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### Granada-Ruiz v. Eighth Judicial Dist. Court, 134 Nev. Adv. Op. 57 (Aug. 2, 2018) (en banc)

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CRIMINAL PROCEDURE, CONSTITUTIONAL LAW: DOUBLE JEOPARDY CLAUSE

**Summary**

The Court concluded that double jeopardy did not prohibit the appellant's retrial because he had implied consent to the district court's declaration of a mistrial. Further, it held that the district court did not abuse its discretion in finding manifest necessity to declare a mistrial. Thus, the Court denied the appellant's petition for a writ of mandamus that would direct the district court to grant his motion to dismiss and bar his re-prosecution.

**Background**

Gambino Granada-Ruiz ("Granada-Ruiz") was charged with murder and battery resulting in substantial bodily harm, and went to trial. The trial hinged on whether Granada-Ruiz acted in self-defense. On the second day of jury deliberations, the district court received two notes from jurors. The first note, from Juror No. 12, claimed that Juror No. 3 performed legal research over the weekend, and the second note, from Juror No. 3, stated that he had researched legal definitions and that he would not disregard his findings.

Prior to Granada-Ruiz's arrival, the district court summoned counsel from both parties and informed them of the notes. The court advised the parties that it would need to determine whether further deliberations were possible and that it would canvass the jurors to determine if the external research was shared, the nature and scope of the taint, and if the deliberative process had been so compromised as to require a mistrial. The court then asked for arguments from both parties. After the arguments, the court indicated that if canvassing revealed that the external research was shared with the other jurors, then deliberations may be irreparably tainted. Furthermore, the court stated that such a finding was within its discretion.

Upon Granada-Ruiz's arrival, the court informed him of what took place. Again, it allowed both parties to present arguments. It then called the foreperson for canvassing in order to determine the nature and extent of the taint. The foreperson informed the court that the deliberations did include discussion about the research, specifically regarding the definitions of pre-meditation and self-defense. The foreperson also informed the court that Juror No. 3 believed his research revealed what constituted premeditation, which was different than what was stated during closing arguments. The deliberations focused on what Juror No. 3 said about premeditation and had never returned to the jury instructions.

The court dismissed the foreperson. It told both parties that it would question Juror No. 3. However, it appeared the external research pertaining to central issues in the trial had permeated deliberations resulting in the exclusion of the jury instructions on important points of law. The court advised it was unsure if it could find that deliberations were untainted and asked for both parties' thoughts on the proceeding.

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<sup>1</sup> By Sara Schreiber.

The court then canvassed Juror No. 3. He stated that he was confused by something the State had said in its closing arguments, so he decided to research premeditation and self-defense. He said that he believed the other jurors comments about outside research being impermissible meant that he was not allowed to consider the law. He further stated that he did not know what he was doing or what was going on. The court dismissed Juror No. 3. It stated that both his incoherent statements as well as his fundamental misunderstanding of his duty indicated his inability to serve on the jury. The court again expressed its concern regarding the nature and length of the discussion involving the research.

Counsel for Granada-Ruiz expressed frustration. She stated that it was her understanding that the court would order a mistrial. The court ordered a mistrial based on its finding of manifest necessity. It found that it was not possible to ensure that any further deliberations would be fair and impartial and not affected by the external research. The court then informed the foreperson that it was declaring a mistrial and dismissed the jury.

Granada-Ruiz then moved to dismiss the charges. He relied on the argument that there was no manifest necessity for a mistrial and therefore re-prosecution was barred by the principles of double jeopardy. The State opposed the motion, arguing that the court acted within its discretion when it declared a mistrial and that Granada-Ruiz had not objected to it. Following oral arguments, the district court denied the motion. Accordingly, Granada-Ruiz petitioned the Court for extraordinary writ relief.

## **Discussion**

It is within this court's discretion to consider a petition for a writ of mandamus,<sup>2</sup> which is used to compel an act required by law or to control the arbitrary exercise of discretion.<sup>3</sup> A petitioner's ability to raise a double jeopardy argument on appeal from a final judgment following a retrial is not an adequate remedy because it subjects the accused of being placed in jeopardy twice.<sup>4</sup> Accordingly, the Court exercised its discretion in considering the merits of Granada-Ruiz's petition.

### *The Double Jeopardy Clause does not bar the re-prosecution of Granada-Ruiz*

A defendant cannot be tried more than once for the same offense.<sup>5</sup> If a mistrial prevents the return of a verdict and has not been requested by the defendant, then re-prosecution violates the Double Jeopardy Clause. There are two exceptions to this rule: 1) the defendant has consented to the mistrial, or 2) the court determines that the mistrial was a manifest necessity.<sup>6</sup>

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<sup>2</sup> Smith v. Eighth Judicial Dist. Court, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

<sup>3</sup> State v. Eighth Judicial Dist. Court (Armstrong), 127 Nev. 927, 931–32, 267 P.3d 777, 779–80 (2011).

<sup>4</sup> Gonzalez v. Eighth Judicial Dist. Court, 129 Nev. 215, 217–18, 298 P.3d 448, 449–50 (2013).

<sup>5</sup> Oregon v. Kennedy, 456 U.S. 667, 671 (1982).

<sup>6</sup> Glover v. Eighth Judicial Dist. Court, 125 Nev. 691, 709, 220 P.3d 684, 696 (2009).

*The totality of the circumstances demonstrate that Granada-Ruiz impliedly consented to a mistrial*

Granada-Ruiz argued that he never expressly consented to a mistrial and that he never had an opportunity to object. He argued, citing *Benson v. State*, that when considering the totality of the circumstances, he did not impliedly consent to a mistrial.<sup>7</sup> The Court did not agree.

