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Glover v. Dist. Court, 125 Nev. Adv. Op. No. 53 (November 12, 2009)¹

CRIMINAL LAW - DOUBLE JEOPARDY, MISTRIAL, HEARSAY, NEGATIVE INFERENCE FROM FACTS NOT IN EVIDENCE

Summary

This case involved a writ of prohibition to determine if Defendant's double jeopardy rights were violated when the district court ordered a mistrial and subsequent retrial as a "manifest necessity" based on potential jury bias because defense counsel impermissibly argued facts not in evidence.

Disposition/Outcome

The Court determined defense counsel irretrievably biased the jury by arguing facts not in evidence. Therefore, declaration of a mistrial was a "manifest necessity" and retrial under these circumstances does not violate the Double Jeopardy Clause.

Facts and Procedural History

Derek Moore drove his car, uninvited, onto the front yard of Defendant, Shawn Glover's property. Moore threatened Glover and then got back into his car. Glover went into the house², came back outside, and then shot Moore at point blank range. No weapons were found on Moore or in his car and no gunshot residue tests were conducted on Moore. Glover left his home before police arrived, but surrendered himself later the same day. Glover agreed to a videotaped police interview where he claimed self-defense, which is the evidence in question in this writ.

Glover consistently maintained that he shot in self defense. Before trial, the State informed the court it would not be using the videotape statement as evidence. Therefore the prosecution objected to defense counsel's use of transcribed excerpts from the videotape in a PowerPoint presentation that was to be shown during opening statements. Despite the court's ruling that the statement was inadmissible hearsay, defense counsel showed the jury the PowerPoint presentation. During the presentation, the State objected to the reference to the videotape, and the objections were sustained by the district court Judge. Because the State chose not to use the videotape, the Judge ruled that it was inadmissible hearsay because it was an out of court statement made by the Defendant and defense counsel was attempting to use the statement to show its truthfulness.

Detective Prieto, a witness for the State, was the police officer who took the statement. Defense counsel was again instructed not to refer to the statement during cross examination of Detective Prieto because it was not admitted into evidence. Despite this ruling, defense counsel presented the jury with an envelope containing the videotape and asked the detective to identify what was in the envelope. Again, the court stated that unless the State presented the videotaped evidence, it constitutes inadmissible hearsay and the defense cannot refer to it.

¹ By Amy Kominsky

² The facts are in dispute as to whether Glover went inside to tell his mother to call 911 or to get his gun.

Glover testified in his own defense that he was fearful of Moore, and that he panicked believing Moore had a gun, causing him to shoot in self-defense. The trial took three days. During closing argument defense counsel told the jury that they should assume the State did not show the videotape statement because it was “absolutely devastating” to their case against Glover. At this time, the state requested a mistrial because defense counsel argued facts not in evidence directly in regard to the contested issue of self-defense. The defense argued against mistrial claiming that defense counsel argued a legitimate negative inference from the state’s failure to show the videotape.

The district court considered both parties concerns and ruled that defense counsel improperly argued facts not in evidence despite being warned on at least three occasions that the tape was inadmissible hearsay and could not be referred to. Furthermore, a limiting instruction for the jury to disregard any reference to the tape was insufficient to prevent or cure potential bias against the State. The district court declared a mistrial in the absence of any other reasonable alternatives to cure the improper argument. Thereafter, Glover moved to dismiss on Double Jeopardy grounds but was denied, and this writ followed.

Discussion

Double Jeopardy does not apply when a mistrial is declared as a “manifest necessity.”

Jeopardy attaches when the jury is sworn, but the Constitutional prohibition against double jeopardy³ does not mean that a person cannot be retried whenever a trial does not reach a final judgment.⁴ If a trial ends after jeopardy attaches but before a jury verdict is reached, a defendant can be retried if he consents to the mistrial or if, in the “exercise [of] a sound discretion” and “taking all the circumstances into consideration,” the trial court determines that the “ends of public justice” make a mistrial a “manifest necessity.”⁵ Improper advocacy that places prejudicial and inadmissible evidence before the jury can create an unacceptable risk of biased jury deliberations and also require mistrial as a matter of “manifest necessity.”⁶

The argument by defense counsel was improper because it argued facts not in evidence.

