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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal no. 14-AP-2470-CR

RUSSELL C. TROKA,

Defendant-Appellant

ON APPEAL OF A NONFINAL ORDER OF THE CIRCUIT COURT FOR COLUMBIA COUNTY, THE HONORABLE DANIEL GEORGE PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited PAGE

Statutes and Constitutional Provisions Cited

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STATEMENT OF THE ISSUES

ISSUE 1: Was the trial court's grant of a mistrial over the defendant's objection, after defense counsel's failure to disclose a summary of a defense expert's expected testimony required exclusion of the witness, manifestly necessary so as to permit retrial over a double jeopardy objection, even though (1) the defense indicated the witness's testimony was not necessary, (2) the defendant preferred to withdraw the witness and proceed with trial, and (3) the trial court knew nothing about the specific facts to which the expert would testify?

The trial court found that a manifest necessity existed to declare mistrial over the defendant's objections.

STATEMENT ON ORAL ARGUMENT

Appellant anticipates that the issues raised in this appeal can be fully addressed by the briefs. Accordingly,

appellant is not requesting oral argument.

STATEMENT ON PUBLICATION

In all likelihood, this opinion will not merit publication because the issues are governed by existing precedent.

STATEMENT OF FACTS

a. Summary of the Case

On the second day of jury trial, the defense called an expert witness to the stand, and the witness began testifying about his educational background. When it became apparent that defense counsel failed to disclose a summary of the expert's proposed testimony, the State sought exclusion of the witness, and subsequently moved for mistrial. The defense opposed the mistrial motion, and indicated the intent of both defense counsel and Mr. Troka was to simply withdraw the witness and request the jury be given a curative instruction. Defense counsel indicated this was a strategic decision and that the excluded expert's testimony was not critical to the defense case.

The court granted the mistrial motion over the defendant's objection under the belief that if convicted, Troka would have a valid claim of ineffective assistance of counsel. The court came to this conclusion (1) without taking an offer of proof on the substance of the excluded expert's proposed testimony, (2) without conducting any voir dire on Mr. Troka about his wishes or reasoning, and (3) without taking any testimony from defense counsel. Thus the trial court's *de facto* finding of ineffective assistance of counsel was made with no idea what the excluded expert would have said if permitted to testify, or what impact (if any) such testimony would have on the trial.

Troka moved to dismiss on double jeopardy grounds, arguing the State had not demonstrated a "manifest necessity" for granting a mistrial over his objection. The trial court disagreed, again citing the probable finding of ineffective assistance. The trial court again claimed that having the Mr.

Troka proceed with trial without the expert's testimony would "obviously" have been prejudicial, again despite no idea what the actual substance of the expert's testimony would have been. Since this *de facto* finding of ineffective assistance was clearly unsupported by the record, no manifest necessity existed, and the court erred in granting a mistrial. Accordingly, the trial court's order denying the motion to dismiss on double jeopardy grounds should be reversed, and counts 1-4 should be dismissedfr.

b. Procedural History, Trial and Mistrial

On July 24, 2013, the State of Wisconsin filed a criminal complaint charging the defendant, Russell Troka, with five criminal counts – attempted 1st degree intentional homicide, strangulation or suffocation, misdemeanor battery, disorderly conduct, and misdemeanor bail jumping.[1] (1: 1-2). The charges stem from allegations made by Andrea Zapata,[2] Mr. Troka's wife, who claimed that around 3 am on July 21st, in the town of West Point, Troka attacked her at their campground (1: 3). According to the complaint, Troka repeatedly hit Zapata with a closed fist, threatened to kill her, and put his hands around her throat (1: 3). Ms. Zapata alleged that she fought Troka off and ran to her car, driving away as Troka continued to shout about killing her (1: 3). Zapata claimed to have received injuries on her face, forearms, and neck (1: 3).

A preliminary hearing was held on December 4, 2013, and Mr. Troka was bound over for trial (62: 24). A jury trial was originally scheduled for March 18, 2014, but that trial was rescheduled at the defendant's request. The defense requested the reset shortly before trial because it had just received additional medical records and wanted to retain an expert to review those records. The defense subsequently filed an amended witness list adding the name of its expert, "Richard Tovar," but it is unclear from the record when the State received this witness list (65: 177-78; 34: 1).

