STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2014AP2470-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RUSSELL C. TROKA,

Defendant-Appellant.

ON PERMISSIVE PRETRIAL APPEAL FROM A NON-FINAL ORDER DENYING A MOTION TO DISMISS ON DOUBLE JEOPARDY GROUNDS, ENTERED IN THE CIRCUIT COURT FOR COLUMBIA COUNTY, THE HONORABLE DANIEL GEORGE, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Did the trial court properly exercise its discretion when it declared a mistrial over Troka's objection?

After the state rested, defense counsel called an expert witness in violation of the discovery statute. The trial court thoroughly explored with the parties several options for addressing counsel's error: allowing the expert to testify for the defense despite the discovery violation and despite the state's inability to rebut his opinion testimony with its own now-unavailable expert; excluding the witness; or allowing defense counsel to withdraw the witness, coupled with a curative instruction that the jury disregard his testimony to that point. The trial court agreed with the state that there was no viable alternative short of a mistrial to safeguard both the state's and Troka's rights to a fair trial.

The trial court denied Troka's motion to dismiss alleging a double jeopardy violation at the outset of the retrial. The court held there was a "manifest necessity" for a mistrial.

Troka petitioned for leave to appeal the non-final order denying his motion to dismiss. This Court granted leave to appeal without objection by the state November 10, 2014.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The state does not request oral argument or publication. This Court is being asked to review the trial court's exercise of discretion to declare a mistrial over the objection of the defense. This involves the application of established principles of law to the unique facts presented.

STATEMENT OF THE CASE

Russell Troka was charged with attempted first-degree intentional homicide contrary to Wis. Stat. §§ 940.01(1)(a), 939.32 and 968.075(1)(a), strangulation or suffocation, domestic abuse related, contrary to Wis. Stat. §§ 940.235(1) and 968.075(1)(a), substantial battery, contrary to Wis. Stat.

§§ 940.19(1) and 968.075(1)(a), and disorderly conduct, domestic abuse related, contrary to Wis. Stat. §§ 947.01(1) and 968.975(1)(a) (1; 11; A-Ap. 1-2; 64:5-6).

The charges arose out of Troka's alleged assault on his wife in the early morning hours of July 21, 2013, at a campground in the Columbia County Town of West Point. The state alleged that Troka battered his wife, Andrea Zapata, and tried to strangle her to death before she fought him off and escaped (*id.*). Troka went to trial on these charges June 11-12, 2014 (64-65). The trial court granted the prosecutor's motion for a mistrial during the defense case and ordered a retrial. Troka moved to dismiss on double jeopardy grounds before the retrial. The trial court denied the motion and Troka now appeals.

The pretrial hearing on Troka's motion to adjourn the trial.

At a pretrial hearing held March 11, 2014, defense counsel moved for an adjournment of the trial scheduled for March 18 in response to medical reports turned over by the state in discovery on February 27. These were the reports of the medical examinations performed on the victim by the emergency room and ear, nose and throat doctors, and the results of her CT scan (63:6-8). Counsel explained that the defense needed more time to review those reports, "including consulting with an expert since they are basically medical documents." Counsel explained that "this is significant as far as the case will go, and we need more time to address that matter and deal with that information" (63:6-7). When pressed by the trial court as to the need for an adjournment to address these medical records, defense counsel explained:

> I specifically am going to consult with Dr. Tovar (ph.). I have – which is, he's an independent SANE expert. I have funding for that. Now that I know the names of the doctors, I plan on calling them. I have amended my witness list. I think that the reports are ambiguous and so it makes their testimony important to the defense, in

> putting on a proper defense, to examine exactly what is being said in these reports, because I don't think that they necessarily categorically support the charges that are laid out here.
>
> So we are at a disadvantage because we haven't been able to consult those doctors and we haven't been able to sufficiently consult our doctors about the specific medical conclusions that are made in these reports – which are significantly different than the amended Complaint which was filed on the 20th, which talks about this broken nasal cavity or fractured nasal cavity, and which are significantly different than the SANE nurse, which is making – I don't know if she can even make a diagnosis as to whether or not the bone is fractured. Can she interpret a CT scan? I don't know. But I think that without having those scans and without having the M.D., the ER reports, then we are at a disadvantage.

(63:13).

The prosecutor opposed an adjournment, arguing that Dr. Tovar, "if he's an independent SANE expert," could have been consulted sooner because the SANE nurse's reports (prepared by nurse Julia Basa (65:29-30)) were disclosed months earlier (63:14-15).

The trial court granted the adjournment over the state's objection for "good cause" shown because, "[i]t does make sense that additional time is needed to reasonably investigate and prepare," and because Troka "does have a right to be appropriately represented" (63:15-16).

The state's case at trial.

Andrea Zapata testified that, after a night of drinking at the campground, Troka attacked her unprovoked as she lay sleeping in their tent early July 21, 2013. Troka punched Zapata in the face, strangled her with his bare hands, and threatened to kill her, exclaiming as he strangled her: "I'm gonna kill you, bitch. Shut up" (64:91-93). According to Zapata, Troka was "suffocating" her and she feared for her life (64:93-94). Zapata fought back, succeeded in getting

Troka off of her, and escaped to her car. Troka pursued her, pounded on the windows of her car and continued to threaten to kill Zapata. She drove off to another part of the campground and eventually drove home to Madison (64:94-95, 97).