Because incorrect evidentiary rulings by the district court dramatically change the mistrial determination,⁷ the first issue decided by the Court was whether the district court correctly ruled defense counsel’s argument out-of-bounds.

³ The double jeopardy clause states “[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb” U.S. CONST. amend V; NEV. CONST art. 1 § 8.

⁴ *Wade v. Hunter*, 336 U.S. 684, 688 (1949).

⁵ *United States v. Chapman*, 524 F.3d 1073, 1081 (9th Cir. 2008) (internal citations omitted).

⁶ *Arizona v. Washington*, 434 U.S. 497, 514, 516 (1978); *Hylton v. Dist. Court*, 103 Nev. 418, 426; 743 P.2d 622, 628 (1987).

⁷ *Benson v. State*, 111 Nev. 692, 695, 895 P.2d 1323, 1326 (1995) (noting that the argument by defense counsel that held the district court to declare a mistrial and hold counsel in contempt was later deemed unobjectionable by the Nevada Supreme Court, making it necessary to determine whether the defendant consented to the mistrial; without the defendant’s consent, double jeopardy barred retrial).

Glover's statement was hearsay

In this case, Glover's statements to police were hearsay since the State had the option to admit the videotape statement, but chose not to.⁸ Further, if the state had impeached Glover for prior inconsistent statements, then the defense could have admitted the videotape evidence as a prior consistent statement.⁹ However the State did not impeach Glover for prior inconsistent statements, and the videotape accordingly remained inadmissible evidence.

Negative inference and facts not in evidence

In general, defense counsel is entitled to argue all reasonable inferences from the evidence including negative inferences from prosecution's failure to produce relevant evidence when it is shown that the evidence was available.¹⁰ However, "counsel may not premise arguments on evidence which has not been admitted."¹¹

In this case, Glover argued that his negative inference argument about the state's failure to test the victim for gunshot residue (which the District Court allowed in) was no different than his negative inference argument about the failure to show the videotape. The Court found these two arguments were different for two reasons. First, in drawing the jury's attention to the lack of gunshot residue test results, defense counsel confined his argument to asking the jury to consider whether the residue test would have been helpful. He did not argue, as he did with respect to Glover's videotaped out-of-court statement, that the test results existed and the state suppressed it because it hurt their case and supported Glover.

Second, the inference that counsel asked the jury to draw from the State's failure to introduce Glover's police statement into evidence was illegitimate. The hearsay rules declare prior out-of-court statements untrustworthy and inadmissible when merely offered to bolster a declarant's own in-court testimony, unless an exception applies. No such exception was applicable in this case.

Two cases illustrate this point; *Johnson v. United States*¹² and *Reichert v. United States*.¹³ In these cases, the government handed written statements of each witness's testimony to the defense in the presence of the jury.¹⁴ Thus, the jury knew the defense had these statements but did not use them to impeach any witness or as evidence.¹⁵ The government argued that the jury should infer the defense's failure to use the statements meant that the statements corroborated the government's case and that the defense's case was weak. The courts found this an improper negative inference and declared a mistrial. In so holding, the *Johnson* court noted that under the

⁸ NEV. REV. STAT. § 51.035 (2008). The statute defines hearsay as "[S]tatement offered to prove the truth of the matter asserted unless: 1. The statement is one made by a witness while testifying at trial or hearing; 2. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement . . ." *Id.* The State would have been allowed to offer the statement against the Defendant, but because it was not admitted defense counsel was not permitted to bring it into evidence based on the hearsay rule. *Id.*

⁹ *Id.* § 51.035(2)(b) (2008).

