

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico
Filed 9/21/2026 11:51 AM



Mark Reynolds

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

No. A-1-CA-42645

CODY HOPKINS,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

Bruce C. Fox, District Court Judge

Raúl Torrez, Attorney General
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for Appellee

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for Appellant

MEMORANDUM OPINION

DUFFY, Judge.

{1} This matter was submitted to the Court on Defendant's brief in chief pursuant to this Court's order construing his application for interlocutory appeal as a direct appeal. Following consideration of the brief in chief, the Court assigned this matter to Track 2 for additional briefing, as defined in the Administrative Order for Appeals

1 in Criminal Cases from the Second, Eleventh, and Twelfth Judicial District Courts
2 in *In re Pilot Project for Criminal Appeals*, No. 2022-002, effective November 1,
3 2022. Now having considered the brief in chief, answer brief, and reply brief, we
4 affirm for the following reasons.

5 {2} Defendant appeals from the district court’s orders (1) denying his motion for
6 directed verdict on a second-degree embezzlement offense, [BIC 22] and (2) denying
7 his motion to dismiss the second-degree embezzlement offense on double jeopardy
8 grounds. [BIC 34; RP 511] We note that Defendant initiated this appeal by filing a
9 motion asking the district court to authorize an interlocutory appeal of the order
10 denying his motion to dismiss the second-degree embezzlement offense. [RP 520-
11 22] The district court granted that motion. [RP 523-24] Defendant’s motion did not
12 request authorization to appeal the denial of the directed verdict, and the district
13 court’s order did not grant such an authorization. [RP 520-24]

14 {3} Defendant then filed with this Court his application for interlocutory appeal
15 of the order denying his motion to dismiss. [5-12-25 App.] This Court entered an
16 order recognizing Defendant’s constitutional right to immediately appeal from the
17 order denying his motion to dismiss on double jeopardy grounds, and construing the
18 application as a direct appeal from that order. [6-18-25 Ord.] *See State v. Apodaca*,
19 1997-NMCA-051, ¶ 17, 123 N.M. 372, 940 P.2d 478 (“We . . . hold that a defendant
20 has a constitutional right to appeal from an order denying a motion to dismiss a

1 charge on the ground that trial of the charge would subject the defendant to double
2 jeopardy.”). Defendant’s application did not seek to appeal from the denial of the
3 motion for directed verdict, and this Court’s order did not construe it as appealing
4 from that denial. [5-12-25 App; 6-18-25 Ord.] We further note that the order denying
5 the motion for directed verdict does not raise double jeopardy issues that would give
6 Defendant a right of immediate appeal, *see id.*, and the order is not otherwise final
7 and appealable because it did not “resolve[] all of the factual and legal issues before
8 the court and completely dispose[] of the case.” *State v. Heinsen*, 2005-NMSC-035,
9 ¶ 14, 138 N.M. 441, 121 P.3d 1040; *see also* NMSA 1978, § 39-3-3(A)(1) (1972)
10 (providing that defendant in a criminal case may appeal “within thirty days from the
11 entry of any *final judgment*” (emphasis added)). Therefore, Defendant’s challenge
12 to the denial of the motion for directed verdict is not properly before us at this time.
13 We therefore will only consider Defendant’s appeal from the order denying his
14 motion to dismiss the second-degree embezzlement offense.

15 {4} Defendant initially contends that the jury acquitted him on the second-degree
16 embezzlement offense and that the constitutional protection against double jeopardy
17 bars retrial on that charge. [RP 34] *See State v. Jones*, 2025-NMSC-049, ¶ 41, 580
18 P.3d 216 (“When a defendant is acquitted, retrial is barred.”) “We review de novo
19 the conclusions of law underlying the denial of [the d]efendant’s motion to dismiss
20 [on double jeopardy grounds].” *State v. Martinez*, 2020-NMCA-010, ¶ 6, 456 P.3d

1 1112; *see also State v. Lewis*, 2019-NMSC-001, ¶ 10, 433 P.3d 276 (“A double
2 jeopardy challenge is a constitutional question of law which we review de novo.”
3 (internal quotation marks and citation omitted)). To the extent Defendant challenges
4 the sufficiency of the evidence underlying the district court’s double jeopardy
5 decision, we review the decision for substantial evidence. *See Martinez*, 2020-
6 NMCA-010, ¶ 6.

