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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP142-CRLV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTHONY ALVARADO,

Defendant-Petitioner.

ON A PETITION FOR LEAVE TO APPEAL A NONFINAL ORDER ENTERED IN THE CIRCUIT COURT FOR RACINE COUNTY, THE HONORABLE EUGENE A. GASIORKIEWICZ, PRESIDING

# RESPONSE BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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STATE OF WISCONSIN

C O U R T  O F  A P P E A L S

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**RESPONSE BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT**

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## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The parties' briefs adequately set forth the relevant facts and law in this case. The State does not believe that oral argument will be necessary but welcomes it if this Court disagrees. Publication is not warranted.

## SUPPLEMENTAL STATEMENT OF THE CASE

By criminal complaint and information, the State charged Anthony Alvarado with second-degree sexual assault. (1:1-2; 2.) The two-day trial involved just two witnesses. J.S. testified that on December 20, 2013, Alvarado had sexual intercourse with her without her consent when he came to her apartment to give her a ride to work. (21:10-12.) J.S. testified that she knew Alvarado because she was friends with his fiancée, but denied that she and Alvarado had had any sort of physical, romantic, or flirtatious relationship before the claimed assault. (21:6-7, 20.)

Alvarado also testified. He admitted that he and J.S. had sex on December 20, but claimed that they had been involved romantically before then, and that the intercourse was consensual. (21:61-71.)

After the close of evidence, the jury received instructions and verdict forms on both second-degree sexual assault and the lesser-included offense of third-degree sexual assault. (12:6.)

After deliberations began, the court received a note from the jury reading in part, "[W]e cannot come to a unanimous decision. Please advise." (22:7.) The court called the jury to the courtroom and read it jury instruction 520:

> You jurors are as competent to decide the disputed issues of fact in this case as the next jury that may be called upon to determine such issues. You are not going to be made to agree, nor are you going to be kept out until you do agree. It is your duty to make an honest and sincere attempt to arrive at a verdict. Jurors should not be obstinate. They should be open minded. They should listen to the arguments of others and talk matters over freely and fairly and make an honest effort to come to conclusion on all of the issues presented to them. You will please retire to the jury room to continue deliberations.

(22:7-8.)

Nearly an hour later, at 2:55 p.m., the court received another note from the jury, reading, "We are still unable to come to an unanimous decision." (22:8.) The court asked the bailiff to tell the jury to continue working for another half an hour to see if it could reach a decision. (22:8.)

At 3:07 p.m., the court received another message from the jury: "[I]f we find the defendant not guilty on second degree, do we have to be unanimous on third degree [?]" (22:9.) The court called the jury back to the courtroom and re-read it a portion of jury instruction 515:

> This is a criminal, not a civil case. Therefore before the jury may return a verdict which may legally be received on the primary or the lesser included offense, the verdict must be reached unanimously. In a criminal case, all twelve jurors must agree in order to arrive at a verdict. You may return back to the jury room.

(22:10.) The jury returned to its deliberations.

Thirty minutes later, the court received another note from the jury: “[W]e still cannot come to an unanimous decision. We all agree on not guilty for second degree, but we are hung on third degree.” (22:10.) After reading that portion of the note aloud, the court told counsel that, given the amount of time it had already asked the jury to deliberate and given that it had already provided additional instructions, it was going to call a mistrial. Both counsel agreed. (22:10-12.)

Counsel for the State then asked the court for clarification, and the court explained, “I’m not bifurcating by primary or lesser included. I think that’s inappropriate. . . . It’s going to be a mistrial on the entire case.” (22:11.) The court then noted: “We don’t have a verdict back here . . . . There’s really—this was an academic question more out of courtesy than anything else.” (22:12.) Defense counsel asked to think it through, but told the court that he “acquiesce[d]” with its decision and said, “I believe you’re correct.” (22:12.)

After the court declared a mistrial, Alvarado filed a motion to dismiss the second-degree sexual assault charge on double jeopardy grounds, arguing that the foreperson’s third note indicating that the jurors “all” found Alvarado not guilty was a verdict barring a retrial on that charge. (16.) The circuit court

disagreed, and denied Alvarado's motion in a hearing and written order. (A-Ap. 12, 38-41; 19.)

Alvarado filed a petition for leave to appeal with this Court. This Court did not grant the petition, but ordered Alvarado to arrange "for the preparation of the portions of the transcript pertinent to the double jeopardy issue and identify relevant portions of the record," to file a brief addressing the merits of the double jeopardy issue, and for the State to file a response brief.

