STATE V. HERNANDEZ

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
ETIENNE HERNANDEZ,
Defendant-Appellant.

NO. 34,156

COURT OF APPEALS OF NEW MEXICO

December 15, 2016

APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY, Sarah C. Backus, District Judge

COUNSEL

Hector H. Balderas, Attorney General, Santa Fe, NM, Tonya Noonan Herring, Assistant Attorney General, Albuquerque, NM, for Appellee

Bennett J. Baur, Chief Public Defender, Kimberly Chavez Cook, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

LINDA M. VANZI, Judge. WE CONCUR: JAMES J. WECHSLER, Judge, JONATHAN B. SUTIN, Judge

AUTHOR: LINDA M. VANZI

MEMORANDUM OPINION

VANZI, Judge.

{1} Defendant Etienne Hernandez appeals four convictions related to an incident that occurred on October 17, 2012, in which Defendant allegedly rammed Stephen Mason's

truck with his car, unprovoked, and subsequently disobeyed police orders and resisted arrest. Defendant argues that (1) the district court erred when it found him competent to stand trial, despite evidence that he could not assist in his defense; (2) double jeopardy barred retrial after mistrial because a police officer testifying for the State violated a pretrial evidentiary order; and (3) there was insufficient evidence to convict him for battery upon a peace officer, contrary to NMSA 1978, Section 30-22-24 (1971), and aggravated assault with a deadly weapon, contrary to NMSA 1978, Section 30-3-2(A) (1963).

{2} We hold that, under the factual circumstances of this case, it was a violation of Defendant's procedural due process rights for the district court to not issue any findings of fact in determining that he was competent to stand trial when the only relevant evidence before the district court was that he was incompetent. We further hold that double jeopardy did not bar retrial in this case, and there was sufficient evidence for a jury to convict Defendant for battery on a peace officer and aggravated assault with a deadly weapon.

BACKGROUND

The Incident on October 17, 2012

{3} At about 11 p.m. on October 17, 2012, Stephen Mason and Joel Miera (collectively, Victims) decided to go to a gym to workout and stopped at the Sun God Lodge (the Lodge) in Taos, New Mexico, where Miera had a room, so he could pick up his workout clothes. Mason drove Miera in his 2008 red Dodge Ram pickup truck to the Lodge. Once at the Lodge, Mason parked in the back parking lot, which was close to Miera's room. Defendant's vehicle, a white station wagon, was the only other occupied car in the lot and was parked in the back corner, also near Miera's room. Victims noticed that Defendant's car was moving and its headlights were on. Mason testified that, while he and Miera were sitting in his truck, "all of a sudden this car rammed the back of my [truck]. It hit at . . . a pretty good force." Feeling scared, Mason immediately drove away, and Miera called 911. Victims both testified that Defendant's vehicle followed them with its lights off, and they feared Defendant would hit them a second time because they heard Defendant rev the engine and saw his car charge at them again. Miera remained on the phone with 911 until the police pulled over both vehicles.

{4} Sergeant David Trujillo and Officer Jim Black responded to Miera's 911 call. According to Sergeant Trujillo, Victims both appeared "extremely frightened." Sergeant Trujillo testified that Defendant exited his car, walked toward the red truck, and the officer came in contact with Defendant. Sergeant Trujillo also testified that, during his interaction with Defendant, Defendant turned away from him and started walking quickly to his station wagon, while ignoring Sergeant Trujillo's repeated commands to stop. Sergeant Trujillo ran up to Defendant to keep up with him, and when Sergeant Trujillo caught up with him, Defendant put his arm around Sergeant Trujillo's neck and started to pull the officer's head inwards. Sergeant Trujillo testified that Defendant "started with a little bit of force and then he started putting more and more pressure." Sergeant

Trujillo eventually pushed Defendant off. Immediately thereafter, Defendant got into a "fighting stance," and Sergeant Trujillo and two other officers struggled with Defendant until they were able to take him to the ground and handcuff him.

The District Court's Competency Finding

{5} In January 2013, three months after Defendant's arrest, but before indictment and arraignment, Dr. Susan Cave interviewed Defendant while he sat in his cell at the Taos County Detention Center. Dr. Cave determined that Defendant was incompetent, and Defendant was subsequently admitted to the New Mexico Behavioral Health Institute (NMBHI) in April 2013 in a "floridly psychotic state." Defendant was treated at NMBHI and evaluated by Susan Gerber, a forensic evaluator, and in a July 2013 report, Gerber and her staff determined that Defendant was competent to proceed to trial. Defendant was then sent back to jail and indicted and arraigned. However, in a September 2013 interview, Dr. Cave found Defendant to be "hostile and aggressive" and concluded that "[h]e may have deteriorated since his return to jail." Dr. Cave's report further stated that Defendant was "barely coherent and was occasionally delusional." The district court then entered an order requesting a competency determination from NMBHI, pursuant to NMSA 1978, Section 31-9-1.1 (1993).