¹⁰ *United States v. Hoffman*, 964 F.2d 21, 24 (D.C. Cir. 1992).

¹¹ *Johnson v. United States*, 347 F.2d 803, 805 (D.C. Cir. 1965).

¹² *Id.*

¹³ *Reichert v. United States*, 359 F.2d 278 (D.C. Cir. 1966).

¹⁴ This procedure is pursuant to the terms of the Jencks Act, 18 U.S.C. § 3500.

¹⁵ *Johnson*, 347 F.2d 803; *Reichert*, 359 F.2d 278.

rules of evidence, a prior consistent statement cannot be used to support an unimpeached witness by a prosecution or defense.¹⁶ Therefore, the courts concluded that the prosecutor impermissibly tainted the jury by instructing them to infer that failure to use the statements constituted a weakness in the defense's case. The instruction in these cases referred to inadmissible evidence and was therefore improper.¹⁷

The Court held that the defense's closing argument in this case was "equally improper." In Mr. Glover's case, defense counsel argued to the jury that the failure to show the videotape, which was not admissible evidence, proved a weakness in the prosecution's case. The Court held this was improper because "Vigorous, even zealous argument is one thing . . . [b]ut the clear intimation of the argument was that [counsel] knew personally that the 'statements were damaging and tended to corroborate [his] witness[.]'"¹⁸ Here, like in *Johnson* and *Reichert*, there was no evidence to prove defense counsel's contention that the tape was devastating to the prosecution, yet the jury was asked to accept defense counsel as a witness, which he was not.¹⁹ Therefore, the Court concluded that defense counsel's action in this case was improper.

Further, contrary to the dissent's position, the Court concluded that the rule prohibiting negative-inferences that improperly address facts not in evidence or matters of counsel's opinion are not confined to the prosecution in criminal cases.²⁰ The ABA standards support this conclusion that it is improper for defense counsel to argue evidence that was excluded or deemed inadmissible by the court.²¹

Manifest necessity and the ends of justice

The Court noted that upholding the district court's determination that defense counsel improperly argued facts not in evidence does not resolve the case. Accordingly, the Court next determined whether retrying Glover would violate the double jeopardy clauses in the United States and Nevada Constitutions.

"A judicial determination of manifest necessity is reviewed for abuse of discretion, but the level of deference varies according to the circumstances in each case."²² When a prosecutor causes the circumstances requiring mistrial,²³ "strictest scrutiny" applies because "the Double Jeopardy clause . . . protect[s] a defendant against governmental actions intended to provoke mistrial requests . . . [or] bad faith conduct . . . [that] threatens the [h]arassment of the accused."²⁴ The other end of this spectrum would be when defense counsel causes the mistrial, and the judge

¹⁶ *Id.* at 805-806.

¹⁷ *Id.*

¹⁸ *Reichert*, 359 F.2d at 281-2.

¹⁹ *Id.* at 282.

²⁰ *See* *Whitney v. State*, 112 Nev. 499, 502; 915 P.2d 881, 883 (1996) (prosecution cannot ask the jury to draw negative inferences for the defendant's failure to testify on his own behalf).

²¹ ABA STANDARDS FOR CRIMINAL JUSTICE, S. 4-7.7 cmt. (3d ed. 1993); *see also* *United States v. Young*, 470 U.S. 1, 9-10 (1985) (the ABA Standards for Criminal Justice "quite properly hold[s] all advocates to essentially the same standards." (internal citations omitted)).

²² *United States v. Chapman*, 524 F.3d 1073, 1082 (9th Cir. 2008); *Beck v. Dist. Court*, 113 Nev. 624, 627, 939 P.2d 1059, 1060 (1997); *see also* *Rudin v. State*, 120 Nev. 121, 143, 86 P.3d 572, 586 (2004).