Zapata's report of being strangled was corroborated by the observations of police officers who met with her on July 21-22, and by the photographs taken of her face and neck that were introduced into evidence at trial (65:81, 84-86, 98, 104-05, 127-28). When interviewed by police, Troka admitted that he was drinking but could not remember anything that happened between the time he was dancing in the campground's bar earlier in the evening and when he woke up in their tent at 5:00 a.m. July 21 with Zapata screaming at him (65:108-10).

Zapata was examined July 22, 2013, by Sexual Assault Nurse Examiner (SANE) Julia Basa. According to Basa, Zapata's face was bruised and swollen. There were bruises on both sides of her face, and multiple bruises on her left arm (65:35, 38-40). Because Zapata reported having been strangled, Basa examined her for evidence of strangulation (65:35). Basa had Zapata demonstrate with her own hands how Troka strangled her (65:40-41). Basa testified that the results of her examination were consistent with Zapata's report of strangulation (65:42-43). Those findings caused Basa to refer Zapata for a follow-up examination by the emergency room physician due to the potential for delayed symptoms, even death, from internal injuries after a strangulation victim is released (65:44-46).

Upon nurse Basa's referral, Zapata was examined on July 22, 2013, by Meriter Hospital emergency room doctor Jeffrey Van Bendegom for evidence of strangulation (65:5). He found petechiae – broken blood vessels – on her anterior neck over the voice box (65:6). He found marks and soft tissue swelling on the outside front of her neck. Zapata complained of coughing up blood (65:7). Dr. Van Bendegom ordered a CT scan of the soft tissue in Zapata's neck, as well

as an endoscopy – inserting a small camera scope through her nose and down her throat to look for internal damage to the voice box. He also ordered an ear, nose and throat examination (65:9-10). Dr. Van Bendegom explained that this "work up" for a patient who reports strangulation is to check for further injury when there are findings consistent with the report of strangulation. He noted that not all patients who are strangled show internal injuries (65:12).

These examinations revealed no injuries to Zapata's airway so Dr. Van Bendegom allowed her to be released (65:10). He admitted not knowing how Zapata's injuries occurred (65:12), but opined that the appearance of petechiae on the outside of Zapata's neck was consistent with her complaint of strangulation until proven otherwise (65:13). Dr. Van Bendegom also found evidence of a nasal fracture and bruising to her forearm (65:6, 8, 14). His diagnosis: "Strangulation, nasal bone fracture" (65:14).

Defense counsel's cross-examination of Dr. Van Bendegom established that Zapata's eyes appeared to be normal and her nose was not deformed (65:16-17). There was no spinal cord injury (65:21). Dr. Van Bendegom's diagnosis of "strangulation" was based on his physical findings, but also on the history provided by Zapata (65:24). He could not determine how much force was used or for how long she was strangled. He also could not determine when her nose was broken (65:25-26).

The defense case.

Troka called three witnesses in his defense. The first was Dr. Tyler Prout, the radiologist who performed the CT scan of the soft tissue inside Zapata's neck ordered by Dr. Van Bendegom (65:152). Dr. Prout testified that the CT scan revealed no traumatic injuries to her airway (65:152-53). He also found a nasal bone fracture, but could not determine how old it was (65:153, 156-57).

The second defense witness was Dr. William Brand, the resident who performed the ear, nose and throat examination of Zapata that was ordered by Dr. Van Bendegom. Dr. Brand examined Zapata after he reviewed the results of her CT scan (65:164). He performed the endoscopy, inserting what he described as a small scope through her nose to examine Zapata's airway in response to her complaints of strangulation and difficulty swallowing. Dr. Brand found no trauma to her airway, no blood and her vocal cords were fine. Zapata was breathing well, he said (65:159-60). Dr. Brand's external examination revealed bruising to Zapata's neck and underneath her jaw. Her ears were clear and there was no further evidence of external trauma (65:160). Defense counsel got Dr. Brand to admit that the red line on Zapata's neck and the mark under her chin could have been caused by a neck brace (65:163-64). Dr. Brand found no major soft tissue injury. While he also found evidence of a nasal fracture, Brand could not determine how old it was (65:165).

On cross-examination by the prosecutor, Dr. Brand testified that he had never seen a neck brace cause petechiae to the anterior front of the throat. Dr. Brand said the bruising he saw was consistent with strangulation (65:166-67). Dr. Brand also explained that strangulation can be fatal both at the time it occurs and in the days or weeks thereafter due to delayed symptoms (65:169). His findings were consistent with Zapata's report of strangulation (65:169-70). Dr. Brand added that Zapata complained of difficulty eating solid foods, of vomiting and coughing. He described these symptoms as "classic signs" of strangulation. Dr. Brand recommended a diet of soft foods because of Zapata's apparent esophagus injury (65:170-71).

The third, and last, defense witness was Dr. Richard Tovar. Unlike nurse Basa and the other three doctors who had testified so far, Dr. Tovar did not examine Zapata. He was called by defense counsel strictly as an expert to opine on the nature and possible causes of Zapata's injuries (65:173, 183).

Dr. Tovar described himself as board certified in Wisconsin in medical toxicology and emergency medicine, and he still practices in both. Dr. Tovar testified that he also works part-time as a Waukesha County law enforcement officer (65:174-75). He is employed by Infinity Health Care, an entity that staffs a number of emergency rooms. Dr. Tovar said he runs the emergency room at Beaver Dam Hospital. He has worked in emergency rooms for over twenty-five years and has seen "blunt and penetrating trauma . . . you see all ages from pregnant ladies to babies, all the way up to older folks" (65:174-75).

