STATE OF WISCONSIN

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

DISTRICT I

Case No. 2017AP2323-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICKEY L. MILLER,

Defendant-Appellant.

APPEAL FROM A NON-FINAL ORDER DENYING
A MOTION TO DISMISS ENTERED IN
THE MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE JEFFREY A. CONEN, PRESIDING.

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Does the prohibition on double jeopardy prevent retrial of a defendant when the defense requests a mistrial after the parties learn of non-exculpatory evidence that likely should have been provided in discovery, but that the prosecution was unaware of and thus inadvertently failed to disclose?

The circuit court answered no.

This Court should affirm the trial court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case involves only the application of well-settled law to the facts, which the briefs should adequately address.

INTRODUCTION

If a defendant requests a mistrial, the prohibition against double jeopardy does not prevent another trial unless the defendant moved for and obtained the mistrial due to prosecutorial overreaching. Prosecutorial overreaching only occurs when two elements are present: (1) the prosecutor's action is intentional in the sense of a culpable state of mind and an awareness that the conduct would be prejudicial to the defendant, and (2) the prosecutors action was designed either to create another chance to convict because the first trial was going badly, or to harass the defendant by successive prosecutions.

The record shows that neither element is present in this case. Miller cites no law supporting his contention that this Court may impute a law enforcement officer's conduct to a prosecutor without any showing of collusion, and he makes only conclusory allegations that the prosecutor intentionally

failed to disclose the second photo array in order to harass Miller with successive prosecutions. The circuit court properly denied Miller's motion. This Court should affirm.

STATEMENT OF THE FACTS

On February 23, 2013, RH ran into a Milwaukee police station crying and yelling for help. (R. 70:5, 26.) She told police that she had driven to Walgreens in her sister's car to pick up some items. (R. 1:2.) When she left the store, a black man, who was about 25 years old and wearing a green army jacket with the hood up, approached her and told her he "wanted the money out of her purse." (R. 1:2.) He made her walk toward the back of the building. (R. 1:2.) RH gave the man her wallet, and he then asked if she had a car there. (R. 1:2.) RH said yes, and the man told her to walk to her car. (R. 1:2.) She said she quickly got in and tried to lock the doors, but the man got into the passenger seat. (R. 1:2.)

The man then showed her a gun and said, "I'm not playing with you." (R. 1:2.) He told RH to drive to the alley behind Walgreens and behind an apartment building. (R. 1:2.) The man then demanded whatever else she had in her car and her purse. (R. 1:2.) RH said she did not have anything else. The man kissed RH on the lips and told her he was going to drive. (R 1:2.) He got in the driver's seat and told her he was taking her to an ATM to get him more money. (R. 1:2.) They stopped at a BP gas station. (R. 1:2.) She tried to give the man her ATM card, but he told her, "I'm not stupid, we're both going in." (R. 1:2.) He told RH that if she did anything stupid, he would kill her and everyone in the store. (R. 1:2.) She withdrew her limit of $200 and gave it to him. (R. 1:2.) The man made her return to the car with him and he got back in the driver's seat. (R. 1:2.) He told RH they were going to use her other cards to withdraw more money. (R. 1:2.) He took her driver's license from her wallet, read her name and address aloud, and told

her that if anything happened to him he would hurt her and her family. (R. 1:2.)

After they drove a few blocks, RH saw a police station. (R. 1:2.) As the car was waiting to make a turn, RH opened the passenger door and jumped out. (R. 1:2.) She fell to the ground and dropped her purse, but leapt up and ran to the station. (R. 1:2.) While RH was giving her report, a woman, Ebony Owens, walked into the station with RH's purse. (R. 1:3.) Owens said she saw RH roll out of her car, drop her purse, and run toward the police station. (R. 1:3.)

Police reviewed surveillance tape from the gas station. (R. 1:2.) They later saw a man, Jason McKinnie, wearing an identical jacket and asked him about it. (R. 1:2.) He said he got the jacket from his sister Taressa McKinnie's house. (R. 1:2.) Police discovered that Taressa's other brother, Mickey Miller, matched the physical description of the suspect and the man on the surveillance tape. (R. 1:2–3.) RH was shown a photo array and identified Miller as the man who abducted and robbed her. (R. 1:3.)