²³ *Beck*, 113 Nev. at 627; 939 P.2d at 1060 (1997) (quoting *Hylton v. Dist. Court*, 103 Nev. 418, 423, 743 P.2d 622, 625 (1987)).

²⁴ *Washington*, 434 U.S. at 508 (quotations omitted) (last alteration in original).

determines mistrial is appropriate based on observations that an impartial jury verdict is impossible.²⁵ If defense counsel creates the need for mistrial, as is the case here, the court gives “special respect” to the judge’s determination of manifest necessity based on jury bias.²⁶

“Great deference” is given to the trial judge because he is the one most familiar with the evidence and background of the case.²⁷ Procedural factors considered when reviewing a declaration of mistrial for abuse of discretion are whether the district court; 1) heard the opinions of the parties about the propriety of the mistrial, 2) considered the alternatives to a mistrial and chose the alternatives least harmful to a defendant’s rights, 3) acted deliberately instead of abruptly, and 4) based the mistrial on evidence presented in the record.²⁸

“Manifest Necessity” in cases involving improper defense argument and jury bias

The first factor to consider in a “manifest necessity” determination is the source of the difficulty that lead to mistrial. In this case defense counsel caused the mistrial. The State repeatedly objected to referencing the tape and defense counsel continued to do so, despite the district court sustaining the objections. Toward the end of the trial, the district court determined that the repeated references to the videotape had unacceptably compromised the jury, and thus granted a mistrial. The judge’s decision to declare a mistrial is granted the highest level of deference.²⁹

The leading Supreme Court case on manifest necessity is *Arizona v. Washington*.³⁰ In that case, defense counsel told the jury during opening statements that the defendant was being retried because the state had “suppressed and hidden” evidence at the first trial.³¹ The Supreme Court found that this retrial did not violate the double jeopardy clause because, while a mistrial could have been avoided with a limiting instruction and was not necessary, overriding interest in fairness requires great deference to the trial judge’s decision that one or more jurors may have been biased by the improper comment.³² The Supreme Court noted that no party has the right to have his case tried by a biased jury and that “the public’s interest in fair trials designed to end in just judgments must prevail over the defendant’s valued right to have his trial concluded before the first jury impaneled.”³³

In this case, Glover argued that his transgressions were minor compared to those in *Washington*, but the Court held that the case at bar is essentially the same. Both cases involved notifying the jury of accusations that the state hid evidence, only in *Washington* the improper reference was made once, and in Mr. Glover’s case it was made three times and went directly to the core contested issue of self defense. In addition to defense counsel’s reference to the videotape, the jury was shown visual references of the transcription of the interview and a bag

²⁵ *Chapman*, 524 F.3d at 1082.

²⁶ *Id.* (quoting *Washington*, 434 U.S. at 510).

²⁷ *Washington*, 434 U.S. at 513-14.

²⁸ *Chapman*, 524 F.3d at 1082.

²⁹ *See Id.* at 1082.

³⁰ *Washington*, 434 U.S. 497.

³¹ *Id.* at 499. The Arizona state trial court determined that this state could not be proven by admissible evidence and carried the risk of tainting the jury, therefore a mistrial was declared. The Ninth Circuit held that this retrial violated the Double Jeopardy clause. *State of Arizona v. Washington*, 546 F.2d 829 (1976).

³² *Washington*, 434 U.S. at 511.

³³ *Id.* (quotation omitted).

containing the tape, which likely prejudiced the jury more than the single improper comment in *Washington*.

