IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
CALVIN ALEXANDER EWING,
Respondent.

No. 85695

ORDER OF REVERSAL AND REMAND

This is an appeal challenging a district court order declaring a mistrial with prejudice. Eighth Judicial District Court, Clark County; Erika D. Ballou, Judge.

The State charged respondent Calvin Ewing with multiple felony offenses after it was alleged that he sexually assaulted E.W. in April 2019 while the two were on a brief visit to Las Vegas from out of state. Police escorted E.W. to a local hospital following the incident, where E.W. made a statement describing the assault to Sexual Assault Nurse Examiner (SANE) Jeri Dermanelian. Dermanelian testified to E.W.'s statement at Ewing's trial in August 2022. The State had also planned for E.W. to travel to Las Vegas to testify. However, at the last minute, E.W. broke off contact with the State and failed to appear. Ewing moved to dismiss the charges, partially on the grounds that E.W.'s statement to Dermanelian was testimonial and violated Ewing's Sixth Amendment right to confrontation without E.W.'s availability for cross-examination. *Cf. Crawford v. Washington*, 541 U.S. 36, 53-54 (2004).[1]

[1]"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. *Crawford* holds that, under the Sixth Amendment Confrontation Clause, *out-of-court statements* by witnesses that are *testimonial in nature* are

The district court agreed that Dermanelian's statement ran afoul of the Confrontation Clause without E.W. testifying at trial, citing *Medina v. State*, 122 Nev. 346, 354-55, 143 P.3d 471, 476 (2006) (holding that victim's statements to SANE nurse regarding rape were testimonial in nature).[2] However, the district court found dismissal to be unwarranted. Instead, the court declared a mistrial *with prejudice*, barring a renewed prosecution. Relying on *Thomas v. Eighth Judicial District Court*, 133 Nev. 468, 475, 402 P.3d 619, 626-27 (2017), the court found that the State had intentionally called Dermanelian as a witness despite knowing that E.W. may not have been available to testify and that prejudice to Ewing could result. The State now appeals, arguing that the district court should have declared a mistrial *without* prejudice, permitting renewed prosecution.

Whether renewed prosecution by the State following a mistrial is barred by the Double Jeopardy Clause of the United States and Nevada Constitutions "presents a question of law that this court reviews de novo." *Id.* at 471, 402 P.3d at 624; *see also* U.S. Const. amend. V; Nev. Const. art. 1, § 8. "However, this court will not disturb [the] district court's findings of fact unless th[ose] [findings] are clearly erroneous and not based on substantial evidence." *Thomas*, 133 Nev. at 471, 402 P.3d at 624 (alterations in original) (internal quotation marks omitted). Reviewing under this standard, we find that the district court erred in relying on the

---

barred unless those witnesses are unavailable and defendants had a prior opportunity for cross-examination. 541 U.S. at 53-54.

[2]We also note that the district court determined that statements E.W. made about the alleged assault to a 911 operator and hotel security official did not implicate the Confrontation Clause. *See Harkins v. State*, 122 Nev. 974, 982-88, 143 P.3d 706, 711-15 (2006); *see also Michigan v. Bryant*, 562 U.S. 344, 358 (2011).

factors set forth in *Thomas*, which are applicable only when a defendant moves for a mistrial. *See id.* at 475-76, 402 P.3d at 626-27. Instead, *Hylton v. Eighth Judicial District Court*, 103 Nev. 418, 743 P.2d 622 (1987), applicable where the prosecution moves for a mistrial or the district court declares a mistrial sua sponte, sets forth the correct test. Thus, we reverse and remand for the district court to review under *Hylton*. We further instruct the district court that, even if a mistrial with prejudice is warranted under *Hylton*, it should further consider whether Ewing consented to the mistrial such that the Double Jeopardy Clause does not bar reprosecution. *See Granada-Ruiz v. Eighth Jud. Dist. Ct.*, 134 Nev. 474, 477-78, 422 P.3d 732, 736 (2018).