7 {5} We note the following facts. Defendant was charged with second-degree
8 embezzlement (over \$20,000). [RP 1] At trial, in addition to being instructed on that
9 offense, [RP 426] the jury was instructed on the lesser-included offenses of third-
10 degree embezzlement (over \$2500 and not more than \$20,000), [RP 427] fourth-
11 degree embezzlement (over \$500 and not more than \$2500), [RP 428] and
12 misdemeanor embezzlement (over \$250 and not more than \$500). [RP 429] The jury
13 was also instructed that it was up to them to choose the manner and order of their
14 deliberation on the crimes charged. [RP 432] After a period of deliberations, the
15 foreperson informed the district court that the jury was deadlocked. [BIC 14] A note
16 signed by the jury foreperson stated the following: “We all believe . . . Defendant is
17 guilty. We cannot determine between 2500-20,000[,] 250-2,500. No further [c]omm
18 will change.” [BIC 15; RP 458] Defendant moved for a mistrial. [BIC 17] The
19 district court polled the jury on the general question of whether further deliberation
20 would be helpful, to which each of the jurors replied that it would not be helpful.

1 [BIC 17; 12-4-23 CD 11:54:44-56:21] Citing *State v. Phillips*, 2017-NMSC-019,
2 396 P.3d 153, the State asked the Court to poll the jury to establish, which charges
3 the jury was deadlocked on—“from the top of the stepdown . . . all the way down”—
4 because “the charges above in a stepdown are ambiguous as to which charges the
5 jury is actually not able to come to a decision on.” [BIC 17-18; 12-4-23 CD
6 11:56:40-58:03] Defendant objected to further polling, arguing that the note showed
7 that the jury was not deadlocked on the second-degree offense, could not agree on
8 the third-degree and fourth-degree embezzlement offenses, and further polling
9 would “tamper with the jury and tamper with the deliberations.” [BIC 18; 12-4-23
10 CD 11:58:06-37] Defendant stated, “I don’t think it really matters, with regard to
11 whether or not the jury is hung, which stepdown they can’t agree. They can’t agree
12 to either one,” the district court denied the State’s request to further poll the jury,
13 declared a mistrial, and discharged the jury. [BIC 18; 12-4-23 CD 11:58:36-59:46]
14 The district court later entered a written order declaring manifest necessity for the
15 mistrial and reserving for the State the right to retry the case. [RP 452] Neither
16 Defendant’s oral motion, [12-4-23 CD 11:50:33-35] the district court’s bench ruling,
17 [12-4-23 CD 12:00:30-38] nor the written order, [RP 452] limited the mistrial to any
18 particular level of the offense, and no verdict was entered as to any level of the
19 offense. [RP 438-46]

1 {6} Defendant subsequently filed a motion to dismiss the second-degree
2 embezzlement offense on double jeopardy grounds. [RP 482] The district court
3 denied the motion to dismiss on the ground that, under *State v. Paul*, 2021-NMCA-
4 041, ¶ 20, 495 P.3d 610, retrial was not barred because Defendant consented to the
5 mistrial. [BIC 19; RP 511-18]

6 {7} On appeal, Defendant contends that retrial on the second-degree offense is
7 barred because the foreperson's note and the district court's discourse with the
8 foreperson established a clear record of the jury's considerations, there was a
9 consensus among the parties and the district court that the jury was hung only on the
10 lesser-included offenses, but the record clearly demonstrates the jury acquitted
11 Defendant on the second-degree offense. [BIC 36-37] We disagree. The note itself
12 does not explicitly indicate a unanimous verdict of acquittal on the second-degree
13 offense. [RP 458] When asked by the district court whether further deliberations
14 would help the jury come to a clearer decision, the foreperson's response—"I think
15 that we were right off there [inaudible], the consensus was what you see here. And
16 we didn't know how much further or what else that we could do"—added no clarity
17 to the meaning of the note. [12-04-23 CD 11:52:25-53:01] No verdict forms were
18 signed. [RP 438-446] The State did not concede an acquittal on the second-degree
19 offense, but instead asked for a poll on each offense. [12-4-23 CD 11:56:40-58:03]
20 At no time during this discourse did Defendant or the district court describe the

1 jury's action as to the second-degree offense as a verdict or an acquittal. Defendant
2 did not request, and the district court did not enter, a verdict on the second-degree
3 offense, and instead the district court declared a mistrial on the entire case. *See*
4 *Phillips*, 2017-NMSC-019, ¶ 6 ("If the jury has unanimously found a defendant not
5 guilty of any offense within the count, the [district] court *is required* to enter a
6 verdict of not guilty for the offense and for any greater degree of the offense."
7 (emphasis added)). Nor did the State dismiss the higher charge following trial. We
8 are therefore unpersuaded that there was clear record of an acquittal, or that the
9 parties and the district court reached a consensus that the jury acquitted Defendant
10 on the second-degree offense. For these reasons, we conclude that the record is
11 insufficient to establish that Defendant was acquitted of the second-degree
12 embezzlement offense.