The fact that defense counsel caused the mistrial does not trump defendant's double jeopardy rights, but it does diminish them because the trial judge's decision to declare a mistrial is awarded such high deference in this situation.³⁴ To hold otherwise would give defense counsel an unfair advantage because if the prosecution used this tactic it would amount to irreversible error.³⁵ It is necessary that the trial judge be able to declare mistrial because

[t]he trial court has a duty to ensure that all parties have a fair trial and has the authority to grant mistrial where injustice is caused to either party in a criminal case and is especially empowered to avoid the absurdity of a defendant benefitting from the prejudicial error he created.³⁶

No procedural indications of abuse of discretion

In this case, the Court found that the trial Court acted with sound discretion and made a rational and reasonable decision by declaring a mistrial. First, the district court considered the opinions of counsel of both sides. Next, the court considered the alternatives to mistrial, including a jury instruction to disregard all references to the videotape, but determined this was not sufficient to cure the potential bias. Additionally, the court gave defense counsel three chances to stop referring to the videotape, before considering the Constitutional standards governing the issue and declaring a mistrial. Finally, defense counsel caused the mistrial by directly disobeying the motions in limine to exclude the videotape. The Court found that these factors combined to make mistrial the only appropriate choice and accordingly upheld the decision on the district court as being a valid exercise of discretion.

Conclusion

The Court concluded that defense counsel directly violated the district court's ruling that a videotape statement from the Defendant was inadmissible hearsay. By instructing the jury to draw a negative inference against the state for not showing the videotape, defense counsel improperly argued facts not in evidence. The Court further concluded that this created a high risk of potential jury bias against the State, creating a "manifest necessity" for retrial. Finally, the Court concluded that double jeopardy does not bar retrial in this case. The Court, therefore, denied the writ petition and vacated the order staying future proceedings in the district court.

³⁴ See 4 J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 29:18 (3d ed. 2009).

³⁵ *United States v. Young*, 470 U.S. 1, 9 n.6 (1985).

³⁶ *Pleas v. State*, 495 S.E.2d 4, 6 (Ga. 1998); see *Banks v. State*, 495 S.E.2d 877, 881 (Ga. Ct. App. 1998).

Dissenting/ Concurring Opinion³⁷

HARDESTY, C.J., joined by SAITTA, J., concurring in part and dissenting in part:

Deference

The majority improperly found that the district court's decision to grant a mistrial was entitled to special deference. In *Washington*³⁸, the U.S. Supreme Court explained that a wide spectrum of deference may be granted in the mistrial context depending upon the circumstances. In particular, a trial judge will be entitled special deference when a mistrial determination is based on his own observations and assessments that a fair trial would not be viable.³⁹ Furthermore, in order to receive such deference, the district court's findings must be specific in the record⁴⁰ and the Court's review is limited to the record.⁴¹ While the majority infers that the defense counsel's actions visibly affected the jury, within the record the district court never states that the mistrial ruling was based on any personal observations. Accordingly, the district court's decision should not be entitled to special deference because the district court failed to note any observations in the record concerning the effect of the defense counsel's statements on the jury.

Curative instruction

The mistrial was not a manifest necessity because the district court failed to consider a curative instruction, which would have been a less drastic alternative to a mistrial.⁴² While the district court did address the defense counsel's curative instruction and deem it inadequate, the district court failed to consider the possibility of creating an alternative instruction- such as instructing the jury to disregard the defense counsel's statements regarding the evidence at issue. The majority concluded that it appeared to be the collective judgment, of all parties involved, that an instruction to disregard the defense counsel's statements would be ineffective. However, this conclusion was not within the record, and therefore, based on pure speculation.

Furthermore, the Nevada Supreme Court has concluded that a court shall presume that juries will follow jury instructions.⁴³ For example, the Nevada Supreme Court has used this principle to find that when the prosecution makes improper statements, subsequent jury

³⁷ Summary of Dissenting and Concurring Opinions by Amanda Hogeg

³⁸ *Arizona v. Washington*, 434 U.S. 497 (1978).

³⁹ *United States v. Chapman*, 524 F.3d 1073, 1082 (9th Cir. 2008).