{6} Defendant was returned to NMBHI for a competency and dangerousness evaluation. Gerber evaluated Defendant again in January 2014 and this time found him incompetent to stand trial because he entertained paranoid and negative views regarding his attorney. However, she also found that he "present[ed] a moderately low risk of violent behavior if he were to be released to the community." On February 25, 2014, the district court held a competency hearing. Gerber was qualified as an expert and testified that Defendant had been diagnosed with schizoaffective disorder by a psychiatrist and that "he was not capable of assisting in his defense." According to Gerber, Defendant entertained "negative, almost paranoid views" about his lawyer. In her report, Gerber quoted Defendant as saying, "My attorney is incompetent and she hates me." Defendant also said that "she's acting against my innocence. She wants to put me in jail and give me a lot of time. My lawyer is paid by my enemy." Gerber additionally testified that she had determined Defendant did understand the nature of the criminal proceedings and had a factual understanding of the case. She further testified that there had been significant changes between her July 2013 report and her January 2014 report. For example, at the time of the July 2013 report, Defendant had confidence in his attorney. She also indicated that detention centers are often not as well equipped as NMBHI to handle individuals with mental health issues, such as Defendant. On cross-examination, the prosecutor seemingly attempted to discredit Gerber by asking a line of questions regarding her finding that Defendant was not dangerous, despite a history of behavior that might suggest otherwise. Of note, Gerber was the only witness at the hearing and the only expert that testified regarding Defendant's competency.

{7} At the hearing, the district court stated that it was "not persuaded of [Defendant's] incompetency" and ultimately issued a one-page order that found Defendant competent

to stand trial, but did not issue any findings of fact. Defendant then filed a motion for reconsideration on the district court's finding of competency. At the pretrial hearing on April 7, 2014, the district court denied the motion and stated that "it didn't appear that [Defendant] was incompetent based on the legal standard of competency." The district court went on to say that its observation of Defendant was relevant and that "he appears to understand what is happening," and just being unable to get along with counsel does not make Defendant incompetent. The district court also specifically stated that it based its decision on Gerber's July 2013 evaluation that occurred pre-grand jury indictment and which found Defendant competent. While the district court did have a copy of the July 2013 report, it is not in our record.

The Mistrial

{8} During the October 17 incident, officers had discovered guns in Defendant's car. At the pretrial hearing on April 7, 2014, Defendant successfully moved to exclude any mention of the guns. The district court determined that the guns were not relevant evidence, and evidence of their existence was unfairly prejudicial. At the first trial, which also began on April 7, Sergeant Trujillo testified for the State. During direct examination, the prosecutor asked Sergeant Trujillo if "an officer contact[ed him] on the radio." Sergeant Trujillo answered, "Yes, I was contacted on my radio at that time and informed that a weapon was located in the vehicle." Defendant immediately moved for a mistrial, but the court decided to keep moving forward and consider the issue at the next break. The prosecutor then asked how Sergeant Trujillo felt when Defendant put his arm around him, and Sergeant Trujillo testified that he felt "very threatened, especially since I knew what was in the area." Upon examination by defense counsel, Sergeant Trujillo acknowledged that the prosecutor had instructed him not to reference the weapons found in Defendant's vehicle. Defendant again moved for a mistrial, and this time the district court granted it based on manifest necessity. Defendant filed a motion to bar retrial, which the district court denied. Defendant was subsequently tried and convicted of battery on a peace officer; two counts of aggravated assault with a deadly weapon; and resisting, evading, or obstructing an officer.

DISCUSSION

Competency

{9} As an initial matter, we discuss Defendant's claim that the district court erred when it found him competent to stand trial. Although the parties agree that the appropriate standard of review is abuse of discretion, we conclude that the district court's failure to include any findings of fact in its order declaring Defendant competent to stand trial, when the only relevant evidence before the court was that he was incompetent, violated Defendant's right to due process of law and is, therefore, subject to de novo review. *See State v. Gutierrez*, 2015-NMCA-082, ¶ 43, 355 P.3d 93, *cert. denied*, 2015-NMCERT-008, ___ P.3d ___; *see also State v. Montoya*, 2010-NMCA-067, ¶ 11, 148 N.M. 495, 238 P.3d 369 ("We review questions of constitutional law and constitutional rights, such as due process protections, de novo.").