When defense counsel asked Tovar, "would that include —," the prosecutor objected before counsel could finish the question (65:175). The prosecutor objected to Tovar's testimony on the ground that he was called as a defense expert without having provided a report or written summary of his testimony before trial, in violation of Wis. Stat. § 971.23(2m)(am). Defense counsel conceded that Tovar had not provided a written report or summary because, "[w]e just consulted him" (65:175). Defense counsel insisted, however, that he had mentioned Dr. Tovar's name in the past and had included Tovar on his witness list. The prosecutor denied having received Tovar's curriculum vitae (65:176).

The trial court ordered a recess to discuss this further (*id.*). After the recess, defense counsel stated that he had gotten an adjournment of the trial at an earlier hearing to consult with Dr. Tovar and said he had included Tovar on his witness list. He did (*See* 34; 44). Counsel admitted he had no record showing that he sent Tovar's curriculum vitae to the prosecutor. In response, the prosecutor pointed out that defense counsel's witness list, although it was dated May 13, 2014, was not faxed to him until June 10, 2014, the day before trial. Moreover, this particular witness was identified on the witness list only as "Richard Tovar" of Delafield. He was not identified as an expert or even as a

doctor (34; 44; 65:177). Defense counsel referred to a letter he sent on March 7 that listed Dr. Tovar as a witness[1] and accompanied another letter sent the same day requesting an adjournment of the trial to obtain a defense expert (65:178).

The trial court remarked that had the state proceeded in this fashion, defense counsel would be "screaming for a mistrial" (65:177). The court also found that the state was put at a disadvantage because it was in no position to be able to rebut Dr. Tovar's opinion testimony. Because she was not provided a report or written summary of Dr. Tovar's testimony before trial, the prosecutor could not question her own expert, Dr. Van Bendegom, in the state's case-in-chief in anticipation of Tovar's opinion testimony. Because she released Dr. Van Bendegom, who had already testified after having delayed his vacation to do so (64:148-49; 65:29; 66:13; R-Ap. 111), the prosecutor had no expert available to rebut Tovar's opinion testimony regarding Zapata's injuries. The trial court described this as "trial by ambush" (65:177-78).

Recognizing that he had violated the discovery statute, defense counsel offered to withdraw Dr. Tovar as a witness and to have the court give a jury instruction announcing that fact and directing the jury to disregard Tovar's testimony up to that point (65:179-80). The court took another recess.

[1] No such letter can be found in the trial court record.

After this second recess, defense counsel announced that he had made the "strategic" decision to withdraw Dr. Tovar as a defense witness, and to agree to a curative instruction. Defense counsel now claimed that Dr. Tovar's testimony was not "critical" to the defense case (65:180). The court took another recess to discuss this further with counsel in chambers (65:180-81).

The mistrial order.

After this third recess, the state moved for a mistrial. The prosecutor argued that there were no other viable alternatives to address the discovery violation by defense counsel. Withdrawing Dr. Tovar as a defense witness was not a realistic solution because it would create a great risk of reversal on appeal. This was so because Dr. Tovar's expert testimony would address the nature and cause of Zapata's injuries, and the loss of his testimony was due to the ineffectiveness of defense counsel (65:181-82).

Defense counsel objected to a mistrial. He again insisted that withdrawing Dr. Tovar was a viable alternative short of a mistrial (65:182). Counsel argued that Dr. Tovar's testimony was "not substantive" because he would opine "in general" about Zapata's "various injuries and potential causes of those injuries." Counsel also pointed out that he had already called two other experts in the defense case to discuss Zapata's injuries (65:183).

The trial court again pointed to the inability of the state to either anticipate or rebut Dr. Tovar's expert opinion testimony. The court agreed with the prosecutor that had it accepted defense counsel's offer to withdraw Tovar, his client would be handed a substantial ineffective assistance claim on the dual grounds that: (a) defense counsel was ineffective for failing to comply with the discovery statute, causing the loss of Dr. Tovar's favorable opinion testimony regarding Zapata's injuries; (b) to compound his error, so the argument would likely go, defense counsel then coerced Troka into agreeing to continue with the trial but without Dr. Tovar's

favorable expert opinion testimony, rather than agreeing to a retrial soon thereafter with Dr. Tovar's favorable testimony (65:183-84). Because it believed that reversal of a guilty verdict on appeal would be "very likely" under these circumstances, the trial court declared a mistrial (65:184).

The denial of Troka's motion to dismiss.

Troka filed a motion to dismiss on double jeopardy grounds before the retrial (48). A hearing on the motion was held September 24, 2014 (66). Defense counsel argued that there was not a "manifest necessity" for a mistrial (66:4-7; R-Ap. 102-05).

The prosecutor explained in detail why there was a "manifest necessity" warranting a mistrial (66:7-18; R-Ap. 105-16). She argued that the only viable remedy for defense counsel's discovery violation would have been to bar Dr. Tovar from testifying. Allowing his testimony with an indefinite continuance for the state to find its vacationing expert for rebuttal, or with a curative instruction, would not work. Disallowing or withdrawing Dr. Tovar's testimony would result in the loss of important defense testimony. This would create a strong ineffective assistance challenge on appeal because the loss of his testimony was caused by defense counsel's deficient performance in the form of (1) the discovery violation, and (2) counsel's advice to Tovar that he go ahead with the trial without Dr. Tovar's testimony rather than opt for a retrial with Tovar's testimony. This was also prejudicial because counsel's error resulted in the loss of an important defense expert witness in what was otherwise a "he said/she said case" that turned on expert testimony. The result would likely be "a retrial years later rather than months later" and, the prosecutor argued, "justice delayed is justice denied both for the victim and the defendant" (66:12-18; R-Ap. 110-16).