⁴⁰ *See, e.g., Knipes v. State*, 124 Nev. ___, ___, 192 P.3d 1178, 1181 (2008); *State v. Ruscetta*, 123 Nev. 299, 304, 163 P.3d 451, 455 (2007); *State v. Rincon*, 122 Nev. 1170, 1176-77, 147 P.3d 233, 237-38 (2006).

⁴¹ *Jacobs v. State*, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975); *Anderson v. State*, 81 Nev. 477, 482, 406 P.2d 532, 534 (1965).

⁴² *See Johnson v. Karnes*, 198 F.3d 589, 596 (6th Cir. 1999) (finding it significant that the trial court failed to consider less drastic alternatives); *see also Harpster v. Ohio*, 128 F.3d 322, 330 (6th Cir. 1997) (concluding that a manifest necessity for a mistrial does not exist where a curative instruction would have safeguarded against juror bias).

⁴³ *See, e.g., Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006); *Allred v. State*, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004), *limited on other grounds by Knipes v. State*, 124 Nev. ___, ___, 192 P.3d 1178, 1183-84 (2008); *Leonard v. State*, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001) (citing *Weeks v. Angelone*, 528 U.S. 225 (2000)).

instructions to disregard such comments are curative.⁴⁴ As such, because the district court failed to even consider an alternative instruction, the district court did not exercise sound discretion in declaring a mistrial.

Conclusion

While the majority was correct to find that the defense counsel's statements were improper, the majority improperly concluded that the mistrial was dictated by manifest necessity for two reasons. First, the district court was not entitled to special deference because specific observations, that would entitle the district court to special deference, were absent from the record. Second, the district court did not even address the use of an alternative curative instruction to disregard the defense counsel's statements- a less drastic alternative to a mistrial.

Dissenting Opinion

CHERRY, J., dissenting

Improper Behavior

The defense counsel raised a proper inference by highlighting the State's decision not to present evidence that would normally be produced, and therefore, the defense counsel's actions were not improper. Additionally, the majority misplaced its reliance on *Johnson*⁴⁵ and *Reichert*⁴⁶ in reaching its decision. Rather, as the Ninth Circuit clarified in *Thompson*,⁴⁷ a defendant is permitted to assert that the Government's failure to introduce particularly strong evidence diminishes the strength of the Government's case.

1. Negative Inference

In this case, the State had the ability to enter the videotape, although hearsay, into evidence under the "admission of party opponent" rule.⁴⁸ Although the State had the power to produce this evidence, it chose not to- thus, creating a presumption that the evidence was unfavorable.⁴⁹ In addition, the district court acknowledged the need for negative inferences in regards to two other pieces of evidence, the State's cancellation of a gunshot residue test and the State's reluctance to examine a key witness. However, the district court abandoned this reasoning in regards to the videotape without supplying any compelling reasons. Accordingly, the defense counsel's actions, in raising a negative inference from the State's failure to introduce the videotape into evidence, were not improper.

⁴⁴ The Dissent cites numerous Nevada cases in support of this point. *See, e.g.*, *Valdez v. State*, 124 Nev. ____, ____, 196 P.3d 465, 478 (2008) ("Although the comment was improper, we conclude that there was no prejudice because the district court sustained [the defendant's] objection and instructed the jury to disregard the comment."); *Pantano v. State*, 122 Nev. 782, 793, 138 P.3d 477, 484 (2006) (improper statements by prosecutor were harmless beyond a reasonable doubt because "the district court sustained the defense's objection and instructed the jury to disregard the statements, which supplied [the defendant] with an adequate remedy").

⁴⁵ *Johnson v. United States*, 347 F.2d 803 (D.C. Cir. 1965).

⁴⁶ *Reichert v. United States*, 359 F.2d 278 (D.C. Cir. 1966).

⁴⁷ *United States v. Thompson*, 37 F.3d 450, 454 (9th Cir. 1994).

⁴⁸ NEV. REV. STAT. § 51.035(3)(a) (2007).

⁴⁹ *Graves v. United States*, 150 U.S. 118, 121 (1893).