13 {8} Defendant next argues that, if the jury's decision on the second-degree
14 embezzlement offense was not clearly established on the record, any ambiguity must
15 be resolved in favor of Defendant's liberty, such that the constitutional protection
16 against double jeopardy bars retrial on that charge. [BIC 38] *See Phillips*, 2017-
17 NMSC-019, ¶ 17 (holding that, where the record is not clear on which charges the
18 jury was deadlocked, any ambiguity must be resolved in favor of the defendant's
19 liberty). We review for an abuse of discretion the district court's decision to declare

1 a mistrial when a jury is deadlocked. *See State v. Wardlow*, 1981-NMSC-029, ¶ 13,
2 95 N.M. 585, 624 P.2d 527.

3 {9} “When a [district] court terminates a defendant’s trial before the defendant
4 obtains a verdict on a charged offense, the [Double Jeopardy] Clause . . . prohibit[s]
5 the State from retrying the defendant for that offense unless the defendant consents
6 to the termination *or* there is a manifest necessity for the termination.” *Paul*, 2021-
7 NMCA-041, ¶ 7 (emphasis added). “A jury’s inability to reach a unanimous
8 verdict—a jury deadlock—is considered the classic basis establishing a manifest
9 necessity.” *Id.* (alteration, internal quotation marks, and citation omitted). Where a
10 jury deadlocks on a charge with greater- and lesser-included offenses, the levels of
11 offense on which the jury is deadlocked must be clearly established on the record by
12 polling the jury pursuant to Rule 5-611(D) NMRA before the district court may
13 conclude that manifest necessity exists. *See Phillips*, 2017-NMSC-019, ¶ 16
14 (“Without establishing a clear record indicating the crimes on which the jurors had
15 failed to reach a unanimous verdict, it was an abuse of discretion for the court to
16 conclude that the jury was hung and that there was manifest necessity justifying a
17 mistrial on all of the crimes in Count 1.”).

18 {10} A defendant’s consent to a mistrial, however, removes the requirement for a
19 finding of manifest necessity. *See Paul*, 2021-NMCA-041, ¶ 20. Such consent
20 generally forecloses any claim that retrial is barred by double jeopardy, regardless

1 of whether manifest necessity was established for the mistrial. *See id.* In *Paul*, the
2 district court expressed its intent to discharge a jury that was deadlocked on a charge
3 with a greater- and a lesser-included offense. *Id.* ¶ 4. With the defendant’s consent,
4 the district court declared a mistrial due to manifest necessity and discharged the
5 jury without polling it on which offenses it was deadlocked. *Id.* ¶¶ 1, 4. On appeal,
6 this Court concluded that there was no manifest necessity to declare a mistrial
7 because the district court had not created a clear record of the charges on which the
8 jury was deadlocked. *Id.* ¶ 17. However, we nonetheless affirmed the order denying
9 the motion to dismiss because the “[d]efendant plainly consented to a mistrial on the
10 record before us,” and we held that the defendant’s consent to the mistrial removed
11 any bar to retrial on the greater charge. *Id.* ¶¶ 23-24.

12 {11} Defendant, like the defendant in *Paul*, was given ample opportunity to object
13 to the mistrial. Instead of objecting, Defendant moved for, and thus consented, to the
14 mistrial. [BIC 17] When given the opportunity to have the jury polled to clarify
15 which charges the jury was deadlocked on—a poll that might have led to entry of a
16 verdict on the second-degree charge—Defendant affirmatively opposed the poll,
17 which led to the jury being discharged. [12-4-23 CD 11:56:40-59:46] Though the
18 parties discussed which charges the jury was deadlocked on, the district court made
19 no finding on that issue. [*Id.*] Like the district court in *Paul*, the district court in the
20 instant case made a finding of manifest necessity. *See id.* ¶ 1. Regardless of whether

1 that finding was correct, Defendant’s consent to the mistrial negated any need to
2 make the finding. *See id.* ¶ 20 (“Our Supreme Court has long recognized that
3 manifest necessity and consent *independently* remove the double jeopardy bar to
4 retrial ordinarily applicable when a defendant’s trial is prematurely terminated.”
5 (emphasis added)). Accordingly, we conclude that the district court did not abuse its
6 discretion in declaring a mistrial and reserving the right to retry Defendant.