Defense counsel argued in response that the state failed to prove a "manifest necessity" because he was willing to withdraw Dr. Tovar as a defense witness (66:18-22; R-Ap.

116-20). Defense counsel insisted that Dr. Tovar's testimony was not all that important to the defense, but acknowledged that he had "contract[ed]" with Dr. Tovar and that counsel's non-compliance with the discovery statute "was an oversight on our part" (66:19; R-Ap. 117). Defense counsel also acknowledged that the state's lone expert, Dr. Van Bendegom, "may not have been available on Friday" for rebuttal, but argued that the state could have asked for a recess "to a later date" to call him in rebuttal if Dr. Tovar were allowed to testify (66:22; R-Ap. 120).

The trial court's decision.

The trial court issued an oral decision from the bench the next day denying Troka's motion to dismiss on double jeopardy grounds (67:4-8; R-Ap. 122-26). The court found that Dr. Tovar was not identified as an expert on the witness list provided by defense counsel, and defense counsel did not produce a report or summary of Dr. Tovar's anticipated testimony (67:51; R-Ap. 123). Letting Tovar testify was not a viable option because the state lost its ability to rebut his testimony when it rested and released its expert, Dr. Van Bendegom, who then went on vacation out of state. Granting the state an indefinite mid-trial continuance to await Dr. Van Bendegom's return was not feasible (67:5-6; R-Ap. 123-24).

The defense offer to withdraw Dr. Tovar as a witness, the trial court found, "was a hollow gesture at best" because Tovar was "very much wanted" by the defense as evidenced by defense counsel's successful pretrial motion to adjourn the trial to enable him to consult with Dr. Tovar upon receiving the victim's medical reports from the state (67:6; R-Ap. 124). Troka would have had a viable ineffective assistance of counsel challenge on appeal if the trial court accepted defense counsel's offer to withdraw Tovar as a defense witness. After defense counsel caused the problem in the first place by violating the discovery statute, Troka could argue that counsel then compounded his error by coercing him into completing the trial but without his expert's

exculpatory testimony, rather than agreeing to a mistrial so that Dr. Tovar could testify on Troka's behalf at the retrial a short time later. In that way, Troka would profit from his own attorney's "inappropriate conduct" and Troka would be handed a "hold card" by his attorney to be played on appeal should he be found guilty. This, the trial court concluded, all added up to a "manifest necessity" justifying its declaration of a mistrial (67:7-8; R-Ap. 125-26). The trial court issued a written order denying the motion to dismiss October 10, 2014 (54).

ARGUMENT

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DECLARING A MISTRIAL BECAUSE DEFENSE COUNSEL'S DEFICIENT PERFORMANCE CREATED A MANIFEST NECESSITY FOR IT.

Defense counsel's discovery violation risked denying the state its right to a fair trial by taking away its ability to rebut Dr. Tovar's testimony about the nature and cause of the victim's injuries had Dr. Tovar been allowed to testify. Defense counsel's offer to withdraw Dr. Tovar as a defense expert witness was a "hollow gesture" because counsel's discovery violation could deny Troka his right to a fair trial by depriving him of the favorable testimony of an important medical expert witness on a central issue in dispute—the nature and cause of the victim's injuries. Had the trial court let defense counsel withdraw Dr. Tovar, Troka would have been handed a viable ineffective assistance challenge on direct appeal that would have resulted in the same remedy but many months later – a retrial at which Dr. Tovar would testify.

The trial court wisely remedied the situation by declaring a mistrial and ordering a retrial to enable the defense to comply with the discovery statute and put Dr. Tovar on the stand. The trial court properly exercised its discretion to provide the same relief an ineffective assistance

challenge would have provided, only sooner rather than later: a retrial that would include Dr. Tovar's testimony. In so doing, the trial court ensured that the state, but especially Troka, received a fair trial with the testimony of all witnesses, and without the unnecessary delay and expense of judicial resources that plowing ahead with the trial would likely have caused.

A. The applicable law and standard for review of a double jeopardy challenge to a retrial on the ground that there was not a "manifest necessity" for declaring a mistrial.

A defendant is protected by the Fifth Amendment to the U.S. Constitution and Wis. Const. art. I, § 8 from being placed in jeopardy twice for the same offense. *State v. Williams*, 2004 WI App 56, ¶ 23, 270 Wis. 2d 761, 677 N.W.2d 691, *rev. denied*, 2004 WI 50, 271 Wis. 2d 110, 679 N.W.2d 546 (Table). Jeopardy attaches when the jury is sworn. *Id.* (citing *State v. Comstock*, 168 Wis. 2d 915, 937, 485 N.W.2d 354 (1992)). The right to be free from double jeopardy includes a defendant's "valued right to have his trial completed by a particular tribunal." *Id.* (citing *State v. Seefeldt*, 2003 WI 47, ¶ 16, 261 Wis. 2d 383, 661 N.W.2d 822).

The Double Jeopardy Clause allows a trial judge to declare a mistrial over defense objection if the judge finds there is a "'manifest necessity'" for it or "'the ends of public justice would otherwise be defeated'" if the trial were to continue. *Illinois v. Somerville,* 410 U.S. 458, 461 (1973) (quoting *United States v. Perez*, (9 Wheat.) 579, 580 (1824)); *State v. Mattox,* 2006 WI App 110, ¶ 13, 293 Wis. 2d 840, 718 N.W.2d 281. *See United States v. Dinitz,* 424 U.S. 600, 606-07 (1976).