## ARGUMENT

**Because the trial court did not receive a verdict from the jury, the State may retry Alvarado on the charge of second-degree sexual assault.**

To obtain a pretrial appeal, Alvarado has to show a substantial likelihood of success on the merits of his double jeopardy claim. *State v. Webb*, 160 Wis. 2d 622, 632, 467 N.W.2d 108 (1991). Alvarado faces an uphill battle. Most mistrials don't bar future reprosecution, and this case presents no exception to that general rule.

"The double jeopardy language in the Fifth Amendment and art. I, sec. 8 of the Wisconsin Constitution is almost identical and declares that no person shall be placed twice in jeopardy of punishment for the same offense." *State v. Sauceda*,

168 Wis. 2d 486, 492, 485 N.W.2d 1 (1992).[1] That language offers three types of protection to criminal defendants: "protection against a second prosecution for the same offense after acquittal; protection against a second prosecution for the same offense after conviction; and protection against multiple punishments for the same offense." *Id.* (citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)).

This case deals with the first of these protections, and, more specifically, the question of what constitutes a verdict of acquittal for double jeopardy purposes. Alvarado claims that the jury's last note to the court, in which the foreperson indicated that "we still cannot come to an unanimous decision. We all agree on not guilty for second degree, but we are hung on third degree" (22:10), was an acquittal for double jeopardy purposes and bars a retrial of Alvarado on a second-degree sexual assault charge.

As explained below, the circuit court correctly determined that the note from the jury foreperson was not a verdict. The court properly did not accept it as a verdict, and the note does not bar the State from retrying Alvarado for second-degree

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[1] Because the double jeopardy clauses in the state and federal constitutions is nearly identical, Wisconsin courts do not interpret the Wisconsin constitution to offer double jeopardy protections beyond those found in the federal constitution. *See State v. Kurzawa*, 180 Wis. 2d 502, 522, 509 N.W.2d 712 (1994).

sexual assault.[2] Accordingly, this court should deny Alvarado's petition for leave to appeal.

### A. Retrial after a mistrial does not offend double jeopardy principles when the court has not accepted a verdict.

In the United States Supreme Court and other federal courts, whether a jury's decision is a "final" verdict is the touchstone for when double jeopardy bars a retrial on that charge. *See Blueford v. Arkansas*, 132 S. Ct. 2044, 2050 (2012). Federal courts have long held that "the jury's verdict is not final until the 'deliberations are over, the result is announced in open court, and no dissent by a juror is registered.'" *United States v. Rastelli*, 870 F.2d 822, 834-35 (2d Cir. 1989) (quoting *United States v. Taylor*, 507 F.2d 166, 168 (5th Cir. 1975)). Jurors' votes taken in the jury room before they are "returned in open court are merely preliminary and are not binding on the jury, any member of which is entitled to change his or her mind up until the time of the trial court's acceptance of the verdict." *United States v. Chinchic*, 655 F.2d 547, 549-50 (4th Cir. 1981) (and cases cited therein). Accordingly, the trial court's *acceptance* of a

[2] Alvarado concedes (and the State agrees) that the State can retry him on a charge of third-degree sexual assault. The only question presented is whether the State may retry Alvarado on a charge of second-degree sexual assault. In this brief, the State's general references to retrying or reprosecuting Alvarado is shorthand to mean a retrial of the second-degree charge.

verdict, after which no juror can change his or her vote, makes the verdict final.

Wisconsin's standard on when a court accepts a verdict is identical to the federal standard. "A jury's verdict is accepted once it is received in open court, the results are announced, and the jury is polled, if requested." *State v. Wery*, 2007 WI App 169, ¶ 13, 304 Wis. 2d 355, 737 N.W.2d 66 (citing *State v. Knight*, 143 Wis. 2d 408, 416, 421 N.W.2d 847 (1988)). Up until the court accepts the verdict through that process, "[j]urors are free to reconsider a verdict, even though they have reached agreement with regard to a particular charge . . . so long as the verdict has not been accepted by the court." *Knight*, 143 Wis. 2d at 416.