The district court erred in applying Thomas *rather than* Hylton

In *Thomas*, this court explained that "analyzing whether double jeopardy bars reprosecution after mistrial" hinges upon which party moved for a mistrial. 133 Nev. at 472, 402 P.3d at 624. If the *prosecution* sought the mistrial, *Thomas* directs district courts to apply the two-prong test from *Hylton*. Under *Hylton*, the State may retry a defendant only after establishing that (1) "the declaration of a mistrial was dictated by 'manifest necessity,' and (2)" the prosecutor is not "responsible for the circumstances which necessitated declaration of a mistrial." *Thomas*, 133 Nev. at 472, 402 P.3d at 624 (quoting *Hylton*, 103 Nev. at 422-23, 743 P.2d at 625). Critically, our caselaw also instructs that *Hylton* is the proper test when a district court "declares a mistrial on its own motion." *Rudin v. State*, 120 Nev. 121, 142, 86 P.3d 572, 586 (2004).

If the *defense* moves for a mistrial, however, *Thomas* recognizes that double jeopardy is typically not implicated, but carves out a narrow exception to account for possible prosecutorial misconduct. 133 Nev. at 472, 402 P.3d at 624. This test asks, in relevant part, whether "[m]istrial is

granted because of improper conduct or actions by the prosecutor" and whether this conduct "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." *Id.* at 475, 402 P.3d at 626 (emphases added) (quoting *Pool v. Superior Court*, 677 P.2d 261, 271-72 (Ariz. 1984) (footnote omitted)).

Here, in its written order, the district court determined that *Thomas*, rather than *Hylton*, applied because "the defense moved for the [c]ourt to *dismiss* the charges against Mr. Ewing." (Emphasis added.) Applying *Thomas*, the district court found that double jeopardy barred reprosecution of Ewing because the mistrial resulted from the State's improper conduct in calling Dermanelian to testify despite "knowing it had no contact with [E.W.] since prior to the beginning of jury selection," and knowing that Ewing stipulated to Dermanelian testifying with the belief that E.W. would testify. According to the district court, this conduct was *intentional* because, "by proffering the testimony of . . . Dermanelian knowing that contact with [E.W.] was only a possibility, the State chose a course of action that, due to the [*Medina*] case, [holding that statements to SANE nurses are testimonial], was both improper and prejudicial to Mr. Ewing's right to a fair trial." Moreover, the State could have avoided the danger of mistrial "through a properly domesticated out-of-state subpoena rather than relying on the voluntary appearance of" a witness who was evidently unreliable.

We agree with the State that the district court erred in applying the *Thomas* standard. Ewing moved to *dismiss* the charges; he did not move for a mistrial. Instead, it was the district court that declared a mistrial sua sponte. Therefore, *Hylton*, not *Thomas*, is the proper analysis.[3] *Rudin*, 120 Nev. at 142, 86 P.3d at 586.

Accordingly, we reverse and remand for the district court to consider whether a mistrial with prejudice is warranted under *Hylton*. The district court must first analyze whether its mistrial declaration "was dictated by manifest necessity or the ends of justice."[4] *Hylton*, 103 Nev. at 422, 743 P.2d at 625. If a mistrial is not manifestly necessary, then reprosecution is barred by double jeopardy, and it is not necessary to consider *Hylton*'s second prong. *Id.* at 424, 743 P.2d at 626. But if the district court determines that manifest necessity was present, the second prong of *Hylton* asks "whether the prosecutor is responsible for the circumstances which necessitated declaration of a mistrial." *Id.* at 423, 743 P.2d at 625. Even if a mistrial was manifestly necessary, the defendant may not be retried if the prosecutor bears responsibility for the mistrial. *Id.* at 424, 743 P.2d at 626.

---

[3]We also note that Ewing, both in his answering brief and at oral argument, admits that he did not specifically propose or move for a mistrial and that *Hylton* is the proper test.

[4]Manifest necessity "applies whenever the judge believes to a 'high degree' that a new trial is needed." *United States v. Chapman*, 524 F.3d 1073, 1081 (9th Cir. 2008) (quoting *Arizona v. Washington*, 434 U.S. 497, 505-06 (1978)). An explicit finding of "manifest necessity" is not required so long as "[t]he basis for the trial judge's mistrial order is adequately disclosed by the record." *Washington*, 434 U.S. at 516-17; *see also Chapman*, 524 F.3d at 1081.