7 {12} Defendant next contends that even if his consent to a mistrial permits retrial
8 on the other offenses, he did not consent to mistrial on the second-degree
9 embezzlement offense. [BIC 39] We disagree. In *Paul*, this Court stated that the
10 “[d]efendant plainly consented to a mistrial on the record before us” by asking the
11 district court whether he should move for a mistrial and not objecting to the
12 discharge of the jury and the declaration of a mistrial despite being given ample
13 opportunity. *See id.* ¶ 23. We recognized that consent under these circumstances
14 “forecloses the possibility that the defendant will game the system by performing an
15 about-face and asserting that the discharge was improper after the opportunity for
16 further deliberations has gone.” *Id.* ¶ 19.

17 {13} Like in *Paul*, Defendant plainly consented to a general mistrial. When
18 presented with the foreperson’s note, Defendant moved for a mistrial. [BIC 17]
19 Defendant twice objected to the State’s request to poll the jury on their decision as
20 to each offense, but did not object to the district court’s declaration of a general

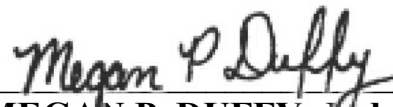
1 mistrial and discharge of the jury before the foreperson’s note could be clarified.
2 [12-4-23 CD 11:56:40-59:46] Because Defendant plainly consented to a general
3 mistrial, the district court did not abuse its discretion in declaring a mistrial on all
4 offenses. *See id.* ¶ 23.

5 {14} Finally, Defendant argues that, to the extent that retrial on the second-degree
6 embezzlement offense comports with the Double Jeopardy Clause of the United
7 States Constitution, the New Mexico Constitution contains greater protections that
8 bar retrial on that offense. [BIC 47-51] Citing *State v. Breit*, 1996-NMSC-067, ¶ 32,
9 122 N.M. 655, 930 P.2d 792, Defendant urges this Court to consider those greater
10 protections and “look to the totality of the circumstances and assess whether
11 [Defendant] earnestly believed that the jury had acquitted him on a particular
12 charge.” [BIC 47-48] In *Breit*, our Supreme Court held that the New Mexico
13 Constitution barred retrial of charges where “pervasive, incessant, and outrageous”
14 prosecutorial misconduct led the defendant to file a motion for a new trial. *Id.* ¶ 37.
15 We are unpersuaded that *Breit* applies to the instant case, where the mistrial arose
16 from a hung jury, not from any prosecutorial misconduct.

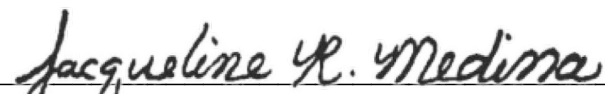
17 {15} Our Court rejected a similar “earnest belief” argument in *Paul* under similar
18 circumstances where a defendant agreed to a general mistrial but later argued he had
19 nevertheless been acquitted of the highest offense. *See Paul*, 2021-NMCA-041, ¶ 24
20 (“We find it difficult to believe that defense counsel would have agreed that the

1 proceedings were ‘at a hung jury state’ and ‘at a mistrial’ if he earnestly believed
2 that the jury had acquitted [the d]efendant on the homicide by vehicle charge.”).
3 Additionally, neither *Breit* nor *Phillips*, to which Defendant also cites, mentions the
4 “earnest belief” standard for which Defendant advocates. *See Breit*, 1996-NMSC-
5 067; *Phillips*, 2017-NMSC-019. Given that Defendant cites no other authority
6 supporting application of an earnest belief standard, we assume none exists. *See*
7 *State v. Vigil-Giron*, 2014-NMCA-069, ¶ 60, 327 P.3d 1129 (“[A]ppellate courts
8 will not consider an issue if no authority is cited in support of the issue and . . . ,
9 given no cited authority, we assume no such authority exists.”). We therefore will
10 not further consider this argument.

11 {16} Accordingly, we affirm.

12 
13 MEGAN P. DUFFY, Judge

14 **WE CONCUR:**

15 
16 JACQUELINE R. MEDINA, Chief Judge

17 
18 SHAMMARA H. HENDERSON, Judge