{10} We begin our discussion with an examination of constitutional law. Under both the New Mexico and Federal Constitutions, "it is a violation of due process to prosecute a defendant who is incompetent to stand trial." *Gutierrez*, 2015-NMCA-082, ¶¶ 9, 32 (internal quotation marks and citation omitted). "To be considered competent, a defendant must (1) understand the nature and significance of the proceedings, (2) have a factual understanding of the charges, and (3) be able to assist in his own defense." *Id.* ¶ 9; *see State v. Rotherham*, 1996-NMSC-048, ¶ 13, 122 N.M. 246, 923 P.2d 1131 ("A person is competent to stand trial when he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding[,] and he has a rational as well as factual understanding of the proceedings against him. An accused must have the capacity to assist in his own defense and to comprehend the reasons for punishment." (omission, internal quotation marks, and citations omitted)).

{11} Due process additionally requires "adequate notice, an adversarial hearing before an independent decision-maker, and a written statement from the fact finder clarifying the evidence relied upon and reasons for the decision." *Gutierrez*, 2015-NMCA-082, ¶ 10. It is a violation of procedural due process when a district court fails to provide any findings of fact that provide sufficient justifications for its competency determination. *See id.* ¶ 30. In *Titus v. City of Albuquerque*, we explained that one of the essential elements of due process includes "a decision based on the record with a statement of reasons for the decision." 2011-NMCA-038, ¶ 42, 149 N.M. 556, 252 P.3d 780 (internal quotation marks and citation omitted). And in *Gutierrez*, we held that a valid competency decision requires discussion of the three competency factors. 2015-NMCA-082, ¶ 30.

{12} Our Legislature explicitly provided for due process protections in the relevant law. *State v. Flores*, 2005-NMCA-135, ¶ 17, 138 N.M. 636, 124 P.3d 1175. Under New Mexico's Mental Illness and Competency Code (NMMIC), NMSA 1978, §§ 31-9-1 to -2 (1967, as amended through 1999), there are specific procedural rules in place to safeguard a defendant's due process rights. The NMMIC provides, "Whenever it appears that there is a question as to the defendant's competency to proceed in a criminal case, any further proceeding in the cause shall be suspended until the issue is determined." Section 31-9-1. In addition,

> [t]he defendant's competency shall be professionally evaluated by a psychologist or psychiatrist or other qualified professional recognized by the district court as an expert and a report shall be submitted as ordered by the court. A hearing on the issue of the competency of an incarcerated defendant charged with a felony shall be held by the district court within a reasonable time, but in no event later than thirty days after notification to the court of completion of the diagnostic evaluation.

Section 31-9-1.1. Under Rule 5-602(B)(2) NMRA, once the question of competency has been raised the court must determine whether the defendant is competent to stand trial. But if prior to trial, the court determines there is "a reasonable doubt as to the defendant's competency to stand trial . . . the court shall order the defendant to be

evaluated as provided by law." Rule 5-602(B)(2)(a). In determining whether there is reasonable doubt as to whether a defendant is competent to stand trial, the court is required to weigh the evidence and make a reasoned decision based on the available evidence. *Montoya*, 2010-NMCA-067, ¶ 14. At the statutorily mandated competency hearing, *see* § 31-9-1.1, the burden is on the defendant to prove by a preponderance of the evidence that he or she is not competent to stand trial. *Gutierrez*, 2015-NMCA-082, ¶ 14. And "the court, without a jury, may determine the issue of competency to stand trial; or, in its discretion, may submit the issue of competency to stand trial to a jury, other than the trial jury." Rule 5-602(B)(2)(a). The district court, however, may not simply ignore relevant evidence. *See Montoya*, 2010-NMCA-067, ¶ 14.

{13} We hold that the district court erred when it failed to include any findings of fact in its order declaring Defendant competent, when the only relevant evidence before the district court was that he was incompetent. As our Supreme Court has said, procedural due process may require "a decision based on the evidence presented at the hearing accompanied by an explanation of the decision[,]" depending on the facts of the case. *Mills v. N.M. Bd. of Psychologist Exam'rs*, 1997-NMSC-028, ¶ 14, 123 N.M. 421, 941 P.2d 502. We conclude that the facts of the case before us present precisely the sort of situation that requires a written explanation of the district court's decision. To safeguard Defendant's constitutional right not to be tried while incompetent, the district court should have provided a reasoned basis for its competency determination since the only relevant evidence was that Defendant was incompetent because he could not rationally assist in his defense. *See Gutierrez*, 2015-NMCA-082, ¶ 30 (holding that, *inter alia*, it was a violation of a defendant's due process rights when a district court found a defendant incompetent but provided no findings of fact or conclusions of law that justified the decision); *see also Flores*, 2005-NMCA-135, ¶ 15 ("The failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." (alteration, internal quotation marks, and citation omitted)). In *Flores*, for example, we concluded that a district court did not err in finding a defendant competent to stand trial because we deferred to the district court's numerous findings of fact, which included findings that the defendant's experts were not as credible as the state's experts and that the defendant was capable of assisting his attorney. 2005-NMCA-135, ¶ 6. Unlike in *Flores*, here we are left to speculate as to why the district court found Defendant competent because there is no explanation of the court's decision, the only expert that testified opined that he was incompetent, and the post-indictment reports indicated that Defendant had deteriorated in jail and was unable to assist his attorney. Due process requires more in this situation.