Competing with the defendant's right to have his case completed before a particular jury is "the public interest in affording the State one full and fair opportunity to present

its evidence to an impartial jury." *Williams,* 270 Wis. 2d 761, ¶ 24 (citing *Seefeldt*, 261 Wis. 2d 383, ¶19). This public interest overrides the defendant's right when there is a manifest necessity for a mistrial. *Williams,* 270 Wis. 2d 761, ¶ 24; *accord Oregon v. Kennedy*, 456 U.S. 667, 672 (1982) ("The 'manifest necessity' standard provides sufficient protection to the defendant's interests in having his case finally decided by the jury first selected while at the same time maintaining 'the public's interest in fair trials designed to end in just judgments.'") (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)).

The decision whether to grant a mistrial rests within the sound discretion of the trial court reversible only for a clear showing of an erroneous exercise thereof. *State v. Doss,* 2008 WI 93, ¶ 69, 312 Wis. 2d 570, 754 N.W.2d 150; *State v. DeLain,* 2004 WI App 79, ¶ 25, 272 Wis. 2d 356, 679 N.W.2d 562. *See State v. Moeck,* 2005 WI 57, ¶¶ 40-43, 280 Wis. 2d 277, 695 N.W.2d 783. When exercising that discretion, the trial court should always consider alternatives short of declaring a mistrial, including the use of cautionary instructions. *Id.* ¶¶ 71-72, 78-79. *See State v. Adams,* 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998). The appellate court should, however, defer to a reasonable trial court mistrial declaration over defense objection when the error was caused by the defense. *Arizona v. Washington,* 434 U.S. 497, 513-14 (1978).

The burden is on the prosecution to demonstrate at trial that there was a "manifest necessity" for declaring a mistrial over the defendant's objection. *Id.* at 505; *Seefeldt,* 261 Wis. 2d 383, ¶ 19.

The term "manifest necessity" is not to be interpreted literally. It is not an absolute necessity, but a "high degree" of necessity. *Arizona,* 434 U.S. at 506; *Seefeldt,* 261 Wis. 2d 383, ¶ 19; *State v. Barthels*, 174 Wis. 2d 173, 183, 495 N.W.2d 341 (1993), *abrogated on other grounds by State v. Seefeldt*, 2003 WI 47, 261 Wis. 2d 383, 661 N.W.2d 822. The circuit court may declare a mistrial when it determines, after considering all the circumstances, that manifest

necessity compels the declaration of a mistrial because the ends of justice would be defeated were the trial to continue. *State v. Copening*, 100 Wis. 2d 700, 709, 303 N.W.2d 821 (1981) (citing *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824)). "The determination whether a manifest necessity exists is a fact-intensive question." *Moeck*, 280 Wis. 2d 277, ¶ 37.

The "manifest necessity" standard cannot be applied mechanically but must be applied with reference to the particular problems confronting the trial court.

> [T]he prohibition against retrial is not a mechanical rule to be applied to prevent any second trial after the first trial is terminated prior to judgment. We have recognized that criminal trials can be complicated and lengthy. Numerous technical or otherwise unforeseen eventualities may arise that necessitate terminating a trial. Treating the prohibition against retrial as a mechanical rule that prevents a second trial in all circumstances would be too high a price to pay for the added assurance of personal security and freedom from governmental harassment which such a mechanical rule would provide.

Seefeldt, 261 Wis. 2d 383, ¶ 18 (citations and internal quotation marks omitted).

The issue for the appellate courts is not whether the mistrial declaration was complete or even correct; it is only whether the mistrial declaration was reasonable. *See* George C. Thomas III, *Solving the Double Jeopardy Mistrial Riddle*, 69 S. Cal. L. Rev. 1551, 1566-67 (1996) (when Justice Story first coined the term "manifest necessity," he meant it to be a guide to trial judges in exercising their virtually unreviewable discretion to declare a mistrial). The strictest scrutiny is reserved for those mistrials declared due to "the unavailability of critical prosecution evidence, or when there is reason to believe the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused." *Arizona,* 434 U.S. at 508. The least exacting scrutiny is applied to a mistrial declared when a jury is genuinely deadlocked. *Id.* at 509-10. *See Seefeldt,* 261 Wis. 2d 383, ¶¶ 25-26.

A trial judge's declaration of a mistrial brought about by the misconduct of defense counsel is entitled to "special respect." *Arizona*, 434 U.S. at 510-11. *See Seefeldt,* 261 Wis. 2d 383, ¶ 27. Even assuming another judge would have let the trial proceed and given cautionary instructions in response to an improper comment in opening statements by defense counsel, "the overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment." *Arizona,* 434 U.S. at 511.

As the Court explained in *Somerville,* the trial court properly exercises its discretion in declaring a mistrial if, "an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial." 410 U.S. at 464. This is similar to the situation where a mistrial is necessary to avoid an unjust acquittal of the defendant caused by defense counsel's error. The defendant's interest in finality is sometimes subordinate to, "the State's legitimate interest in avoiding an improvident acquittal by being able to abort a proceeding in which its prosecutorial position is fundamentally impaired." Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81, 93 (University of Chicago Law School) (discussing *Illinois v. Somerville,* 410 U.S. 458 (1973)).