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[1] The battery charge was subsequently amended to substantial battery in an amended complaint.

[2] Although the complaint identifies the alleged victim as "Andrea Estefania Zapata-Ferrufino, this petition will refer to her as "Ms. Zapata," as the trial transcripts identify her only as "Andrea Zapata."

Trial commenced on June 11, 2014. The first day included jury selection, opening arguments, and testimony from Andrea Zapata. During a break after opening statements, Mr. Troka entered a no contest plea to the bail jumping charge, which was accepted by the court following a plea colloquy (64: 74-77). Following Ms. Zapata's testimony, the court inquired about scheduling for the remaining witnesses, and specifically asked if the defense intended to call "independent" witnesses (64: 151). Defense counsel indicated the defense had "[f]our short ones," (64: 151).

The second day of trial included testimony of investigating officers, as well as numerous medical witnesses called to explain the medical findings, and opine whether those findings were consistent with the reported strangulation. The State presented testimony from Ms. Zapata's treating physician Dr. Jeff Bendigom, who testified about her injuries and his diagnosis, which was strangulation and a nasal fracture (65: 3-14). The State also called Julia Basa, a SANE nurse who treated Ms. Zapata, to testify about injuries she observed and photographed, including bruises and petechiae (65: 34-40).

After the State rested, the defense called two witnesses, Dr. Tyler Prout and Dr. William Brand, to rebut certain testimony from the State's witnesses. Dr. Prout, a diagnostic radiologist, testified that he reviewed and interpreted the alleged victim's CT scan and identified no traumatic injuries related to strangulation (65: 152-53). Although he observed evidence of a nasal bone fracture, there had been no report of facial trauma in this case, and the age of the bone fracture was "indeterminate" (65: 153-55).

Dr. Brand, a resident at a UW head and neck surgery department, evaluated the alleged victim regarding the reported strangulation and no problems with her breathing, as well as no evidence of any sort of trauma to the airway (65: 159). Dr. Brand also testified that although he observed bruising to the neck, he did not observe any bruising to the vocal chords and observed no other evidence of external trauma (65: 160). Dr. Brand also denied observing any petechaie (65: 167). Finally, Dr. Brand reviewed the CT scan findings, and found no major soft tissue injury (65: 165).

The defense then called Dr. Richard Tovar, an emergency physician and medical toxicologist (65: 173). After Dr. Tovar had testified about his education, he began discussing his clinical experience and the type of cases he saw (65: 174-75). The State asked to take a break, and the jury was excused (65: 175). At this time, the prosecutor indicated she had received no report or summary regarding Dr. Tovar's findings or proposed testimony (65: 175).

Defense counsel acknowledged that no report had been provided, but indicated Dr. Tovar was on the witness list, and he did not prepare a report (65: 175). Further discussion revealed that counsel had not provided a written summary of the expert's proposed testimony, as required by Wis. Stat. sec. 971.23(2m)(am) (65: 176-77). While the defendant's witness list identified "Richard Tovar," it made no mention that Tovar was an expert (65: 177).

The Court expressed concern that this was "trial by ambush," and that if Dr. Tovar testified, the State's witnesses could not rebut his testimony because they had already been excused (65: 177-78). The State argued that by statute Dr. Tovar must be excluded, and expressed concern that this could result in a finding of ineffective assistance of counsel and having to re-try the case (65: 179).

Defense counsel proposed another option – withdrawing the witness, having the Court issue a curative instruction, and continuing without Dr. Tovar's testimony (65: 179). The Court replied "I don't have a problem doing that," and suggested a recess so the defense attorneys could discuss with Mr. Troka the options of either withdrawing Dr. Tovar and proceeding with trial, or with declaring a mistrial (65: 179-80).

After a 22 minute recess, defense counsel reported as follows:

> ATTORNEY MIDDLETON: Your honor, we're prepared to withdraw Dr. Tovar as a witness. We've talked to our client and evaluated it, and what he testified to we don't think is critical to our case so it's a decision that we're making strategically.

> THE COURT: All right.
>
> ATTORNEY MIDDLETON: I guess, also, we were contemplating a curative instruction to the jury that we just withdrew Dr. Tovar - - he hasn't given anything other than his background - - and we decided to go on.