The State, represented by ADA Joanne Hardke and ADA Sarah McNutt, charged Miller with one count of armed robbery and one count of false imprisonment. (R. 1:1.) Attorney Douglas Bihler represented Miller at trial. Miller's theory of defense was that the victim misidentified him, and the police had not conducted a thorough investigation of other possible suspects, including a man named Marquis Jones. (R. 68:67–68.) During Miller's opening statement, Bihler told the jury,

> There is a surveillance video. We're going to see stills and probably the surveillance video itself, and it shows a person that looks a lot like my client, Mr. Miller. The evidence is going to show that the police looked at that video, and first came up with a different person they thought they recognized, a Mr. Marquis Jones, as the person they thought was shown on that video.

> At some point in time, a person related to my client, his half brother, was stopped by the police because that person was wearing a jacket that looked remarkably similar to the one that appeared in the surveillance video. Through some investigation, they found out that my client, Mr. Miller, was related to the person who had possession of that jacket, and based on that, they arrested Mr. Miller, and they showed a photo array of Mr. Miller to [RH]. They never showed a photo array of Marquis Jones to [RH], the person they originally suspected of the offense. They never showed a photo array with a picture of the person who is related to my client to [RH].
>
> This whole trial is going to be about identification, whether Mr. Miller is the one who committed this crime. And we believe that the evidence is going to show you that he is not the person who committed this bad crime against [RH].

(R. 68:67–68.)

Marquelia Barry was the first witness for the State. (R. 68:69.) She testified that on the night of February 23, 2013, she was driving through Milwaukee with her cousin, Ebony Owens, when she saw the victim roll out of the car in front of her and run to the police station. (R. 68:69–72.) She said Owens retrieved RH's purse from the road and they took it to the police station, where she saw RH who "looked terrified." (R. 68:73–74.) The defense had no questions, and Barry was excused. (R. 68:75.) The court adjourned for the day. (R. 68:75.)

The next morning the State called RH. (R. 70:5.) She testified about her abduction and robbery, and she identified Miller in court as the perpetrator. (R. 70:5–26.) The State introduced portions of the surveillance video from the Walgreens parking lot showing Miller approaching RH, demanding her money, and getting into her car. (R. 70:11–14.) It introduced further surveillance video and photos from the gas station showing RH and Miller in the store. (R.

70:17–18.) RH testified that when she saw the police station, she opened the car door, rolled out, and "just started running." (R. 70:25–26.) She ran inside, fell on the floor, and started crying for help. (R. 70:26.)

The State then asked RH if she remembered being shown a photo array by police. (R. 70:27.) RH said that she did, and that she had identified Miller's photo as a picture of the perpetrator. (R. 70:28–29.) The State also introduced the jacket Miller had been wearing that night, and RH identified that as well. (R. 70:29.)

The defense asked RH if police told her they recovered the jacket from Miller's relative, Jason McKinnie. (R. 70:30–31.) RH said police told her they saw someone riding a bike with the jacket on. (R. 70:31.) When asked if she had ever been shown a photograph of McKinnie, RH said she did not know. (R. 70:31–32.) The defense asked if the police ever told RH "that an Officer Valuch looked at the video and recognized someone he knew as Marquis Jones?" (R. 70:32.) The State objected on hearsay grounds, and the court had a short recess. (R. 70:32.) When the court went back on the record, it "summarize[d] for the record that there are a couple of issues that have come to the Court's attention." (R. 70:36.)

The court said that it had learned during the break "that there was a photo array put together and shown to the victim in this matter, [RH], prior to the photo array that was shown containing Mr. Miller. There is no report of that photo array, and the images are not available, and this is something that just came to light." (R. 70:37.)[1] The court

[1] The prosecutors learned about the second array while prepping RH immediately before she took the stand. (R. 73:9–10.) McNutt advised RH they would be asking her about the photo array, and RH asked "Which one?" (R. 73:9.)

said given that the theory of the defense was that RH misidentified Miller, it was going to recess for the morning and give the State an opportunity to find any additional information about the earlier photo array and whether or not there was a report generated. (R. 70:3–38.) If not, one would need to be generated and given to the defense. (R. 70:37.) The court asked if there was anything else the parties wanted to put on record. (R. 70:37–38.) Hardtke said,

> I would just supplement that the only information about the photo array came to us this morning from the victim, and we don't have any indication from any of the officers present that they were aware or knew of any other photo array, but we will certainly attempt to locate whether or not that happened and by whom.