> The government has a strong interest in retrial when improper conduct by the defense threatens an unjust acquittal, because the only way to protect the government interest in a fair opportunity to convict and "the overriding interest in the evenhanded administration of justice" is to declare a mistrial and retry the case to an untainted jury. Not only is the government interest strong, but the defendant's interest is diminished because the defense is responsible for the corruption of the initial trial.

Anne Bowen Poulin, *Double Jeopardy Protection from Successive Prosecution: A Proposed Approach*, 92 Geo. L.J. 1183, 1257 (2004) (footnote omitted).

The great deference owed to the trial judge's discretionary decision to declare a mistrial in these circumstances is to be tempered with due consideration of the importance of the defendant's right to have his trial completed before "'a tribunal he might believe to be favorably disposed to his fate.'" *Arizona,* 434 U.S. at 514 (quoting *United States v. Jorn,* 400 U.S. 470, 486 (1971)).

The trial court must exercise "sound discretion" when balancing the defendant's interest in seeing his trial to completion despite defense counsel's error against the public's interest in the fair and even-handed administration of justice. *Seefeldt,* 261 Wis. 2d 383, ¶¶ 28, 35. The trial court should not act hastily and it must give both sides "a full opportunity to explain their positions" with due consideration to the defendant's interest in having his trial concluded in a single proceeding. *Id.* ¶ 28. Sound discretion requires acting deliberately and taking sufficient time in response to the state's mistrial motion to give both sides the opportunity to explain their positions, and to explore viable alternatives short of mistrial such as curative instructions or sanctioning counsel. The trial judge must ensure that the record reflects an adequate basis for a "manifest necessity" finding. *Id.* ¶¶ 36-37.

The appellate court should not disturb a mistrial declaration in such a case unless it is "irrational[] or irresponsibl[e]." *Arizona*, 434 U.S. at 514. Accordingly, if the appellate court is to independently review the record at all, it should do so in an effort to *uphold* rather than undermine the trial court's discretionary decision. *Id.* at 516-17 (mistrial declaration upheld even though the trial judge failed to make an explicit "manifest necessity" finding because, "[t]he basis for the trial judge's mistrial order is adequately disclosed by the record" despite the judge's failure "to articulate on the record all the factors which

informed the deliberate exercise of his discretion." *Id.* at 517 (footnote omitted)). The "close case" is to be resolved in favor of the trial court's mistrial declaration. *See* Westen & Drubel, 1978 Sup. Ct. Rev. at 96-97.

B. This Court should give "special respect" to the trial court's reasonable exercise of discretion in declaring a mistrial over Troka's objection. The trial court did so only after thoroughly exploring all available options to remedy defense counsel's discovery violation. It reasonably sought to avoid the situation where a conviction would likely be reversed on appeal on an ineffective assistance challenge, resulting in the same retrial with Dr. Tovar's testimony that it ordered here. The trial court acted reasonably to safeguard both the state's and Troka's rights to a fair trial designed to end in a just judgment, while also protecting the victim's right to justice that was not delayed or denied.

Make no mistake, despite defense counsel's after-the-fact protestations to the contrary, Dr. Tovar was an important witness for the defense. He was prepared to render an expert opinion about the nature and cause of Zapata's injuries. Dr. Tovar was qualified to do so because he was board certified in toxicology and emergency medicine (65:174). He was described as an "independent SANE expert" (63:13), who had seen trauma of all types in his twenty-five years of experience in emergency rooms and as head of the Beaver Dam Hospital emergency room (65:174). This is not to mention his experience working part-time in law enforcement for Waukesha County. These qualifications enabled Dr. Tovar to opine on everything the examining doctors and the SANE nurse, Basa, had to say about

Zapata's injuries. These qualifications enabled Dr. Tovar to review and interpret the findings in their reports and the CT scan results.

The outcome of this trial would in all reasonable likelihood have turned on the jury's assessment of the nature and cause of Zapata's injuries. That is why defense counsel moved for, and obtained, an adjournment of the trial to consult with Dr. Tovar three months before trial (63:13, 15-16). That is why defense counsel called Dr. Tovar to the stand as his last expert witness at trial.

The jury had to resolve all of the following fact issues: (a) whether Troka battered Zapata; (b) if so, whether he caused her "substantial bodily injury," Wis. Stat. § 940.19(2); (c) whether Troka intended to kill her; (d) whether Troka strangled her; (e) if so, whether Troka intentionally strangled Zapata with the intent to impede the circulation of blood or normal breathing by applying pressure to her throat or neck, Wis. Stat. § 940.235(1); (f) whether Troka's assaultive actions against Zapata "demonstrate[d] unequivocally" that he formed the intent to kill her and she would have died but for the "extraneous factor" of her resistance and escape, Wis. Stat. § 939.32(3); (g) whether Troka broke her nose that night; or (h) whether the nasal fracture was an old injury.

Dr. Tovar, with his extensive experience treating traumatic injuries in emergency rooms for twenty-five years, and in law enforcement, would in all likelihood have directly or indirectly addressed most, if not all, of the above issues favorably to Troka. The state's emergency medicine expert and treating physician, Dr. Van Bendegom, would have then been called to rebut that testimony had he not been released.

Troka does not dispute that his attorney performed deficiently when he called Dr. Tovar to the witness stand without identifying him as an expert defense witness, and without providing a report or written summary of Tovar's anticipated testimony before trial as required by Wis. Stat.