(65: 180). The Court then requested a conference in chambers, held off the record, which lasted 36 minutes (65: 181). Once back on the record, the State moved for mistrial:

> DA KOHLWEY: Your honor, at this time I am moving for a mistrial. As I reported to the Court and counsel in chambers, I have had discussions at length with the victim concerning all the various aspects of what has happened; the violation that has occurred, the appellate process, the possibilities both ways, as far as going forward without Dr. Tovar's testimony or having a mistrial; advantages and disadvantages as far as Miss Zapata's concerns. And based upon her agreement with me, I am asking for a mistrial. I do not see a feasible way of proceeding at this point in time, based upon the violation, no matter what the Court may try as far as curative instructions and colloquy with the defendant. I just believe that the appellate risk is far too high and believe that mistrial is the appropriate call at this point.

(65: 181-82). After confirming that the defense had discussed the options with Mr. Troka, defense counsel objected to the mistrial motion, and the following discussion occurred:

> ATTORNEY MIDDLETON: We would object to a mistrial. We think that the Court can - - given that Dr. Tovar only introduced himself and gave his background, I don't think that he even got to necessarily - - well, he did talk about where he works, but we think that can be cured by the Court just instructing the jury that we just decided to withdraw and continue on with our case. So we would object to the mistrial and ask the Court to allow us to continue without Dr. Tovar.
>
> And I did look in some of the cases. And as to what Dr. Tovar would testify to, it's not substantive as far as, he was an expert and so not factually would we necessarily need him to continue the case (sic).

THE COURT: Well, I'm assuming Dr. Tovar was going to opine on the various injuries and potential causes of those injuries. In general.

ATTORNEY MIDDLETON: In general. That's correct, Your Honor. And we have two other experts called by the defense.

THE COURT: Well, the Court is placed in a very difficult position with regard to the motion for a mistrial. And there are a couple of options, one of which is proceeding today without Dr. Tovar and entertaining a colloquy with the defendant concerning whether to go forward or not with this witness.

The basic problem with the witness testifying has already been discussed by the Court on the record. There would be substantial potential prejudice to the State, given its lack of knowledge as to what the specific testimony of Dr. Tovar would be and the ability to have their expert witnesses testify in rebuttal, as those witnesses are people who have testified yesterday or this morning and are gone, no longer available to the Court.

In the event the Court then precludes the testimony of Dr. Tovar, whether that is done against the defendant's will or with his blessing - - and it's being represented here today that Mr. Troka is in agreement with the relinquishing of the ability to call Dr. Tovar in support of his case. Even with a well-calculated colloquy at this point, my anticipation would be that when the verdict came in, if that verdict happened to be a guilty verdict on one or both of the very serious crimes, that of attempted homicide or the strangulation - - even the substantial battery - - there would, in all likelihood, be an appeal and the very plausible argument could be made by appellate counsel and the defendant that the defendant felt compelled to go along with this at this time so that the trial could get completed, but if he had to do it all over again he would really have rather had his expert witness testify.

The risk of an ultimate finding of ineffective assistance of counsel for failing to disclose the substance of what Dr. Tovar's testimony would have been would be a substantial risk of this matter being overturned on appeal and being remanded for another trial. That would be an untenable position and would be a very likely disposition.

> As such, the Court feels compelled to grant the State's motion, and I will declare a mistrial at this time and we will reschedule this for another date just as quickly as it possibly can be put back on the calendar.

(65: 182-84).

c. Double Jeopardy Litigation

On August 26, 2014, the defense filed a Notice of Motion and Motion to Dismiss – Double Jeopardy (48: 1-4). The motion argued that once jeopardy attached, the State bears the burden of demonstrating a "manifest necessity" for any mistrial ordered over the defendant's objection (48: 3). The motion conceded there had been a discovery violation, but argued there were other options short of declaring a mistrial, including granting an adjournment so that a summary of Dr. Tovar's findings could be provided to the State's witnesses, or simply having the defense withdraw Dr. Tovar as a witness and give the jury a curative instruction (48: 3-4).