(R. 70:38.)

When the court recalled the case that afternoon, the prosecutor had learned that there was indeed a second photo array shown to RH where she did not make an identification. (R. 69:3.) She arranged for copies of the photos to be given to the defense and located the officer, Officer Valuch, who was possibly involved. (R. 69:3.) Valuch said he did not have an independent recollection of the photo array, and that no reports had been generated. (R. 69:3.) Bihler said he believed there could be some exculpatory information regarding the identification process,

> and I think that's an area of investigation that I have a duty to explore on Mr. Miller's behalf.
>
> I think there is potentially exculpatory material in there. There is no good explanation as to why no report was generated and made available to the District Attorney's Office.
>
> I do not believe the District Attorney's Office in any way, shape or form tried to hide or keep evidence from the defense and they revealed it to me as soon as they discovered the potential for this.

(R. 69:7.) Bihler said it would be unfair to continue the trial knowing that there was an area of investigation counsel had a duty to explore and had not, and asked for a mistrial. (R. 69:7–8.) The court asked Hardtke if there were any other means available to obtain the additional information about the photo array without a mistrial, and Hardtke said no because Valuch was out of town. (R. 69:8–9.) Hardtke said, "The State would just ask that the jeopardy not attach and that we would be allowed to retry the case." (R. 69:9.)

The court said there was no indication of misconduct by the District Attorney's Office, and that "this was just one of those -- and the only way I can characterize it at this time is an unfortunate oversight with respect to the discovery of this additional photo array." (R. 69:9–10.) It determined that adjourning but keeping the jury panel waiting an indefinite amount of time was not a reasonable alternative and declared a mistrial. (R. 69:10–11.)

Before the retrial, Bihler moved to withdraw as Miller's counsel after learning Miller had filed a grievance against him with the Office of Lawyer Regulation. (R. 19:1.) Attorney Scott Anderson was appointed to represent Miller.[2] (R. 30:1.) Anderson filed a motion to dismiss the charges on double jeopardy grounds and requesting an evidentiary hearing.[3] (R. 31:1.) The State, now represented by Assistant

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[2] Attorney Lori Kuehn originally replaced Bihler as defense counsel, but she, too, withdrew after Miller informed her that he intended to file a grievance against her and to contact the media about his case. (R. 24:1.)

[3] Miller began sending the court several pro se motions and correspondence. (R. 25; 26; 29; 33.) The court declined to consider them, as Miller was represented. (R. 34:3.) Miller also sent a letter to ADA Parthum on July 15, 2016, attempting to blackmail her into dismissing the charges with prejudice and threatening to contact the media, request a *John Doe* proceeding, and file a civil

District Attorney Irene Parthum, responded that pursuant to *State v. Jaimes*, 2006 WI App 93, 292 Wis. 2d 656, 715 N.W.2d 669, the improper conduct of a law enforcement officer is not imputed to the prosecutor to bar retrial unless there is some evidence of collusion between the prosecutor and the officer. (R. 34:15–17.) Because there was no collusion and no evidence that the prosecution was attempting to trigger a mistrial here, Miller's retrial was not barred by the prohibition on double jeopardy. (R. 34:18–19.)

The circuit court[4] held a series of evidentiary hearings where multiple law enforcement officers, McNutt and Hardtke, and Bihler all testified. (R. 71; 72; 73.)

The State first called Valuch. (R. 71:4.) He testified that he was not the investigating officer on this case. (R. 71:7.) He became involved when officers who were investigating the case began watching the Walgreens surveillance video in a common area of the police station. (R. 71:7.) Valuch believed he recognized the suspect on the video as Marquis Jones, a person he had contact with about five times before. (R. 71:8.) Valuch said he put a temporary felony warrant out on Jones to detain him and question him about the incident, which he indicated in a supplemental

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suit if she did not respond by July 22, 2016. (R. 34:5.) Parthum did not respond and sent copies to Anderson and the court. (R. 32.)