{14} As discussed, the district court did not provide any reasons for its determination, but during the competency hearing, it stated that it was "not persuaded of [Defendant's] incompetency." Furthermore, at the pretrial hearing on April 7, 2014, the court stated that "the basis of [its] decision" was the pre-indictment July 2013 report that found Defendant competent. Although we note that a final order must be written, *State v. Lohberger*, 2008-NMSC-033, ¶ 20, 144 N.M. 297, 187 P.3d 162, we think the district court's informal announcement of its ruling is instructive to our review of its decision. By

basing its decision on the pre-indictment July 2013 report, the district court ignored the only relevant evidence presently before it—that Defendant had decompensated upon his return to jail. The district court did not say it found the July 2013 report more credible than the September 2013 or January 2014 reports, or that it discredited Gerber's testimony. *See Flores*, 2005-NMCA-135, ¶ 32 (asserting that a judge may base his or her competency decision on expert credibility). Nor did the district court explain why it discounted the two reports and expert testimony. *See id.*; *State v. Castillo*, No. 31,054, 2013 WL 5310262, mem. op. ¶ 10 (N.M. Ct. App. Aug. 28, 2013) (non-precedential) ("Although obviously the district court makes the ultimate determination regarding competency and may reject an expert opinion, its rejection must be based on a sound rationale."). In light of the fact that the only relevant evidence at the competency hearing was expert testimony and two post-indictment reports that found Defendant incompetent, we hold that, pursuant to his due process rights, Defendant was entitled to know the reason for the district court's decision.

{15} Moreover, we agree with Defendant that the district court was required to determine whether he was competent as of the time of the competency hearing, not whether he had previously been competent. Indeed, it is possible that Defendant's condition had deteriorated between July 2013, when Gerber found him competent, to January 2014, when she found him incompetent. *See, e.g.*, *Flores*, 2005-NMCA-135, ¶ 32 (recognizing that "a substantial interval between [a competency] assessment and trial may . . . justify . . . further evaluation" and acknowledging the possibility of deterioration over time). But there is no indication in the record that the district court considered this possibility or that the court weighed the available evidence as the law requires. *See Montoya*, 2010-NMCA-067, ¶ 14. Significantly, the July 2013 report was not relevant to the question of whether Defendant was competent as of the time of the competency hearing because it occurred before the grand jury indictment and before the impetus for the competency hearing pursuant to Sections 31-9-1 and -1.1 of the NMMIC and Rule 5-602(B) took place. Further, Dr. Cave's September 2013 report found Defendant incompetent and stated that he had deteriorated in jail. *See Flores*, 2005-NMCA-135, ¶ 35 ("The history of [a d]efendant's competency evaluations, determinations, and treatment [do] not necessarily reflect [a d]efendant's present competency.").

{16} We also note that it appears from the district court's oral expression of its ruling on April 7, 2014, that the judge misconstrued the experts' reports and the legal standard for competency. The district court judge specifically stated that "it just seemed that he wasn't able to get along with [his attorney] or communicate with her, but it didn't appear that he was incompetent based on the legal standard of competency." The judge, however, did not indicate what that legal standard was and appears to have misapprehended the substance of the experts' reports. *See Gutierrez*, 2015-NMCA-082, ¶¶ 30, 38 (explaining that a valid ruling on competency would include mention "of the three factors for determining competency"). Here, the only competency factor in question was whether Defendant was capable of assisting his attorney. *See generally Rotherham*, 1996-NMSC-048, ¶ 13 ("An accused must have the capacity to assist in his own defense."). We have held that a defendant was competent when he "understood

that the defense attorney worked for him[.]" *State v. Rael*, 2008-NMCA-067, ¶ 15, 144 N.M. 170, 184 P.3d 1064. But the district court incorrectly framed the issue as Defendant being unable to get along with his attorney and stated that inability to get along with defense counsel does not make a defendant incompetent. As discussed above, however, that was not the evidence before the court. Rather, Dr. Cave's September 2013 report stated that Defendant was "defensive, paranoid, and suspicious." And the January 2014 competency evaluation revealed that Defendant had "negative, almost paranoid views" about his lawyer. Furthermore, Gerber quoted Defendant as saying, "My attorney is incompetent and she hates me." Defendant also said that "she's acting against my innocence. She wants to put me in jail and give me a lot of time. My lawyer is paid by my enemy." The evidence thus indicates that Defendant, who entertained paranoid views regarding his attorney and did not comprehend that she worked for him, *see id.*, was not capable of assisting his attorney in his defense, and there is no relevant evidence in the record to the contrary or any explanation as to why the district court discredited such evidence. Without addressing these concerns, the district court summarily found Defendant competent to stand trial.