At a motion hearing on September 24, 2014, defense counsel further argued that the stated reason for granting the mistrial – fear of a finding of ineffective assistance of counsel – was premature because the defense had not finished presenting its case, and there had been no finding of guilt (66: 5).

The State acknowledged that jeopardy had attached (66: 7). However, the State argued there was a manifest necessity for a mistrial because the defense had failed to "disclose an intrical (sic) part of their evidence" (66: 7). The State acknowledged there were three options available other than granting a mistrial – (1) excluding the witness while possibly giving a curative instruction, (2) allowing the testimony but giving the State a recess or continuance to rebut Tovar's testimony, or (3) allowing the testimony and instructing the jury on the defendant's discovery violation (66: 9).

The State opined that "[w]ithout Dr. Tovar's testimony, the defendant simply would not have been able to fully present its case," yet subsequently noted "the defendant still

has not revealed what Dr. Tovar was expected to testify to" (66: 9-10). The State also argued that a continuance would not have been viable because Dr. Bendegom would not have been available to review a new report and testify the next day, as he left for Michigan immediately after his testimony (66: 12-13). Further, the State argued that allowing the testimony of Dr. Tovar and giving an adverse jury instruction for the defendant's discovery violation would not cure the prejudice to the State of being unable to rebut the testimony (66: 14-15).

The State proceeded to opine on whether defense counsel's error at trial constituted ineffective assistance of counsel, and specifically whether the exclusion of Dr. Tovar's testimony prejudiced the defense. The State argued that "[t]he elimination of Dr. Tovar's entire testimony certainly had a dramatic negative effect on the defendant's fundamental right to present his defense," and discussed the importance of experts to the case, generally (66: 16). Of course, missing from the State's argument was any mention of what Dr. Tovar's actual testimony would have been, since at that point there had been no report, no summary, and no offer of proof as to the substance of Dr. Tovar's testimony.

In response, defense counsel observed that it had called two other medical experts, and that since the State didn't know what Dr. Tovar's testimony would be, "that ground easily could have been covered by Drs. Prout or Brand" (66: 20). Attorney Middleton reiterated that they were still in the middle of the defense case, that the strategy was "within the purview of the defense," and that the defense didn't have to call any witnesses (66: 21-22).

The Court issued an oral ruling the next day, denying the motion to dismiss:

> All right, this matter is before the court with regard to the defendant's motion to dismiss based on double jeopardy grounds. And the motion was argued yesterday. The court took it under advisement to review the materials that had been submitted and the arguments that were made.
>
> We are dealing with a situation here where a jury trial had been commenced and had progressed to a point

where the defense had called an expert witness to testify and it became apparent to the state that this expert had not been disclosed, nor had any report been provided to the state of what this witness's testimony would be.

The court was adjourned briefly to address options. There were conferences with counsel and ultimately it was determined that the court would declare a mistrial. And the defense has now brought on a motion challenging that as a denial of the defendant's protection against double jeopardy.

It is clear that the expert witness had not been identified and no report had been provided by the defense to the state. As such, there was certainly a violation of the discovery rules and there is now argued by the defense the position that the court should have utilized one of the options available to it under Section 971.23 for violations of discovery orders.

The options that were presented by that statute the court finds to have been inadequate under the circumstances at the time of the stage of the trial that we were in. The state had completed its case and the doctor, the expert witness that the state had utilized, was no longer available.

That doctor had tried to avoid having to be here on the second day of trial when he wasn't able to be put on the stand on the first day of trial due to an obligation out of state. The doctor came, testified on the second day of trial and left for another state. The option of allowing a short continuance under the statute was going to provide an ineffective remedy to the situation that was created by the defense.

The defense ultimately offered to withdraw this witness and go forward and complete the trial without the use of the witness. The court finds that to have been a hollow gesture at best.

