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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE STATE'S REPLY BRIEF MISREPRESENTS MANY OF THE APPLICABLE LEGAL PRINCIPLES

The State's brief begins with a lengthy discussion of the legal principles to be applied when a trial court grants a mistrial request over a defendant's objection, accurately noting that (1) when the State requests a mistrial over the defendant's objection, it is the State's burden of establishing a "manifest necessity" for mistrial; (2) the decision whether to grant a mistrial is discretionary and reversible only upon an erroneous exercise of discretion; (3) the court should always consider less drastic alternatives short of declaring a mistrial, including cautionary instructions, and (4) "manifest necessity" requires a showing of a "high degree" of necessity after considering all of the circumstances (State's brief: 15).

However, the State's brief also misstates many of the legal principles involved, and invokes completely inapposite holdings. For example, the State cites ***Arizona v. Washington*** for the principle that an appellate court should "defer to a reasonable trial court mistrial declaration over defense objection when the error was caused by the defense" (State's brief: 15). This argument greatly overstates the holding of ***Arizona,*** which involved a defense attorney making improper and prejudicial remarks during his opening statement that prompted the court to grant a mistrial over concerns that such arguments would taint the jury. ***Id.,*** 434 U.S. 497, 510-14 (1978). Deference was owed to the court's decision to grant a mistrial not because it was an "error caused by the defense," but because the mistrial decision was based on the lower court's assessment of whether the prejudicial remarks may have biased the jury ("Our conclusion that a trial judge's decision to declare a mistrial based on his assessment of the prejudicial impact of improper argument is entitled to great deference does not, of course, end the inquiry"). ***Id.***, 434 U.S. at 514.

In Troka's case, the mistrial request had nothing to do with potential jury bias. The jury heard no substantive testimony from Dr. Tovar, and the State never suggests the jury was biased by this minimal exposure to Dr. Tovar. The State's only claim regarding manifest necessity is potential prejudice to Troka for not having Dr. Tovar testify. Thus the cited holding from ***Arizona*** requiring deference is inapposite.

Equally inapplicable is the State's citation to ***Arizona*** and ***State v. Seefeldt*** for the principle that "A trial judge's declaration of a mistrial brought about by the misconduct of defense counsel is entitled to "special respect" (State's brief: 17). In ***Arizona,*** SCOTUS explicitly stated that defense counsel's "misconduct" that triggered "special respect" for the mistrial ruling was because "the defendant's lawyer made improper and prejudicial remarks during his opening statement to the jury." ***Id.***, 434 U.S. at 510. Likewise, the misconduct of defense counsel in ***Seefeldt*** that prompted mistrial was improper opening arguments that violated a pretrial order prohibiting the introduction of other acts evidence. ***State v. Seefeldt***, 2003 WI 47, ¶¶6-8, 261 Wis.2d 383, 661 N.W.2d 822. Thus, both cases involved prejudicial

remarks made to the jury, which the respective courts found could not be cured by jury instructions. That did not happen here. The circuit court's ruling in this case is entitled to neither "great deference" nor "special respect."

The State then cites ***Arizona*** for the principle that "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," (State's brief: 18) (emphasis in original). No such legal principle is articulated in ***Arizona.*** Instead, the ***Arizona*** court concluded that the discretionary decision in that case was proper under the circumstances because "Neither party has a right to have his case decided by a jury which may be tainted by bias." ***Arizona, id.*** at 516. Again, the jury in Troka was not tainted because Dr. Tovar testified to nothing of consequence before being excluded.

Finally, the State erroneously argues that "The "close case" is to be resolved in favor of the trial court's mistrial declaration," citing Westen & Drubel, 1978 Sup. Ct. Rev. at 96-97 (State's brief: 19). However, both state and federal courts have long recognized that a "close case" is to be resolved in favor of defendants. *See* ***State v. Collier,*** 220 Wis.2d 825, 584 N.W.2d 689 (Ct. App. 1998) ("If we are presented with a close case, the United States Supreme Court advises us to resolve doubts about the propriety of a mistrial in favor of the liberty of a citizen").

II. THE STATE FAILED TO PROVE A MANIFEST NECESSITY EXISTED BECAUSE A REASONABLE ALTERNATIVE TO MISTRIAL EXISTED, CONCERN OVER POTENTIAL INEFFECTIVE ASSISTANCE WAS PREMATURE, INEFFECTIVE ASSISTANCE CANNOT CONSTITUTE GROUNDS FOR MANIFEST NECESSITY, AND ANY CLAIM REGARDING PREJUDICE WAS COMPLETELY SPECULATIVE

The appellant raised several challenges to the circuit court's finding of a "manifest necessity" to grant the State's mistrial request over the defendant's objection, including:

(1) A viable alternative to mistrial existed – withdrawing Dr. Tovar as a witness, giving the jury a curative instruction, and proceeding with trial – and the circuit court unreasonably rejected this option;

(2) The circuit court relied on the wrong legal standard at trial when granting a mistrial, specifically that there was "substantial risk of reversal" on appeal;

(3) Even if there was a substantial risk of reversal based on ineffective assistance of counsel, ***State v. Mattox,*** 2006 WI App 110, 718 N.W.2d 281, held that this concern does not constitute a "manifest necessity" to justify mistrial over the defendant's objection;

(4) A finding of manifest necessity for mistrial based on presumed ineffective assistance of counsel was premature because Troka had not been convicted and the defense had not finished presenting its case; and

(5) Any claim that trial counsel's discovery violation, which resulted in exclusion of Dr. Tovar, constituted ineffective assistance of counsel was completely speculative, because there was never an offer of proof requested regarding the specifics of Dr. Tovar's proposed testimony.

