

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,  
Appellant,  
vs.  
DEANNA KAY WINTERS,  
Respondent.

No. 48324

**FILED**

**MAR 06 2007**

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING

This is a State's appeal from an order of the district court dismissing a criminal case after granting a motion for a mistrial with prejudice. Second Judicial District Court, Washoe County; Deborah A. Agosti, Senior Judge.

The State contends that the district court abused its discretion by granting Winters' motion for a mistrial. Specifically, the State argues that: (1) the prosecutor did not intentionally elicit the allegedly improper testimony; (2) the prosecutor did not violate a district court order or an agreement of the parties; (3) defense counsel invited the error by referring to the Horizontal Gaze Nystagmus (HGN) test on cross-examination; and (4) any inappropriate testimony could have been easily cured by striking the testimony and admonishing the jurors to disregard it. Additionally, the State argues that the possible harm from the remark was minimal given that the State intended to admit evidence that Winters' blood alcohol level was .227. We conclude that the State's contention lacks merit.

A district court's ruling on a motion for a mistrial "will not be reversed unless it was an abuse of discretion."<sup>1</sup> Generally, a mistrial is not appropriate unless an error occurs affecting the substantial rights of the accused that is so prejudicial that it cannot be neutralized by an admonition to the jury.<sup>2</sup>

In this case, the district court found that an admonition to the jurors would have been inadequate because the police officer's testimony that there was a seventy-seven percent chance that Winters was driving while under the influence of alcohol was inadmissible evidence of a "statistical probability" of the fundamental issue of guilt. Although the district court acknowledged the State's blood alcohol evidence, it explained that if the jurors believed the defense theory of the case and disregarded that evidence, they could convict Winters based solely on the improper testimony. Additionally, the district court found that the improper testimony was intentionally elicited in direct violation of the prosecutor's agreement to only reference the HGN test to assist in establishing probable cause for the arrest. In light of the police officer's testimony and the prosecutor's representations on the record, the State has failed to show that the district court's factual findings in this regard are not supported by substantial evidence or are clearly wrong. Accordingly, the district court

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<sup>1</sup>Lisle v. State, 113 Nev. 679, 700, 941 P.2d 459, 473 (1997), modified on other grounds by Middleton v. State, 114 Nev. 1089, 968 P.2d 296 (1998).

<sup>2</sup>See Pacheco v. State, 82 Nev. 172, 178, 414 P.2d 100, 103 (1966); see also Geiger v. State, 112 Nev. 938, 942, 920 P.2d 993, 995-96 (1996).

did not manifestly abuse its discretion by granting the motion for a mistrial.

The State also argues that the district court erred by granting Winters' motion with prejudice. Specifically, the State argues that prohibiting retrial was inappropriate given that the district court found that the prosecutor did not act with the intent to subvert the protections afforded by the Double Jeopardy Clause. We agree.

Generally, a defendant's motion for a mistrial removes any double jeopardy bar to retrial.<sup>3</sup> There is a very narrow exception to the general rule allowing retrial where the district court finds that the prosecutor engaged in "overreaching" or "harassment" to an extent that the prosecutor intended to "subvert the protections afforded by the Double Jeopardy Clause."<sup>4</sup> However, even "egregious" prosecutorial misconduct will not preclude retrial, unless there is a finding that the prosecutor acted in bad faith with the specific intent to "goad the defense into moving for a mistrial."<sup>5</sup>

In this case, the district court granted the motion with prejudice without finding that the prosecutor acted in bad faith with the

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<sup>3</sup>Benson v. State, 111 Nev. 692, 695, 895 P.2d 1323, 1326 (1995).

<sup>4</sup>Id. at 696, 895 P.2d at 1326 (quoting Melchor-Gloria v. State, 99 Nev. 174, 178, 660 P.2d 109, 112 (1983)).

<sup>5</sup>Collier v. State, 103 Nev. 563, 566, 747 P.2d 225, 227 (1987); see also Oregon v. Kennedy, 456 U.S. 667, 679 (1982) (holding that retrial is not barred unless "conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial").

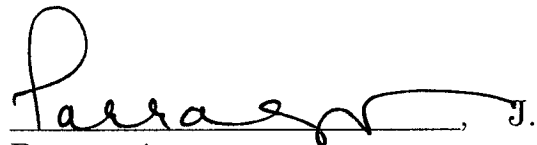
intent to goad the defendant into moving for a mistrial. To the contrary, the district court found:

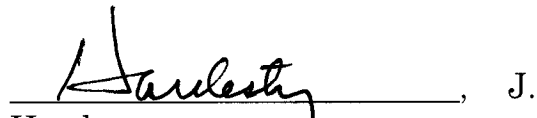
I do not believe that [the prosecutor], despite the fact that I believe she violated her representations on response to the motion in limine, I do not believe that she was being malicious, I do not believe that she was being spiteful, and I do not believe that she was doing anything in her own mind other than vigorously prosecuting the case.


Given the district court's own findings about the prosecutor's intent, we conclude that the district court erred by ruling that a retrial was impermissible.

Having considered the State's contentions, we conclude that the district court acted within its discretion by granting the motion for a mistrial, but erred in granting the motion with prejudice. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

  
Parraguirre

  
Hardesty

  
Saitta

cc: Chief Judge, Second Judicial District  
Hon. Deborah A. Agosti, Senior Justice  
Attorney General Catherine Cortez Masto/Carson City  
Washoe County District Attorney Richard A. Gammick  
Larry K. Dunn & Associates  
Washoe District Court Clerk