{17} We further observe that a competency "hearing cannot be dispensed with based on factors like the defendant's demeanor before the court" because such a determination is a procedural right. *Gutierrez*, 2015-NMCA-082, ¶ 10. Here, the district court said that its observation of Defendant was relevant and that "he appears to understand what is happening." As we have said, the district court must weigh the available evidence in making its competency determination, *see Montoya*, 2010-NMCA-067, ¶ 14, and it was error for the district court to base part of its decision on its observation of Defendant in court because Defendant's behavior in court was not evidence. Additionally, we again note that the relevant question was whether Defendant could rationally assist in his defense, not whether he understood what was happening.

{18} Because Defendant presented sufficient evidence of incompetence, *see Gutierrez*, 2015-NMCA-082, ¶ 14, the district court in the present case was required to provide a "written statement . . . clarifying the evidence relied upon and reasons for the decision" pursuant to the dictates of procedural due process. *Id.* ¶ 10. Failure to do so in this case was error and a violation of Defendant's constitutional right to procedural due process.

Double Jeopardy

{19} We now turn to Defendant's claim that double jeopardy barred retrial after a mistrial was declared. Defendant argues that "[t]he district court should have barred retrial following a mistrial precipitated by the supervising law enforcement witness directly violating a pretrial ruling[,]" and "[t]he prosecutor acted in willful disregard of a mistrial." We generally apply a de novo standard of review to the constitutional question of whether there has been a double jeopardy violation. *State v. Andazola*, 2003-NMCA-146, ¶ 14, 134 N.M. 710, 82 P.3d 77.

{20} The New Mexico Constitution, like the Federal Constitution, prevents any person from being "twice put in jeopardy for the same offense[.]" N.M. Const. art. II, § 15; *see* U.S. Const. amend. V. The purpose of double jeopardy protection is to prevent "defendants from being subjected to multiple prosecutions for a single infraction." *State v. Breit*, 1996-NMSC-067, ¶ 8, 122 N.M. 655, 930 P.2d 792. Generally, however, when a defendant obtains a mistrial on his or her own motion, retrial is allowed. *Id.* ¶ 14. Nonetheless, when mistrial is a result of prosecutorial misconduct, retrial may be barred by double jeopardy. *Id.* Under the three-part test announced by the New Mexico Supreme Court in *Breit*,

> [r]etrial is barred under Article II, Section 15, of the New Mexico Constitution, when improper official conduct is so unfairly prejudicial to the defendant that it cannot be cured by means short of a mistrial or a motion for a new trial, and if the official knows that the conduct is improper and prejudicial, and if the official either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal.

Id. ¶ 32.

Prosecutorial Misconduct

{21} Defendant argues that "[t]he prosecutor acted in willful disregard of a mistrial." We disagree. "An appellate review of a prosecutorial misconduct claim presents a mixed question of law and fact." *State v. McClaugherty*, 2008-NMSC-044, ¶ 39, 144 N.M. 483, 188 P.3d 1234. Therefore, "[t]he appellate court will defer to the district court when it has made findings of fact that are supported by substantial evidence and reviews de novo the district court's application of the law to the facts." *Id.*

{22} In *Breit*, our Supreme Court explained that the term "willful disregard" means that the "prosecutor is actually aware, or is presumed to be aware, of the potential consequences of his or her actions. The term connotes a conscious and purposeful decision by the prosecutor to dismiss any concern that his or her conduct may lead to a mistrial." 1996-NMSC-067, ¶ 34. In *McClaugherty* our Supreme Court clarified, "the *Breit* objective standard is based on the prosecutor's conduct as it manifests at the trial, not the motivation for that conduct." *McClaugherty*, 2008-NMSC-044, ¶ 27.

{23} Here, we will defer to the district court's finding of fact because it was supported by substantial evidence in the record. The district court found that it did not believe the prosecutor intentionally sought a mistrial. *Cf. State v. Salas*, 1999-NMCA-099, ¶ 13, 127 N.M. 686, 986 P.2d 482 (recognizing that it is for the fact finder to resolve any conflict in the testimony of the witnesses and to determine where the weight and credibility lie). The record supports the district court's finding because the prosecutor himself never referred to the guns; rather, it was the testifying officer who did so. The record also indicates that the prosecutor specifically instructed Sergeant Trujillo not to mention the guns, but the officer mentioned them anyway. Importantly, Sergeant Trujillo brought up the radio call without the prosecutor's prompting, and the prosecutor quickly interrupted