The State's response brief largely ignores these problems. For example, the record is clear that the trial court never discussed the correct legal standard at trial before granting mistrial, and only retroactively declared that a manifest necessity justified its mistrial order when the defendant subsequently moved to dismiss on double jeopardy grounds. The State makes no suggestion to the contrary. Arguments that are not refuted are deemed conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.,*** 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

The State also offers only minimal response to the

claim that concerns for potential ineffective assistance do not constitute "manifest necessity" for granting a mistrial. The State cites ***United States v. Combs***, 222 F.3d 353 (7th Cir. 2000), and ***Illinois v. Somerville***, 410 U.S. 458, 461 (1973) as cases where concerns about possible reversal on appeal prompted granting of a mistrial, upheld on appeal (State's brief: 24-25). Neither is on point, because neither case could have proceeded to a valid verdict. In ***Combs,*** after the conflict with defense counsel was discovered, the defendant refused to waive his right to proceed with conflict-free counsel. ***Combs,*** 222 F.3d at 359. In ***Somerville,*** a jurisdictional error in the indictment meant that if the government secured a conviction, the conviction would have been overturned on appeal. ***Somerville,*** 410 U.S. 459-60. No such error precluded proceeding to a valid verdict in Troka.

More importantly, neither ***Combs*** nor ***Somerville*** involves ineffective assistance of counsel. The only case cited by the State for the principle that potential ineffective assistance of counsel can quality as a "manifest necessity" is an unpublished federal case (State's brief: 25). The State completely fails to address ***Mattox,*** the published Wisconsin case directly on point. The State does not argue that ***Mattox*** was wrongly decided or that it is not good law. This court is obligated to follow ***Mattox,*** not an unpublished federal case. Again, the State's failure to refute this argument should be deemed a concession. *See* ***Charolais,*** 90 Wis. 2d at 109.

The State also offers no response to the point that a finding of presumed ineffective assistance was completely premature, given that Troka hadn't been convicted and the defense hadn't even finished presenting its evidence. The State focuses its arguments on a single, breathtakingly speculative premise – that the exclusion of Dr. Tovar was so significant as to undermine confidence in the verdict and create a reasonable probability of a different outcome (State's brief: 23).

The obvious flaw in this argument, ignored by the assistant attorney general (as well as the prosecutor and the circuit court), is that there can be no ineffective assistance without prejudice, and prejudice must be based on specific facts. When the alleged ineffectiveness is based on failure to

present testimony from a witness, the defendant must show with specificity what the witness would have said, and how that would have altered the outcome of the case. *See* ***State v. Flynn***, 190 Wis.2d 31, 48, 527 N.W.2d 343, 349-350 (Ct. App. 1994); *see also* ***State v. Arredondo***, 2004 WI App 7, ¶40, 674 N.W.2d 647, 269 Wis.2d 369 ("Arredondo does not elaborate, however, on what the parole agent would have said if called to testify. When a defendant claims that trial counsel was deficient for failing to present testimony, the defendant must allege with specificity what the particular witness would have said if called to testify").

The State never disputes Troka's point that the record is completely devoid of any specific facts regarding Dr. Tovar's proposed testimony. Instead, the State dances around the issue, engaging in increasingly creative forms of speculation:

- "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" (State's brief: 19)

- "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" (State's brief: 21)

- "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" (State's brief: 21)

- "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" (State's brief: 22, n. 2)

- "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" (State's brief: 22-23)

- "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" (State's brief: 23)

At no point does the State ever identify even a single specific fact or opinion to which Dr. Tovar would have testified. Regardless, the State manages to divine that Dr. Tovar's testimony would have been so significant that its loss likely undermined confidence in the verdict – despite the fact that both defense counsel and Troka himself personally chose to proceed without Dr. Tovar rather than agree to a mistrial. The State's guesswork is reminiscent of the defendant in ***Flynn*****,** whose non-specific claims were easily rejected by the court of appeals: "Indeed, Flynn's allegations of deficient investigation are premised on speculation "might haves" strung together in a series that leads nowhere." ***Flynn***, 190 Wis. 2d at 48.

Imagine if the tables were turned, Troka had been convicted at trial, and he alleged ineffective assistance based on this record. The State would no doubt argue, correctly, that Troka would not even be entitled to a hearing. Courts may deny motions alleging ineffective assistance without a ***Machner*** hearing when the defendant fails to allege sufficient facts to raise a question of fact, or when the defendant presents only conclusory allegations. ***Nelson v. State***, 54 Wis.2d 489, 497-98, 195 N.W.2d 629 (1972).

