturb the district court's findings of fact unless they are clearly erroneous and not based on substantial evidence. Thus, we hold that the district court did not abuse its discretion when it concluded that the State suborned perjury.

The third prong of the *Thomas* test requires a finding that "egregious and intentional prosecutorial misconduct has truly necessitated the grant of a mistrial." 133 Nev. at 476, 402 P. 3d at 627. Here, the district court considered measures such as granting a continuance to review newly-produced evidence, imposing sanctions against the prosecutor, or issuing curative jury instructions, and found none of them would adequately remedy the misconduct. The record contains multiple allegations of misconduct in addition to the instances the district court identified. For example, the defense alleged that the prosecution intercepted and recorded telephone conversations between Krieger and his attorney. *See Gibbs v. State*, 140 Nev. 131, 135 543 P.3d 1185, 1190 (2024) (recognizing that improper intrusion into attorney-client phone calls violates the Sixth Amendment right to counsel). The State did not contest that this occurred but instead argues that the calls were not privileged. In addition, evidence presented at trial, including recorded phone calls and handwritten notes, strongly suggests that Lopez-Trujillo had negotiated a deal with the State in exchange for his trial testimony. But the State repeatedly denied that any such deal existed and even elicited trial testimony from Lopez-Trujillo that he had not entered into any deals. Given the frequency and severity of prosecutorial misconduct, the district court did

[1]We presume that the district court, having examined photographs of both guns, deduced that they were one and the same. And because neither party produced the photos in question, we rely on the court's judgment.

not abuse its discretion in determining that a mistrial was the only way to appropriately remedy defects that prevented Krieger from having a fair trial.

Because each of the *Thomas* factors was satisfied, we conclude that the district court properly determined that a mistrial with prejudice was warranted. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Stiglich, J.

Cadish, J.

Lee, J.

cc: Hon. Michael Montero, District Judge
Gorman Law PLLC
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Humboldt County District Attorney
Nevada State Public Defender's Office
The Sixth Judicial District Court of the State of Nevada, in and for the County of Humboldt, District Court Clerk