him, presumably knowing that Sergeant Trujillo was about to violate the pretrial order. When the prosecutor then asked whether Sergeant Trujillo had been contacted by radio during his interaction with Defendant, he attempted to limit the officer's response by saying, "And I don't want to hear what you heard from other people, but . . . did an officer contact you on the radio?" We will not hold a prosecutor responsible for the actions of a state witness when the witness contravened a direct instruction from the prosecutor and the record indicates that the prosecutor was trying to follow the court's order. *Cf. State v. Wildgrube*, 2003-NMCA-108, ¶¶ 23-24, 134 N.M. 262, 75 P.3d 862 ("In assessing whether a comment has been improperly elicited by the state, our courts have distinguished between inadvertent remarks made by a witness and those that are intentionally solicited by a prosecutor. . . . The prosecutor did not pursue the officer's comment or otherwise exploit the reference." (citations omitted)). We hold, therefore, that the prosecutor did not act in willful disregard of a mistrial because he took affirmative steps to comply with the district court's pretrial order. That is, the prosecutor did not objectively engage in any prosecutorial misconduct. *See McClaugherty*, 2008-NMSC-044, ¶ 27.

Witness Misconduct

{24} Defendant next argues that the "district court should have barred retrial following a mistrial precipitated by [Sergeant Trujillo] directly violating a pretrial ruling." Defendant recognizes that no authority explicitly extends *Breit*'s double jeopardy analysis to a police officer's misconduct unconnected with prosecutorial collaboration, yet Defendant asks us to do so in this case. With respect to the facts currently before us, we decline to broaden our Supreme Court's holding in *Breit*.

{25} Defendant emphasizes the term "official" as used in *Breit* to argue that we should extend our understanding of that term to testifying police officers. *See generally Breit*, 1996-NMSC-067, ¶ 32 ("[W]hen a defendant moves for a mistrial . . . because of prosecutorial misconduct[, r]etrial is barred . . . when improper *official* conduct is so unfairly prejudicial to the defendant that it cannot be cured by means short of a mistrial or a motion for a new trial, and if the *official* knows that the conduct is improper and prejudicial, and if the *official* either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal." (emphases added)). We first note that the *Breit* Court inserted an important introductory clause before going on to announce the three-part test for "official" misconduct in connection with the double jeopardy bar on retrial: "because of prosecutorial misconduct[.]" *Id.* The term "prosecutorial misconduct" in the introductory clause modifies the term "official" such that any reference to "official" necessarily refers back to "prosecutorial misconduct." *See id.*; *see also* William A. Sabin, *The Gregg Reference Manual* 669 (11th ed. 2011) (stating that a "modifier" is a "word, phrase, or clause that qualifies, limits, or restricts the meaning of a word"); *cf. Garcia v. Schneider, Inc.*, 1986-NMCA-127, ¶ 9, 105 N.M. 234, 731 P.2d 377 ("Under the doctrine of the 'last antecedent,' relative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or indicating others more remote."). Second, we note that the *Breit* Court, in using the phrase "official," specifically

referenced “legal professionals” and “lawyers.” *See* 1996-NMSC-067, ¶ 33. Third, we have found no authority in New Mexico that extends *Breit* to testifying police officers, and Defendant concedes there is none. Because “prosecutorial misconduct” modifies the term “official,” the *Breit* Court itself expressly referenced members of the “legal profession,” *see id.* ¶¶ 32-33, and no subsequent case extends the holding in *Breit*, we decline Defendant’s invitation to extend *Breit* to testifying police officers, and we conclude that the term “official” refers to the prosecutor.

{26} Next, we address Defendant’s contention that “[i]n order to effectuate due process and to provide the double jeopardy protections recognized in *Breit*, it is necessary to treat [Sergeant Trujillo] as an extension of the prosecution team for purposes of a misconduct analysis.” Although we agree with Defendant that police officers who testify as witnesses for the State should be held to high standards in “preserving the integrity of the proceedings[,]” we decline to hold that double jeopardy barred retrial after mistrial in this case because Sergeant Trujillo violated the pretrial order. “As [our Supreme Court] said in *Breit*, ‘raising the bar of double jeopardy should be an exceedingly uncommon remedy.’ ” *McClaugherty*, 2008-NMSC-044, ¶ 25 (alteration omitted) (quoting *Breit*, 1996-NMSC-067, ¶ 35). The double jeopardy remedy should only be applied in cases in which there are “the most severe prosecutorial transgressions.” *Id.* (internal quotation marks and citation omitted); *see also State v. Lucero*, 1999-NMCA-102, ¶ 20, 127 N.M. 672, 986 P.2d 468 (“[W]e are reminded that not every prosecutorial error that leads to a mistrial or reversal will justify barring a retrial. On the contrary, it is a remedy to be used sparingly.” (alteration, internal quotation marks, and citation omitted)).