2. Majority's Reliance on Johnson and Reichert

The majority incorrectly relied on *Johnson* and *Reichert* to conclude that the defense counsel's statements were improper. *Johnson* and *Reichert* are inapplicable for three reasons.

First, in both *Johnson* and *Reichert*, the prosecutors referenced the defendant's failure to present certain evidence for impeachment or other purposes.⁵⁰ In Nevada, however, the burden is solely on the prosecution. Therefore, the State may not make statements concerning a defendant's failure to introduce certain evidence because it would impermissibly shift the burden of proof to the defense.⁵¹ However, that does not disclose a defendant from making such statements.

Second, as *Gibson* clarified, the prosecutors in both cases went further than merely *inferring* that inadmissible evidence would substantiate witnesses' testimonies; they *affirmatively argued* that the barred evidence corroborated the witness' testimonies.⁵² In this case, the defense counsel never argued that the evidence would corroborate Glover's testimony, but rather, that the jury could infer the State's decision not to enter the videotape into evidence was because the videotape was detrimental to the State's argument. Additionally, had the district court found that the defense counsel's statements were still improper, a sustained objection would sufficiently remedy these actions.⁵³

Third, neither case involved a double jeopardy concern or a mistrial decision based on the prosecutors' comments. Thus, as discussed in *Gibson*, because a corrective instruction would have eliminated any prejudice resulting from the defense counsel's statements, a mistrial was not appropriate to these particular circumstances.⁵⁴

3. Majority's Application of ABA Standards for Criminal Justice

In addition to *Johnson* and *Reichert*, the majority references the ABA Standards for Criminal Justice to conclude that a negative inference was improper. The ABA standards express that it is unfair to draw a negative inference against a party whom fails to present evidence when such evidence is barred from being introduced at trial. In this case, the only reason why the videotape was not presented was because the prosecution chose to withhold it from the jury. As such, the ABA standards are inapplicable to this circumstance and a negative inference was proper.

4. Repeated Disobedience of District Court Orders

The defense counsel's actions did not manifest into a repeated disobedience of the district court's orders. First, the majority fails to address the fact that the night before the trial both the prosecution and defense were still considering the admission of this evidence. In fact, the defense attorney who presented the powerpoint during opening arguments, was not aware that the State chose not to use this evidence, until after the State's opening.

⁵⁰ *Johnson*, 347 F.2d at 803; *Reichert*, 359 F.2d 278.

⁵¹ *Browning v. State*, 120 Nev. 347, 360, 91 P.3d 39, 49 (2004).

⁵² *Gibson v. United States*, 403 F.2d 569, 570 n.1 (D.C. Cir. 1968).

⁵³ *Id.*

⁵⁴ *Id.*

Second, the defense counsel's cross-examination of Detective Jesus Prieto was appropriate as his questions were focused on whether the recorded interview took place- not the substance of the interview. Furthermore, prior to this cross-examination, defense counsel recognized that he may not ask substantive questions, but asserted to the district court that he should be able to ask about the circumstances surrounding the interview. The district court then stated, "Well, we'll take it as it comes." Moreover, the majority incorrectly concluded that the defense counsel violated numerous evidentiary rulings when he merely demonstrated to the jury that the interview took place.

Third, the negative inference presented during closing arguments was appropriately used and not beyond the scope of an inference. While the majority focuses on the defense counsel's unauthorized use of a negative inference, both parties, in their briefs, agree that a negative inference was warranted. The important question, rather, is whether the defense counsel went beyond an inference and into an argument.

Fourth, the district court's declaration of a mistrial was only based on the defense counsel's closing sentence going beyond an inference and not an assortment of disobedience that the majority alleges. In so ruling, the district court made no mention of any prior misconduct and the State even agreed that the defense counsel's opening statements were justified. In fact, during argument on the State's motion for mistrial, the judge declined to evaluate an accumulation of actions and specifically restricted the issue to the particular comment made during closing arguments.