Even if the defendant had been voir dired with regard to his willingness to do such, this was clearly a witness that the defense very much wanted. It was an expert witness that a previous trial had been continued for, such that this witness could review evidence and be available to testify. To forego the use of that witness would have obviously been prejudicial to the defendant and we would have, by going forward, despite the defendant's agreement to do such, put the defendant in a situation

> where he would obviously have an ineffective assistance of counsel argument on any kind of appeal.
>
> Clearly the failure to disclose this expert witness and to provide a report of this expert witness constituted obvious deficient performance on the part of counsel and would put the defendant in a position of, by agreeing to go forward without this witness, he would be in a position to be able to argue that he was compelled to agree to forego the use of this very important witness.
>
> We're dealing with an issue of manifest necessity when it comes to the decision on the granting of a mistrial. The options that were available to this court at the time of the discovery of the problem with the witness were not adequate.
>
> They would not have provided both sides with a fair trial and the court found itself in a position compelled to grant the mistrial. To do otherwise would have created a situation where the defendant was able to essentially profit by the inappropriate conduct of counsel. To literally be able to create a situation where he would have a proverbial hold card: Go forward, take your chance with the trial, but have the opportunity to rely on an argument for ineffective assistance of counsel in the event that trial is not successful.
>
> Manifest necessity existed. The court's grant of a mistrial does not represent a denial of the defendant's right to be free from double jeopardy. The motion to dismiss on double jeopardy grounds is denied.

(67: 4-8). The court entered a written order on October 10, 2014, officially denying the motion to dismiss for double jeopardy based on the reasons given at the September 25th hearing (54: 1). It is from this ruling that the defendant appeals.

On October 23, 2014, the defendant filed a petition for leave to appeal the non-final order (57A: 1). This court issued an order granting the petition to appeal (58: 1).

ARGUMENT

I. NO MANIFEST NECESSITY EXISTED TO GRANT THE STATE'S MISTRIAL MOTION OVER THE DEFENDANT'S OBJECTION, AND SUBJECTING TROKA TO ANOTHER TRIAL WOULD VIOLATE HIS RIGHTS TO BE FREE FROM DOUBLE JEOPARDY

a. Legal Framework and Standard of Review – Double Jeopardy, Mistrial and Manifest Necessity

The Fifth Amendment to the U. S. Constitution and article I, section 8 of the Wisconsin Constitution prevent the State from trying a defendant multiple times for the same offense. "[G]iven the importance of the constitutional protection against double jeopardy, the State bears the burden of demonstrating a 'manifest necessity' for any trial ordered over the objection of the defendant." ***State v. Seefeldt***, 2003 WI 47, ¶19, 261 Wis. 2d 383, 661 N.W.2d 822. "Manifest necessity" means a "high degree" of necessity. ***Id.***

Whether a "high degree" of necessity exists rests within the trial court's discretion because that court is in the best position to determine whether the state seeks a mistrial to gain unfair advantage over the defendant. ***State v. Collier***, 220 Wis. 2d 825, 835, 584 N.W.2d 689 (Ct. App. 1998). If the State requests the mistrial, the reviewing court gives stricter and more searching scrutiny to the judge's decision than had the defendant requested or consented to it. ***Id.*** In exercising its discretion, the trial court must examine the circumstances leading to the State's motion and should consider the alternatives before depriving the defendant of the right to have the original tribunal render a final verdict. See ***Id.*** If courts are presented with a close case, doubts about the propriety of a mistrial are to be resolved in favor of the liberty of a citizen. ***Id.***

b. The Court Granted A Mistrial Based On An Improper Legal Standard And Inadequate Reasoning

The appellant does not contest the fact that trial counsel's failure to provide a summary of Dr. Tovar's testimony to the State violated Wis. Stat. sec. 971.23(2m)(am). Nor does the apellant contest the argument that two possible remedies provided by Wis. Stat. sec. 971.23(7m) – granting a short continuance or allowing Dr. Tovar to testify and giving an adverse jury instruction regarding the defendant's dereliction – would have adequately cured the potential prejudice to the State.

However, there was a perfectly viable alternative proposed by the defense, which the trial court ultimately rejected. After acknowledging the discovery violation, Mr. Troka's trial attorneys proposed to withdraw Dr. Tovar as a witness (thereby effectively excluding the witness, the appropriate remedy under sec. 971.23(7m)(a)) and giving a curative instruction to the jury (65: 179-80).