**B. The trial court properly did not accept the foreperson's note, which the court read to the parties without the jury present, as a final verdict.**

Here, the circuit court properly did not accept the note from the foreperson indicating that the jurors all agreed that Alvarado was not guilty of second-degree sexual assault as a verdict before it declared a mistrial. Therefore, it was not a final verdict triggering double jeopardy protections. The circuit court court read the note aloud and into the record, but the members of the jury were not present to register any dissents or confirm their votes. Further, in the time it took for the circuit court to receive the note, read it to the parties, decide how to

address it, and call the jury back into the courtroom, the jurors were entitled to change their minds about their preliminary votes on either charge.

Despite Alvarado's arguments to the contrary, the Supreme Court's decision in *Blueford*, 132 S. Ct. 2044, supports the conclusion that the foreperson's note in this case was not a final verdict. In *Blueford*, the state of Arkansas charged Blueford with capital murder; the jury was instructed on that charge in addition to the lesser-included offenses of first-degree murder, manslaughter, and negligent homicide. *Id.* at 2048. During deliberations, the jury returned and the jury foreperson informed the trial court and parties that the jury had unanimously voted to acquit Blueford of capital and first-degree murder, but had not voted on other lesser-included offenses. *Id.* at 2049. The trial court directed the jury to continue to deliberate. *Id.* A half an hour later, the jury again returned to the courtroom and the foreperson informed the court that the jury had not reached a verdict. *Id.* The trial court declared a mistrial and discharged the jury. *Id.*

Blueford challenged his subsequent retrial on capital and first-degree murder charges on double jeopardy grounds, arguing that the foreperson's report of the jury's votes on those charges was a formal announcement of acquittal. *Id.* at 2050.

The Supreme Court disagreed, writing that "[t]he foreperson's report was not a final resolution of anything." *Id.* It explained that that was so because it was "possible for Blueford's jury to revisit the offenses of capital and first-degree murder, notwithstanding its earlier votes." *Id.* at 2051. Because the foreperson's report under the circumstances "lacked the finality necessary to amount to an acquittal on those offenses," Arkansas did not violate Blueford's double jeopardy protections by retrying him on the capital and first-degree murder charges. *Id.* Likewise, here, the State will not violate Alvarado's double jeopardy rights by retrying him for second-degree sexual assault.

Alvarado seeks to distinguish *Blueford*. He notes that the jury in *Blueford* returned to deliberate after the foreperson reported the preliminary unanimous votes on capital and first-degree murder, whereas here, the circuit court declared a mistrial immediately after reading the note explaining that the jurors all had voted to acquit on the primary charge. He suggests that the Supreme Court would not have reached the same holding if the *Blueford* trial court had declared a mistrial immediately after hearing the foreperson's report. Alvarado's br. at 9-10.

Not so. Although the jury's actual additional deliberation in *Blueford* made it easier for the Court to conclude that the verdicts of acquittal were not final under the circumstances, there's nothing to suggest that the Court would have reached a different result if it had been presented with the facts here. The point in *Blueford* was not whether the jury *actually* continued deliberating, but whether it could have. As noted above, the jurors here, like the jurors in *Blueford*, were entitled to change their votes while the court was considering the foreperson's third note. Further, unlike the jurors in *Blueford*, the jurors here were not in the courtroom—and hence could not register a dissent—when the trial court read the foreperson's note.

Again, "[a] jury's verdict is accepted once it is received in open court, the results are announced, and the jury is polled, if requested." *Wery*, 304 Wis. 2d 355, ¶ 13 (citing *Knight*, 143 Wis. 2d at 416). In sum, the foreperson's note, read in court without the jury present to confirm or deny its accuracy, and read during a time when the jurors were entitled to change their votes, simply did not satisfy that standard for finality.

### C. The circuit court properly exercised its discretion in not accepting the foreperson's note as a final verdict, and in declaring a mistrial on the whole case.

Alvarado also argues that if the verdict was final, that he did not waive his double jeopardy rights when his counsel acquiesced to the court's announcement that it was declaring a mistrial on all of the counts. Alvarado's br. at 11-14. This Court need not reach that question because, as explained above, the verdict was not final.

That said, whether Alvarado waived his objection to the court's declaration of a mistrial under the circumstances is unclear. On one hand, Alvarado's consent to the trial court's granting a mistrial on the whole trial and dismissing the jury prevented the court from correcting any possible error before the jury was dismissed. *See State v. Huebner*, 2000 WI 59, ¶ 12, 235 Wis. 2d 486, 611 N.W.2d 727 (stating that objectives of waiver rule include allowing the court and parties to immediately correct the error).