In this case, the burden to establish prejudice fell to the State, not Troka. What specific facts has the State alleged regarding Dr. Tovar's proposed testimony that support its claim of prejudice? Not a single one. Thus it cannot possibly establish that a "manifest necessity" existed to grant a mistrial rather than continue the trial without Dr. Tovar.

The record refutes the State's claims that the trial court exercised "sound discretion" in granting the mistrial over Troka's objection. The court in ***Seefeldt*** defined "sound discretion" as follows:

> Sound discretion … requires giving both parties a full opportunity to explain their positions and considering alternatives such as a curative instruction or sanctioning counsel. Sound discretion is not exercised when the circuit court fails to consider the facts of record under the relevant law, bases its conclusion on an error of law or does not reason its way to a rational conclusion.
>
> Sound discretion also requires that the trial judge ensure that the record reflects there is an adequate basis for a finding of manifest necessity. As such, sound discretion is more than a review to ensure the absence of a mistake of law or fact. Rather, a review for sound discretion encompasses an assurance that an adequate basis for the finding of manifest necessity is on the record.

Id., 2003 WI 47, ¶¶36-37.

If the circuit court reasonably believed the exclusion of Dr. Tovar might prejudice Troka such that only a mistrial could safeguard his rights, the court might at least have asked the following question: *what, exactly, would Dr. Tovar have said if called to testify?* The court did not make even a minimal effort to find out.

Accordingly, even if the potential for ineffective assistance could constitute a manifest necessity to grant a mistrial, the circuit court lacked any factual basis to conclude Troka would be prejudiced without Dr. Tovar's testimony. Thus, the court erroneously exercised its discretion in granting a mistrial.

III. A RETROSPECTIVE FACTFINDING HEARING IS INAPPROPRIATE BECAUSE THE STATE HAD THE BURDEN OF PROVING A MANIFEST INJUSTICE, AND THE TRIAL COURT COMPLETELY FAILED TO MAKE AN ADEQUATE FACTUAL RECORD TO JUSTIFY GRANTING A MISTRIAL OVER THE DEFENDANT'S OBJECTION

Apparently recognizing (but not conceding) the obvious flaw in its analysis, the State offers an alternative way to save its case – holding a retrospective evidentiary hearing to take an offer of proof on Dr. Tovar's potential

testimony (State's brief: 33). In doing so, the State turns the legal standard for granting a mistrial over the defendant's objection on its head by suggesting it was the defendant who failed to make an offer of proof about Dr. Tovar's testimony (State's brief: 33). As discussed above, 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. ***Seefeldt***, ***id.,*** ¶19. It is not the defendant's burden to disprove the existence of a manifest necessity.

The State's argument also ignores the trial court's responsibility in granting a mistrial over the defendant's objection. When the State requests a mistrial and the defendant objects, the circuit court must perform a thorough examination of the facts, circumstances, and alternatives before "depriving the defendant of the right to have the original tribunal render a final verdict." ***Collier***, 220 Wis.2d at 835. The time to determine whether a factual basis existed to support a manifest necessity for mistrial is during the trial, not long after a mistrial is granted and the jury is discharged. Allowing a court to declare a mistrial over the defendant's objection based on a premature and completely speculative ineffective assistance claim, and then permitting the court to shore up its deficient factual record retrospectively, does not sufficiently safeguard a defendant's rights.

The authority cited by the State purportedly supporting such a hearing is also inapposite, as those cases (***Klessing, Kassee, Lomax***) involve a retrospective hearing to examine whether a defendant validly waived his right to counsel. Those hearings are fairly straight-forward assessments involving a court's colloquy with a defendant. The retrospective hearing proposed in this case has no precedent in Wisconsin law, and raises a host of questions completely unanswered by the State. For example:

- Who would have the burden of production?
- Who would have the burden of proof, and what is that burden?
- Who would question Dr. Tovar?
- Who will be paying for the preparation time, travel expense and testimony from Dr. Tovar?

- Can the court compel a witness withdrawn by the defense to testify at such a hearing without violating the defendant's right to control his defense?

- Is causing Dr. Tovar to be examined in front of the prosecutor appropriate, given the discovery statute only requires a written summary of proposed testimony, and such testimony is being taken in anticipation of having Dr. Tovar testify at a 2nd trial?

These questions are not easily answered. This only underscores that the time to take some sort of offer of proof on the proposed testimony of Dr. Tovar was during trial, *before* granting a mistrial, and *before* dismissing a sworn jury. Since the prosecution failed to prove such facts at the time, and the trial court lacked sufficient facts to make such a finding at the time, the court erroneously exercised its discretion in ordering a mistrial. The only appropriate remedy at this point is dismissal of the charges.

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: 6/25/2015:

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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 reply brief and appendix produced with a proportional serif font. The length of this brief is 2,971 words.

Signed 6/25/2015:

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CERTIFICATE OF COMPLIANCE WITH 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 s. 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.

Signed 6/25/2015:

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