While we leave further findings of fact in accordance with *Hylton* to the district court, we briefly take this opportunity to note that some of the district court's findings under *Thomas* are not supported by substantial evidence. Specifically, we see insufficient support in the record for the notion that the State's conduct was "intentional" or "know[ing]" rather than merely negligent. *Thomas*, 133 Nev. at 475, 402 P.3d at 626. The extent to which the prosecutor was aware of the uncertainties surrounding E.W.'s appearance when she called Dermanelian to the stand is not clear to us. Moreover, there were numerous facts pertaining to E.W.'s absence that were discussed at oral argument but were insufficiently supported in the record below.[5] If the district court's analysis on remand reaches the second prong of *Hylton*, these facts must be addressed in order to accurately determine the State's culpability for E.W.'s failure to appear. That being said, we do note that *Hylton*'s second prong imposes a lower threshold regarding the kind of prosecutorial conduct that implicates double jeopardy. The district court must only determine "whether the prosecutor was *in some way responsible* for the circumstances which gave rise to *any possible necessity* to declare a mistrial." *Hylton*, 103 Nev. at 424, 743 P.2d at 626 (emphases added) (internal quotation marks omitted).

The district court must determine whether Ewing consented to the mistrial

Nevada law also provides that "[w]here a mistrial that has not been requested by the defendant prevents the return of a verdict, re-prosecution violates the Double Jeopardy Clause unless [1] the defendant

---

[5]These include, but are not limited to, E.W.'s sudden relocation on the eve of trial, the State's efforts to contact and arrange travel for E.W., the State's issuance of a subpoena to secure E.W.'s appearance and, most critically, the prosecution's state of mind surrounding E.W.'s appearance when they called Dermanelian to the stand.

has either *consented to the mistrial* or [2] the court determines that a mistrial was a manifest necessity." *Granada-Ruiz*, 134 Nev. at 477-78, 422 P.3d at 736 (emphasis added). As applied to this appeal, we read this precedent to mean that *even if* the district court determines that a mistrial was a manifest necessity *and* the State bears responsibility for the mistrial pursuant to *Hylton*, reprosecution still is not barred by double jeopardy if there is substantial evidence to show that Ewing consented to the mistrial declaration.

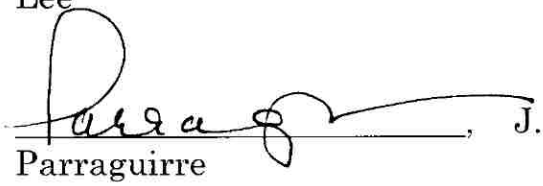
Here, the State argues that Ewing consented to the district court's mistrial declaration such that double jeopardy is not implicated. The State specifically points to a statement by Ewing's counsel opining that, "absent to dismissal, I think [a mistrial] is the just thing to do at this point." However, the State did not raise the issue of Ewing's consent until its reply brief, and this court generally declines to consider arguments raised for the first time on reply. *See Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 671 n.7, 262 P.3d 705, 715 n.7 (2011). Nonetheless, on remand, we instruct the district court to make findings and conclusions as to whether Ewing consented to the mistrial, unless the district court otherwise determines that double jeopardy is not implicated under *Hylton*.[6] Accordingly, we

[6]We further highlight that, pursuant to *Granada-Ruiz*, "[c]onsent to mistrial need not come in the form of a motion from the defendant or verbal approval, but may be *implied* from the *totality of the circumstances*." 134 Nev. at 478, 422 P.3d at 737 (emphases added) (citing *Benson v. State*, 111 Nev. 692, 696-97, 895 P.2d 1323, 1326-27 (1995)). *Granada-Ruiz* and *Benson* contain lengthy discussion and application of the "totality of the circumstances" standard. *See id.* at 478-80, 422 P.3d at 737-38; *Benson*, 111 Nev. at 696-99, 895 P.2d at 1326-28.

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

_____, J.
Herndon

_____, J.
Lee



_____, J.
Parraguirre

cc: Hon. Erika D. Ballou, District Judge
Attorney General/Carson City
Clark County District Attorney
Law Office of Frank P. Kocka, PLLC
Steven S. Owens
Eighth District Court Clerk