{27} As Defendant concedes, “Officers may be less culpable than lawyers when blurting out inadmissible testimony.” While we do not condone what appears to have been a deliberate disregard of the district court’s pretrial order not to mention the guns, we note that there is no evidence that Sergeant Trujillo acted in collusion with the prosecutor or has had the formal legal education required of licensed attorneys. *See Breit*, 1996-NMSC-067, ¶ 33 (“Rare are the instances of misconduct that are not violations of rules that every legal professional, no matter how inexperienced, is charged with knowing.”). We thus think it is unlikely that Sergeant Trujillo knew or appreciated that the potential, even probable ramification of referencing the weapons in Defendant’s car would be a mistrial. *See id.* ¶ 32 (“Retrial is barred . . . if the official either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial[.]”). Because the Double Jeopardy Clause protects defendants from government action designed to provoke mistrial and there is no evidence that Sergeant Trujillo knew or understood referencing the weapons would likely cause a mistrial, it would not be appropriate to extend the uncommon double jeopardy protections to Defendant in this case.[1] *See id.* ¶ 26.

{28} We also note that we are unpersuaded by Defendant’s argument that the case before us is analogous to cases in which the state, including the police, did not disclose exculpatory material because this case is distinguishable from cases which hold that disclosure of *Brady* exculpatory material extends to police officers, *see, e.g.*, *State v.*

Wisniewski, 1985-NMSC-079, ¶ 21, 103 N.M. 430, 708 P.2d 1031, since the *Brady* rule applies to violations that occur after trial. *See State v. Balenquah*, 2009-NMCA-055, ¶ 15, 146 N.M. 267, 208 P.3d 912 ("[N]o *Brady* violation exists where evidence is found *during* trial as opposed to *after* trial."); *see generally Brady v. Maryland*, 373 U.S. 83, 87-88 (1963) (explaining that *Brady* material is exculpatory material). Here, the pretrial evidentiary rule was violated during Defendant's first trial. Moreover, Defendant cites *Wisniewski* for the broad proposition that "police officers involved in a case are part of the prosecution team." We point out that *Wisniewski* involved a *Brady* violation, and our Supreme Court specifically looked to the language in what is now criminal procedure, Rule 5-501(A)(6) NMRA, for its analysis. *See Wisniewski*, 1985-NMSC-079, ¶ 21. That rule notably says that "the [S]tate shall disclose . . . any material evidence favorable to the defendant." Rule 5-501(A)(6); *see Wisniewski*, 1985-NMSC-079, ¶ 21. Thus, in the context of disclosing exculpatory material, our Supreme Court clearly contemplated that actors of the state, which reasonably extends to police officers, were within the purview of Rule 5-501(A)(6). Defendant points to no such equivalent rule in arguing that testifying police officers should be held to the same high standards as attorneys in complying with evidentiary pretrial orders.[2]

{29} In addition, we note that public policy considerations further caution us against extending *Breit*'s limited rule to testifying police officers without something more, such as evidence of collusion between the officer and the prosecutor. To do so would be to create an unworkable rule. If double jeopardy were to prohibit retrial after mistrial every time a state witness violated a pretrial order, even if that witness was a supervising officer, we would essentially be raising the bar of double jeopardy, and the instances in which retrial could be barred would be virtually limitless. This we decline to do since the constitutional remedy is rarely intended to bar re-prosecution when there are isolated instances of misconduct. *See Breit*, 1996-NMSC-067, ¶ 33. Rather, double jeopardy bars retrial after mistrial when there has been "pervasive, incessant, and outrageous" prosecutorial misconduct. *Id.* ¶ 37. Aside from Sergeant Trujillo's reference to the guns, there is no allegation that the proceedings were contaminated with sweeping government misconduct. Thus, we hold that double jeopardy did not bar retrial after mistrial.

Sufficiency of the Evidence

{30} As a final matter, we briefly address Defendant's sufficiency of the evidence arguments because, if we were to conclude that there was insufficient evidence, Defendant would be entitled to greater relief than the relief provided from our reversal on the competency determination. However, we hold that there was sufficient evidence for a jury to convict Defendant of battery on a peace officer and assault with a deadly weapon.

{31} "The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Montoya*, 2015-NMSC-010, ¶ 52, 345 P.3d 1056 (internal quotation marks and citation omitted). The

reviewing court "view[s] the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. We will not reweigh the evidence and will not substitute our judgment for that of the jury if the verdict is supported by sufficient evidence. *State v. Griffin*, 1993-NMSC-071, ¶ 17, 116 N.M. 689, 866 P.2d 1156. "Jury instructions become the law of the case against which the sufficiency of the evidence is to be measured." *State v. Smith*, 1986-NMCA-089, ¶ 7, 104 N.M. 729, 726 P.2d 883.

Battery on a Police Officer

{32} Defendant specifically argues that "[t]here is insufficient evidence that [his] conduct caused either an actual threat to Sergeant Trujillo or a meaningful challenge to his authority." Defendant first contends that he "did not attempt a choke hold" on Sergeant Trujillo when he put his arm around the officer. The jury instructions required the jury to find, in pertinent part, that Defendant attempted to get Sergeant Trujillo in a choke hold. Based on the testimony described above, we are unpersuaded that there was insufficient evidence of an attempted choke hold.