5. Conclusion

The defense counsel's closing argument was proper because he simply demonstrated to the jury that the State chose not to present evidence it would normally show because that evidence was detrimental to the State's case. In fact, the defense counsel never described any of the statements made on tape or even asserted that the statements were in conformity with his client's testimony.

Manifest Necessity

Even if the defense counsel's statements were improper, they do not justify a manifest necessity for mistrial. A negative inference concerning the failure to produce evidence is a weak argument and not at the level needed to constitute a mistrial.⁵⁵ Defense misconduct found to amount to a mistrial involves situations far more offensive than the circumstances here.⁵⁶ In addition, the district court, here, had less drastic alternatives to a mistrial available. Moreover, both federal and state courts have consistently reversed mistrial decisions based on a trial judge's failure to consider other, less extreme options.⁵⁷ In fact, the Second Circuit emphasized, when

⁵⁵ 2 KENNETH S. BROUN, ET AL., MCCORMICK ON EVIDENCE 225-26 (6th ed. 2006); *see also* Wilson v. Merrell Dow Pharms., Inc, 893 F.2d 1149, 1152 (10th Cir. 1990); Allen v. United States, 603 A.2d 1219, 1227 (D.C. 1992).

⁵⁶ The Dissent cites numerous cases evidencing offensive circumstances warranting a mistrial. *See, e.g.*, United States v. Mastrangelo, 662 F.2d 946 (2d Cir. 1981) (Here, the trial judge was concerned the defendant was responsible for arranging the murder of the prosecution's only witness.); Reinstein v. Superior Ct. Dept. of Trial Ct., 661 F.2d. 255 (1st Cir. 1981) (The defendant published an advertisement in the area where the jurors were being picked which asserted his innocence).

⁵⁷ The Dissent cites numerous cases in support of this point. *See, e.g.*, Brady v. Samaha, 667 F.2d 224, 230 (1st Cir. 1981) (noting that the judge erred in failing to considering options such as severance or curative instructions);, State

there is even one reasonable alternative, a mistrial decision is not warranted by manifest necessity.⁵⁸

In this case, the district court had multiple options, such as sending the jury out temporarily and holding the attorney in contempt,⁵⁹ allowing the State to reopen its case and potentially present the evidence, or giving the jury a curative instruction.⁶⁰ The multitude of options indicates that this mistrial was not dictated by manifest necessity.

Finally, a mistrial, requested by the prosecution in order to bolster its own case, should receive the strictest scrutiny.⁶¹ Here, the State was able to preview Glover's case and respond to its own weaknesses accordingly. In fact, following the court's mistrial decision, the State responded to the defense counsel's arguments regarding the cancellation of the gunpowder test, by requesting that the test be completed. Moreover, the district court itself explained after the mistrial that it would be a very close case. The majority's deference to the district court's decision failed to recognize this concern.

Conclusion

The defense counsel's actions, utilizing a negative inference because of the State's failure to admit certain evidence, did not rise to the level of improper conduct. Furthermore, even if the defense acted improperly, there was not a manifest necessity for a mistrial because the district court could have utilized alternative measures to properly remedy any effects of the improprieties in the defense counsel's behavior.

v. Bertrand, 587 A.2d 1219, 1226 (N.H. 1991) (stating that the court should have properly considered alternatives to granting a mistrial rather than merely considering the consequences of granting one).

⁵⁸ Dunkerley v. Hogan, 579 F.2d 141, 147-148 (2d Cir. 1978).

⁵⁹ State v. Frazier, 555 A.2d 1078, 1086 (Md. Ct. Spec. App. 1989).

⁶⁰ Lisle v. State, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997) (Curative instructions can be a strong alternative to a mistrial as juries are presumed to follow jury instructions.).

⁶¹ *Washington*, 434 U.S. at 507-508.