The court rejected the defense's proposed alternative based on a stated concern that, if convicted, Troka would have a "very plausible argument" that he felt compelled to proceed without Dr. Tovar's testimony based on the ineffective assistance of his attorneys (65: 183-84). Of course, concern over ineffective assistance was completely premature at that point. The defendant had not been convicted. The defense wasn't even finished presenting its case. On the first day of trial, the defense indicated its intent to present testimony from "[f]our short [witnesses]" and had presented testimony of three witnesses by the time mistrial was declared (64: 151). The court never inquired about the identity of the defense's fourth witness or what that witness's would have been.

Further, when the trial court rejected the option of proceeding without Dr. Tovar's testimony and granted a mistrial over the defendant's objection, at no point did the court make any reference to the applicable "manifest necessity" standard. Instead the court referenced only the perceived "substantial risk" of the matter being overturned on appeal based on ineffective assistance of counsel, and the court described the prospect of having the case remanded for another trial an "untenable position," (65: 183-84).

Not only is this the wrong legal standard, but the court of appeals previously rejected claims that concerns over possible reversal based on ineffective assistance of counsel could constitute a "manifest necessity" to warrant mistrial. *See* ***State v. Mattox,*** 2006 WI App 110, ¶17 718 N.W.2d 281 ("The thought that Mattox, if convicted, might appeal on ineffective assistance of counsel grounds, and that this court would agree with him and overturn the verdict, is an insufficient reason for declaring a mistrial").

Only after the defense moved to dismiss on double jeopardy grounds, citing the lack of "manifest necessity" for the mistrial, did the trial court retroactively declare that the manifest necessity standard had been met (67: 7-8). However, the court's ruling did not cite any other reasons why the defense's proposed alternative – proceeding without Dr. Tovar's testimony – would have been an inadequate procedure such that manifest necessity existed to grant a mistrial. The only reason identified by the court was a concern that if Troka got convicted, he could obtain reversal based on ineffective assistance, and thereby "profit" from counsel's error (67: 7).

The problem, as will be discussed below, is that there is no ineffective assistance without prejudice, and the court had zero facts upon which it could base a finding of prejudice at the time it granted mistrial. So even assuming *arguendo* that the court's premature concern over the possibility of conviction and reversal based on ineffective assistance of counsel could conceivably constitute "manifest necessity" in some circumstances, there was no basis for such a finding in this case.

c. The Court Had No Idea What The Excluded Expert Witness Would Have Testified, And The Court's Finding That Such Exclusion Resulted In "Obvious" Prejudice To The Defense Was Wholly Speculative

A finding of ineffective assistance requires both deficient performance and prejudice. ***Strickland v. Washington***, 466 U.S. 668, 691-94 (1984). Prejudice requires

demonstration of an actual, adverse impact on the defendant's case, such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. When an ineffective assistance claim is based on an allegation that counsel was ineffective for failure to properly call witnesses, a defendant must show with specificity what a particular witness would have said if called to testify and how this testimony would have altered the outcome of the case. See ***State v. Flynn,*** 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994). A defendant must base a challenge to counsel's representation on more than speculation. ***Flynn,*** 190 Wis. 2d at 48.

In Troka's case, trial counsel's discovery violation was certainly deficient. But the record was silent as to prejudice, primarily because the trial court had no idea what Dr. Tovar's testimony would have been.

Mr. Troka's trial counsel cited several reasons why it believed that withdrawing Dr. Tovar's testimony and proceeding with trial was the preferred option, including (1) the defense didn't believe Dr. Tovar's testimony was "critical" to its case; (2) the decision to proceed without Dr. Tovar's testimony was "strategic," and (3) Mr. Troka agreed with the suggested approach after a discussion of his options (65: 180). The fact that Troka personally agreed with this strategy strongly militates against a finding of prejudice. *See* ***State v. Leighton***, 2000 WI App 156, ¶40, 237 Wis. 2d 709, 616 N.W.2d 126 (reasonableness of counsel's actions may be substantially influenced by client); *see also* ***State v. Oswald***, 2000 WI App 3, ¶50 n.7, 232 Wis. 2d 103, 606 N.W.2d 238 (if a decision was made by the defendant himself, defendant cannot be prejudiced by counsel's advice).

When the trial court made one vague inquiry into the general topic of Dr. Tovar's proposed testimony (opinions on the various injuries and potential causes), defense counsel cited an additional reason why Tovar's testimony was potentially unnecessary – the defense had already presented two other medical expert witnesses (65: 183).