{33} Defendant next contends that he "did not cause an actual threat to officer safety." We disagree. Defendant was physically able to get his arm around Sergeant Trujillo's neck and apply force and pressure and, therefore, presented the officer with an actual threat to his safety. An attempted choke hold, which we already said there was sufficient evidence for, constitutes an actual threat. Not only could an attempted choke hold itself cause physical injury, it could curtail the officer's freedom of movement, thus placing the officer in even more danger.

{34} We turn now to Defendant's contention that he "did not meaningfully challenge [Sergeant] Trujillo's authority." Again, we disagree. Because Defendant placed his arm around Sergeant Trujillo's neck and attempted to get him in a choke hold after repeatedly ignoring Sergeant Trujillo's commands, Defendant meaningfully challenged Sergeant Trujillo's authority. *See State v. Cooper*, 2000-NMCA-041, ¶ 13, 129 N.M. 172, 3 P.3d 149 (holding that a meaningful challenge to a police officer's lawful authority could be reasonably construed when a defendant physically touched an officer after repeatedly disobeying his orders).

Aggravated Assault With a Deadly Weapon

{35} Defendant also argues on appeal that "[t]here was insufficient evidence that [Defendant] committed aggravated assault with a deadly weapon." Specifically, Defendant claims that "[a] reasonable person in [Victims'] circumstances would not have feared an imminent battery." Defendant additionally contends that "[t]he evidence of attempted second impact is insufficient[,]" and Defendant "did not use his car in a manner capable of causing death or great bodily harm." We do not find these arguments availing. The jury instructions required the jury to find, in pertinent part, that a reasonable person in Victims' circumstances would have feared an imminent battery.

Based on the evidence and viewing the verdict in the light most favorable to the jury's conclusion, we hold that there was sufficient evidence because there was testimony that Defendant's white station wagon had suddenly hit Mason's truck, revved its engine a second time, and then proceeded to follow Victims with his headlights off at an increasing rate of speed until police arrived. For these same reasons, we also hold that the evidence of an attempted second impact was sufficient.

{36} We further conclude that there was sufficient evidence for the jury to find that Defendant's station wagon was a deadly weapon. Defendant asserts that "[t]he evidence does not establish that [Defendant] used his motor vehicle in a manner capable of causing death or great bodily harm." But Defendant misconstrues the requirements of UJI 14-322 NMRA and NMSA 1978, Section 30-1-12(B) (1963). The State is not required to prove that Defendant actually used his car in a manner that could cause death or great bodily harm, just that "when used as a weapon" it *could* cause such results and that Defendant did use it as a weapon. *See* UJI 14-322; *State v. Neatherlin*, 2007-NMCA-035, ¶ 12, 141 N.M. 328, 154 P.3d 703. Here, the jury instructions required the jury to find, in pertinent part, the following beyond a reasonable doubt: "[D]efendant used a deadly weapon. [D]efendant used a motor vehicle. A motor vehicle is a deadly weapon if you find that a motor vehicle, when used as a weapon, could cause death or great bodily harm." Because Defendant rammed Mason's truck with his car, he used his motor vehicle as a weapon. A motor vehicle fits within the definition of a deadly weapon because it can be used to cause great bodily harm or death.

{37} Defendant also argues that the district court erred when it issued jury instructions for aggravated assault with a deadly weapon, but for the reasons discussed immediately above, we conclude that the district court did not err when it issued the jury instructions. Therefore, we hold that there was sufficient evidence to convict Defendant of battery on a peace officer and aggravated assault with a deadly weapon.

CONCLUSION

{38} For the foregoing reasons, we vacate Defendant's conviction and sentence, and remand to the district court for proceedings consistent with this opinion. We clarify: if after a competency hearing the district court finds Defendant competent and the only relevant evidence is that he is incompetent, to comport with due process, the district court must provide a written factual basis for its finding.

{39} IT IS SO ORDERED.

LINDA M. VANZI, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

JONATHAN B. SUTIN, Judge

1We pause to emphasize that our holding today applies only to the case presently before us. We can foresee situations where it may be proper to extend double jeopardy protections when a testifying police officer violates a pretrial evidentiary ruling, for example, if the officer acts in collusion with the prosecutor.

2Furthermore, Defendant references *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), and states that the case extends *Brady*'s "due process requirements [to] apply to others acting on the prosecutor's behalf . . . including police officers." To the contrary, however, the United States Supreme Court merely said that the

> individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police[, and] . . . whether the prosecutor succeeds or fails in meeting this obligation . . . the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

Kyles, 514 U.S. at 437-38 (citation omitted).