§ 971.23(2m)(am). Tovar was called after the state had rested and released its own expert, Dr. Van Bendegom, who then left on vacation out of state. An indefinite continuance in the midst of trial with a sitting jury to await Dr. Van Bendegom's return was not feasible. Allowing Dr. Tovar to testify would have been unfair to the state because his testimony could not be rebutted by the state's expert. That unfairness was caused entirely by defense counsel's violation of the discovery statute. Troka has the right to a fair trial, but so does the state. *State v. Grande,* 169 Wis. 2d 422, 434, 485 N.W.2d 282 (Ct. App. 1992). The trial court acted reasonably to protect the state's right to a fair trial when it ruled that allowing Dr. Tovar to testify was not a viable option.

Troka argues, "no problem," because he was willing to proceed without Dr. Tovar's testimony and with a curative instruction (presumably telling the jury that Tovar could not testify because of the discovery violation). Things are never as simple as they seem and two wrongs do not make a right. Troka would have been deprived of his expert's testimony addressing most if not all of the above disputed fact issues solely because of his attorney's error. That error would have been compounded if counsel then forced Troka to agree to proceed to verdict without Dr. Tovar's exculpatory expert testimony rather than advising Troka to agree to a mistrial so that everyone could start all over, but this time with the benefit of having Dr. Tovar's testimony in his defense, only a few weeks later.

Defense counsel no doubt knew that Dr. Tovar had valuable and favorable testimony regarding the nature and cause of Zapata's injuries based upon his independent review of all her medical records, the CT scan, and the photographs of her injuries. His many years of emergency room experience examining and treating traumatic injuries gave him that expertise to opine on her injuries. Counsel certainly would not have called Tovar to the stand without knowing in advance that his testimony would be favorable to Troka's defense — that he did not commit substantial

battery to Zapata, did not strangle her, did not break her nose and did not intend to kill her. The loss of that expert testimony could, therefore, only have hurt Troka's defense.

Both the state and the trial court reasonably recognized the importance of Dr. Tovar's expert testimony before and at trial.[2]

The trial court correctly labeled defense counsel's offer to remedy his discovery violation by withdrawing Tovar as a witness "a hollow gesture at best." The court correctly recognized that this "strategic" decision would (a) deny Troka an important defense witness, and (b) simply give his client a viable ineffective assistance challenge on appeal if the jury found him guilty (a "hold card").

The trial court reasonably opted for a retrial sooner rather than much later after appeal. Counsel's deficient performance was conceded by Troka and the resulting prejudice caused by the loss of Tovar's expert opinions as to the nature and cause of the victim's injuries was real. The state's case as to the severity of Zapata's injuries and Troka's intent to kill was sufficient but not overwhelming. There was external evidence of choking, but little internal evidence of it. It is not clear how long and with what degree of force Troka strangled Zapata. Zapata had a broken nose,

[2] Troka insists that Dr. Tovar's testimony was not as important as that of the three examining physicians who had already testified, two for the defense. True, Dr. Tovar did not examine Zapata, but Troka ignores the fact that Dr. Tovar reviewed the medical examination reports prepared by the other doctors and the SANE nurse, the CT scan, the endoscopy results, the police reports and the photographs of Zapata's injuries. This enabled Tovar to render an opinion as to the nature and cause of Zapata's injuries, based on his experience as a trained SANE examiner and on his twenty-five years of experience in emergency medicine, almost as if he had examined Zapta himself. Tovar's expert opinion testimony presumably would have called into question many of the findings and opinions by the SANE nurse and the three doctors who examined Zapata. In short, his testimony had great potential to create reasonable doubt.

but it was not clear when it occurred. There were no eyewitnesses and the medical examinations were performed more than a day later.

This was, to be clear, not a situation where the state sought a mistrial to shore up a weak case. *Cf. Seefeldt,* 261 Wis. 2d 383, ¶¶ 29-33 (discussing the situation where a mistrial was improperly declared because the prosecution did not have its witnesses ready). Troka has never made that claim and the trial court never hinted at it when deciding to grant the state's mistrial motion. There was sufficient evidence for the jury to find Troka guilty, as the trial court correctly determined in denying his motion to dismiss the substantial battery charge at the close of the state's case (65:146-47). Dr. Tovar's testimony, on the other hand, may have created reasonable doubt as to all fact issues in dispute. That, presumably, is why defense counsel called him.

In short, Troka would have had a strong argument on appeal that his attorney's deficient performance, resulting in the loss of his highly qualified expert's opinion testimony relevant to several central issues in dispute, would have undermined confidence in any guilty verdict and created a reasonable probability of a different outcome, thereby denying Troka a fair trial with a reliable result. *Strickland v. Washington,* 466 U.S. 668, 687, 694 (1984).

The trial court's decision to declare a mistrial was an eminently reasonable exercise of discretion because it was intended to protect Troka's right to a fair trial with a reliable result. By declaring a mistrial, the trial court prevented the loss of Dr. Tovar's favorable expert testimony to Troka's defense caused by his attorney's deficient performance. The retrial will presumably include Dr. Tovar's testimony assuming Troka provides a report or written summary of his testimony. The trial court's discretionary decision is, therefore, entitled to "special respect" in this court.

A similar situation was confronted by the Seventh Circuit Court of Appeals in *United States v. Combs,* 222 F.3d 353 (7th Cir. 2000). It came to light during trial that defense counsel for Combs was also providing legal advice to the government's star witness against Combs. Despite that potential conflict of interest, Combs wanted to proceed with conflicted counsel. The trial court refused to let counsel represent Combs at trial unless Combs was willing to waive his right to conflict-free counsel. Combs refused to waive that right. The trial court declared a mistrial over his objection and scheduled a retrial with new defense counsel. *Id.* at 359.