Faced with these representations from the defense, the trial court could have taken several different steps to develop a factual record on whether exclusion of Dr. Tovar's testimony would result in actual prejudice, such that a mistrial could (theoretically) constitute a "manifest necessity." The court could have had the defense present an offer of proof on Dr. Tovar's testimony, to show with specificity the proposed substance of his testimony. The court could have engaged in a colloquy with defense counsel for further clarification on how proceeding without Dr. Tovar was "strategic," and why Dr. Tovar's testimony was not "critical" to the case. The court also could have engaged in a colloquy with Mr. Troka to ascertain his true feelings on proceeding without Dr. Tovar. Any of these inquiries would have developed a factual record on whether the exclusion of Dr. Tovar's proposed testimony actually posed a risk of prejudicing Mr. Troka.

The trial court took none of those steps. In effect, the court determined there was a "substantial risk" of reversal on appeal based on ineffective assistance of counsel due to exclusion of the expert witness, while knowing absolutely nothing about the specifics of what that witness would have said or how the testimony would have altered the case (65: 184). Instead, the court presumed prejudice, completely ignoring the holdings of ***Flynn.***

The court's denial of Mr. Troka's double jeopardy claim added nothing to the analysis aside from additional speculation. With regards to potential prejudice if the defense had to proceed without Dr. Tovar, the court stated the following:

- "[T]his was clearly a witness that the defense very much wanted. It was an expert witness that a previous trial had been continued for, such that this witness could review evidence and be available to testify. To forego the use of that witness would have obviously been prejudicial to the defendant " (67: 6)

- "[B]y agreeing to go forward without this witness, he would be in a position to be able to argue that he was compelled to agree to forego the use of this very important witness" (67: 7)

Despite claiming there would be "obvious" prejudice and describing Dr. Tovar as a "very important" witness, the court's findings are completely devoid of any reference to what Dr. Tovar would have testified to, and how his testimony would have impacted the trial. The court provided no factual basis to justify implicitly disregarding Attorney Middleton's representation that Dr. Tovar's testimony was not "critical" to the defense case (65: 180).

Nor did the court provide any factual basis to implicitly disregard Attorney Middleton's statement that, although Dr. Tovar would have commented on the injuries and causation "generally," the defense had already called two other medical witnesses (65: 180). Would Dr. Tovar have testified to anything differently than those medical two witnesses? Would his testimony have added anything of substance to the defense case? Or would it have been rendered unnecessary by the defense's next witness, of which the court made no inquiries? The court's decision did not address any of these points, because the court had absolutely zero facts at its disposal to address such questions.

The exercise of discretion "contemplates a process of reasoning" based on the facts of record. ***State v. Lehman***, 108 Wis.2d 291, 300, 321 N.W.2d 212 (1982). In this case, the court's exercise of discretion was based on guesswork and speculation rather than facts in the record. The court's decision to grant a mistrial was (1) based the wrong legal standard, specifically a "substantial risk" of reversal on appeal rather than manifest necessity; (2) improper, because ***State v. Mattox*** demonstrates that concern about possible reversal for ineffective assistance does not constitute a manifest necessity; (3) premature, because Troka hadn't been convicted of anything yet, and the defense hadn't finished presenting its case; and (4) speculative, because the court knew nothing about the specific testimony Dr. Tovar intended to provide, or what impact such testimony would have on the case.

Trying Mr. Troka again would violate his right against double jeopardy. Counts 1, 2, 3, and 4 of the Information must be dismissed, and the case should be remanded for further proceedings (sentencing) on count 5.

CONCLUSION

For the reasons discussed in this brief, the defendant-appellant respectfully requests that the court reverse the trial court's non-final order denying the motion to dismiss counts 1-4 on double jeopardy grounds, grant dismissal of those counts, and remand to the circuit court for further proceedings on count 5.

Respectfully submitted: 4/13/2015:

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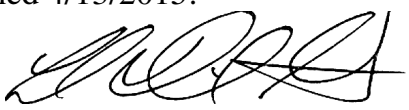
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 5,468 words.

Signed 4/13/2015:



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CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)

I hereby certify that:

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