On the other hand, the trial court here declared a mistrial on its own motion, which it could do with or without Alvarado's consent. *Wheeler v. State*, 87 Wis. 2d 626, 630-31, 275 N.W.2d 651 (1979) (stating that with compelling reasons, the trial court could declare a mistrial "without the defendant's consent and even over his objection, and he may be retried consistently with

the Fifth Amendment.'"). Given that, and given that the trial court here signaled that it would not entertain accepting a partial verdict or directing the jury to deliberate further, it does not appear that any objection would have changed the court's decision.

And even if Alvarado waived his objection, the State concedes that applying the waiver rule probably would not be appropriate here. As an initial matter, appellate courts have authority to ignore the waiver rule. *State v. Raye*, 2005 WI 68, ¶ 26, 281 Wis. 2d 339, 697 N.W.2d 407. Moreover, if counsel wrongly acquiesced to the court's declaring a mistrial under the circumstances, Alvarado would seemingly have an ineffective assistance of counsel claim hinging on the merits of the court's mistrial decision. *See, e.g.*, *State v. Erickson*, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999) (addressing forfeited claim through rubric of ineffective assistance of counsel).

Accordingly, the State does not address waiver further. Rather, it addresses the question implicit in Alvarado's challenge: Did the circuit court properly exercise its discretion in declaring a mistrial under the circumstances? For the reasons below, the court's decision was sound.

A trial court has discretion whether to grant a mistrial. *State v. Mink*, 146 Wis. 2d 1, 8, 429 N.W.2d 99 (Ct. App. 1988) (citation omitted). A court may declare a mistrial without

barring retrial for the same offense when "'particular circumstances manifest a necessity'" to do so. *Blueford*, 132 S. Ct. at 2052 (citing *Wade v. Hunter*, 336 U.S. 684, 690 (1949)). The "classic justification" establishing that "necessity" for a mistrial is that the jury is unable to agree. *Id.*; *see also Mink*, 146 Wis. 2d at 8 (citing *State v. Kendall*, 94 Wis. 2d 63, 72, 287 N.W.2d 758 (1980)).

Here, the circuit court properly exercised its discretion in declaring a mistrial. It had received three notes from the jury foreperson indicating that the jury was deadlocked. It read (and re-read) the pertinent instructions to the jury regarding unanimity and its duty as the finder of fact. It twice directed the jury to continue deliberating, to no avail. When the third and final note came from the jury, the court properly concluded that the jury was not going to come to an agreement and declared a mistrial on the whole case.

Given this record, the court was well within its discretion to declare a mistrial on the whole case. The Supreme Court has "never required a trial court, before declaring a mistrial because of a hung jury, to consider any particular means of breaking the impasse[.]" *Blueford*, 132 S. Ct. at 2052. In *Blueford*, the jury had two options: find Blueford guilty of one of the charges or acquit on all. Given that, "the trial court did not

abuse its discretion by refusing to add another option—that of acquitting on some offenses but not others." *Id.* at 2053.

So too, here, the jury had two options: find Alvarado guilty of one of the charges, or acquit him on both. The circuit court did not erroneously exercise its discretion in declining to introduce additional options to break the impasse.[3]

In sum, Alvarado failed to show a substantial likelihood of success on the merits. This Court should decline to grant his petition.

If this Court does grant Alvarado's petition, Wisconsin law compels the conclusion that the foreperson's third note to the court was not a "final" verdict, and that the State may retry Alvarado on the charge of second-degree sexual assault without offending his double jeopardy protections.

**CONCLUSION**

For the foregoing reasons, the State respectfully asks that this court deny Alvarado's petition, or, alternatively, affirm the decision and order of the circuit court.

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[3] The trial court indicated that it was not going to accept a partial verdict, believing that to be "inappropriate." (22:11.) That decision was sound. Although Wisconsin law is unsettled on the permissibility of partial verdicts, this Court has signaled its disfavor at that practice in situations like this one "where the facts are interlocking" between the charges. *See State v. Grant*, Case No. 2013AP515-CR, 2014 WL 128315, ¶ 19 (Wis. Ct. App. Jan. 15, 2014) (unpublished) (R-Ap. 101-05).

Dated this 3rd day of June, 2016.

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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 3179 words.

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## 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 3rd day of June, 2016.

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