The Seventh Circuit Court of Appeals upheld the trial court's discretionary decision to declare a mistrial because it agreed there was a "manifest necessity" for it. The issue was whether the mistrial was necessary once the trial court learned of defense counsel's "questionable conduct" of representing both Combs and the star witness against him. The Court recognized the "Catch-22" the lower court found itself in:

> Because of [defense counsel] Profitt's conduct, the validity of the verdict would have been in question whether or not the court allowed Profitt to continue his representation of Combs. If the court dismissed Profitt, Combs could complain that he was denied the counsel of his choosing. If the court accepted Combs' waiver of his right to conflict-free representation, Combs could complain that the waiver was invalid and his counsel was ineffective.

Id. at 359-60.

That is quite like the analysis engaged in by the trial court here. As in *Combs,* the trial court's focus was on protecting both the state's and Troka's rights to a fair trial with a reliable and just result. That is the paramount consideration in determining whether there was a "manifest necessity." *Id.* at 360 (citing *Somerville,* 410 U.S. at 463). The likelihood of reversal on appeal in *Combs* due to defense counsel's conduct was also, as here, a highly relevant

consideration. *Id.* This was so even when reversal, though likely, was not a certainty. *Id.* (citing *United States v. Cyphers,* 553 F.2d 1064, 1068 (7th Cir.), *cert. denied,* 434 U.S. 843 (1977)). Finally, it was also significant that the declaration of a mistrial in *Combs* was, as here, primarily for the defendant's benefit. Troka can hardly complain when the trial court was vigilant in seeking to preserve his right to a fair trial. *Id.* S*ee also United States v. Gomez,* No. 04-1765, 120 Fed. App'x 930, 2005 WL 271459 (3d Cir. Feb. 4, 2005) (unpublished, cited only for persuasive value) (*sua sponte* mistrial declaration upheld where it was done to protect defendant from the ineffective assistance of counsel and, presumably, to avoid a subsequent appeal and reversal). *Also see Somerville,* 410 U.S. at 468-69 (upholding mistrial declaration because error in the indictment would have resulted in reversal of a conviction).

This Court should affirm here for the same reasons that the Seventh Circuit Court of Appeals affirmed in *Combs.* The mistrial was caused by defense counsel's misconduct. There were no good alternatives for safeguarding both parties' rights to a fair trial with a reliable and just result. The likelihood of reversal on appeal if the trial continued to a guilty verdict was great. And, the mistrial was declared primarily to protect Troka's right to a fair trial by ensuring that Dr. Tovar would be able to testify on his behalf at the retrial. Troka will receive that fair trial as soon as this Court affirms. The trial court's declaration of a mistrial under these circumstances is entitled to "special respect" by this Court. *Arizona,* 434 U.S. at 510-11. *Cf. Seefeldt,* 261 Wis. 2d 393, ¶¶ 38-43 (trial court erroneously exercised its discretion in declaring a mistrial over defense objection when defense counsel mentioned certain evidence in his opening statement in violation of a court order, but the evidence that counsel referred to would have been admissible at trial).

C. If this Court believes that Dr. Tovar's testimony must be presented, either live or in the form of an offer of proof, it should remand for a retrospective evidentiary hearing.

Defense counsel never made an offer of proof, either in response to the state's mistrial motion or in support of his motion to dismiss, to substantiate his after-the-fact claim that Dr. Tovar's testimony regarding the nature and cause of the victim's injuries was just not all that important to the defense and trial could have proceeded without it.

If this Court is reluctant to affirm because it believes the record is incomplete regarding the precise nature of Dr. Tovar's proffered testimony, it should remand for an evidentiary hearing to establish what his testimony would have been. This would enable both the trial court and this Court to thoroughly evaluate whether Dr. Tovar's testimony was of sufficient import to the defense that (a) its absence would have jeopardized Troka's right to a fair trial, and (b) its absence caused by defense counsel's deficient performance would have been prejudicial to the defense. *See, e.g., State v. Klessig,* 211 Wis. 2d 194, 206-07, 213, 564 N.W.2d 716 (1997); *State v. Kazee,* 146 Wis. 2d 366, 374-75, 432 N.W.2d 93 (1988); *State v. Lomax,* 146 Wis. 2d 356, 364-65, 432 N.W.2d 89 (1988); *State v. Johnson,* 133 Wis. 2d 207, 224-25, 395 N.W.2d 176 (1986). This is the appropriate remedy rather than the outright dismissal sought by Troka because, if it turns out that Dr. Tovar's testimony was as important to the defense as it appeared when defense counsel called him to the stand, the mistrial order was proper.

CONCLUSION

The trial court properly exercised its discretion when it declared a mistrial over Troka's objection in response to defense counsel's discovery violation. The trial court did not, therefore, err in denying Troka's motion to dismiss before the retrial on double jeopardy grounds.

For all of the above reasons, the State of Wisconsin respectfully requests that the trial court's non-final order denying Troka's motion to dismiss be AFFIRMED.

Dated at Madison, Wisconsin this 11th day of June, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,822 words.

Dated this 11th day of June, 2015.

_____
Daniel J. O'Brien
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 11th day of June, 2015.

_____
Daniel J. O'Brien
Assistant Attorney General

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 11th day of June, 2015.

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