Consent may be implied from the totality of the circumstances and it is not reliant solely on a defendant's motion or a defendant's verbal approval.<sup>8</sup> The Court has recognized that, when evaluating the totality of the circumstances, it considers whether the defendant failed to object or argue against a court's declaration of a mistrial. Failure to object or argue may support a conclusion of implied consent.<sup>9</sup> Consent cannot be implied based on failure to object when the defendant was not given the opportunity to object or where the circumstances made the objection impracticable.<sup>10</sup>

Here, Granada-Ruiz never expressly consented to a mistrial, however the totality of the circumstances indicate that he impliedly consented. In fact, when asked by the district court for his opinion regarding whether a mistrial was appropriate, he and his counsel seemed amenable to it. The Court was unable to find any indication of opposition in the record that would have changed its conclusion that there was implied consent to the mistrial.

Furthermore, the facts of this case were unlike those where the trial court declared a mistrial without warning and the defendants did not have an opportunity to object or where an objection was impracticable. Here, Granada-Ruiz was invited to present his views on whether a mistrial was appropriate. Moreover, the district court investigated the impact of the external research. Additionally, the basis for the mistrial here was jury misconduct, which was brought to the district court's attention by members of the jury. The proceedings that followed to resolve the issue were driven by an appropriate inquiry regarding the integrity of jury deliberations.

Finally, just because the district court stated that the decision to declare a mistrial was within its discretion, Granada-Ruiz was not absolved from objecting to the mistrial. Regardless of whether the power to order a mistrial rests with the court, counsel must still advocate its positions. Here, when the district court asked for the parties' opinion on whether the juror misconduct permeated the deliberations and impacted the jury's ability to render an impartial decision, defense counsel agreed with the district court's assessment. Further, Granada-Ruiz was in the courtroom when the jurors were canvassed on the matter and the district court informed him of the misconduct and the possibility of a mistrial. Though counsel and Granada-Ruiz expressed frustration with what transpired, they never objected to the declaration of a mistrial. Therefore, double jeopardy does not bar a second trial because Granada-Ruiz impliedly consented to the district court's declaration of a mistrial.

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<sup>7</sup> *Benson v. State*, 11 Nev. 692, 895 P.2d 1323 (1995).

<sup>8</sup> *Id.* at 696–97, 1326–27.

<sup>9</sup> *See Gaitor v. State*, 106 Nev. 785, 788, 801 P.2d 1372, 1374 (1990).

<sup>10</sup> *United States v. Jam*, 400 U.S. 470, 487 (1971); *Benson*, 111 Nev. at 698, 895 P.2d at 1327–28.

*The district court did not abuse its discretion in finding manifest necessity to declare a mistrial*

Even if implied consent had not been found, the district court did not abuse its discretion in finding manifest necessity to declare a mistrial. Granada-Ruiz argued that the district court used the incorrect legal standard because not every exposure to improper research necessitated a mistrial. Furthermore, he argued that less drastic remedies would have been appropriate, such as impaneling an alternate juror. The Court disagreed.

A *sua sponte* declaration of a mistrial does not prevent re-prosecution of the same charges when the court finds manifest necessity.<sup>11</sup> In these incidents, the finding of manifest necessity is reviewed for an abuse of discretion.<sup>12</sup> The abuse of discretion standard relies on whether the finding of manifest necessity could have been made by a rational jurist based on the record.<sup>13</sup> Though the deference of the trial court varies based on the facts of the case, great deference is afforded when the district court declared a mistrial due to its finding of potential juror bias.<sup>14</sup> To determine whether the trial court exercised sound discretion in declaring a mistrial, the Court considered whether the district court: 1) gave both parties an opportunity to voice their opinion on the necessity of a mistrial; 2) considered alternatives to a mistrial; 3) arrived at the decision to declare a mistrial with deliberation; and 4) declared the mistrial based upon evidence in the record.<sup>15</sup>

The record indicated that the district court acted within its discretion when it declared a mistrial. First, the district court gave both parties an opportunity to voice their opinions on multiple occasions following the discovery of juror misconduct. Second, the record showed that the district court did consider alternatives to a mistrial. Third, the district court deliberately arrived at its decision to declare a mistrial. Relatedly, the record did not support Granada-Ruiz's argument that the district court employed an incorrect legal standard in coming to its decision. Therefore, the Court concluded that the district court's factual findings were not clearly erroneous. Finally, the decision to order a mistrial was based on evidence in the record, which the district court had relied on. Therefore, the Court concluded that the district court did not abuse its discretion in finding manifest necessity to declare a mistrial.

## **Conclusion**

The Court found that the district court properly denied Granada-Ruiz's motion to dismiss. Double jeopardy does not bar a second prosecution following the district court's declaration of a mistrial when the defendant impliedly consents to it. Furthermore, the record indicated that the district court did not abuse its discretion in finding manifest necessity to declare a mistrial. Therefore, the Court found that re-prosecution was not barred by double jeopardy and denied Granada-Ruiz's petition for a writ of mandamus.

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<sup>11</sup> United States v. Perez, 22 U.S. 579, 580 (1824).

<sup>12</sup> *Glover*, 125 Nev. at 703, 220 P.3d at 693.

<sup>13</sup> United States v. Chapman, 524 F.3d 1073, 1083 (9th Cir. 2008).

<sup>14</sup> *Id.* at 1082; United States v. Jarvis, 792 F.2d 767, 769 (9th Cir. 1986).

<sup>15</sup> *Chapman*, 524 F.3d at 1082; *Glover*, 125 Nev. at 710, 220 P.3d at 697.