[4] Due to judicial rotation, Judge Joseph Donald, who presided at the first trial, was no longer presiding and the motion was before Judge Conen. (R. 34:4.) Judge Jeffrey Conen agreed to retain the case despite judicial rotation until Miller's motion was resolved so that the court would be familiar with the record. (R. 34:4.) Neither Anderson nor Parthum were the original attorneys on the case, either, and they were not privy to the discussions with RH or Valuch at the original trial, so the court scheduled hearings to take testimony from the police officers and to allow all the parties to learn the underlying facts behind the array. (R. 34.)

report. (R. 71:9.) He said he did no other investigation on the case, did not recognize Miller, and was not called to testify against him. (R. 71:9–10.)

The State then produced a photo array that contained six photos, including one of Jones. (R. 71:10–11; 38:1.) The photo array had a lineup number on top and was dated September 1, 2014. (R. 71:11.) Valuch explained how the Milwaukee Police Department software worked for creating photo arrays, and that some people had log-in information for that program, but others did not. (R. 71:12–15.) When someone without a log-in needed to use the software, they used someone else's log-in. (R. 71:14–15.) Valuch did not remember if he was the person who put together the photo array containing Jones or if he showed it to RH, but he had no notes in his memo book indicating that he had. (R. 71:14, 16.)

Valuch said standard operating procedure if a photo array was shown but there was no identification would have been to create a supplemental report about it. (R. 71:17.) But the array and supplemental report would not be inventoried. (R. 71:28–29.) He testified that there was an internal investigation about the preparation of that photo array and that there was no supplemental report created, but he did not know the outcome of that investigation. (R. 71:15–16, 29–30.) There was a supplemental report indicating that Detective James Henner questioned Jones on February 26, 2013, and "[i]t was determined that Jones was not the actor in the incident." (R. 71:19; 37:1.) Valuch testified that the only contact he had with the District Attorney's Office regarding this case was when they requested his memo book after the mistrial. (R. 71:32–33.)

The State asked the court to adjourn the hearing so it could subpoena some of the other officers who had contact with Jones because it seemed likely that one of the officers who arrested Jones "showed the array and just did not

document it properly." (R. 71:35–36.) The court agreed to adjourn the hearing to bring in more officers. (R. 71:36–39.)

Six more officers—Detective Herb Glidewell, Officer Brent Miscichoski, Officer Neil Verburgt, Officer Michelle Farney, Detective Henner, and Officer Kurt Saltzwadel—were called to testify about the investigation. (R. 72:3.)[5]

Glidewell testified that he was the initial investigating officer who interviewed RH when she made the complaint. (R. 72:9–12.) He said he did not follow up with RH or show her any photo arrays, and he was unaware of RH being shown the Jones photo array. (R. 72:21–22.) He said standard operating procedure for a photo array where there is no identification would be to create a supplemental report saying that the array occurred, but the array itself would not be inventoried. (R. 72:24.) He said that if an array was shown to RH but she did not make an identification, the officer who showed her the array should have filed a supplemental report. (R. 72:25–26.)

Officer Miscichoski testified that he showed RH the array with Miller in it and created the supplemental report about it after Miller was identified as a possible suspect through Jason McKinnie. (R. 72:33–39.) All of the officers who were asked about the procedures for inventorying photo arrays testified that if RH was shown a photo array but made no identification, a supplemental report about it should have been created. But, they also said, the array would not necessarily have been inventoried. (R. 72:40, 52–55, 60–62.) The officers all testified that they either did not, or did not recall, showing RH the array with Jones in it. (R. 72:41–42, 52–53, 58–59, 67–68, 71–72.)

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[5] The court also received the Internal Affairs records about the photo array incident that it inspected *in camera*. (R. 72:5.)

At the continuation of the hearing, the attorneys at the original trial testified. (R. 73:2.) Assistant District Attorney McNutt testified that she and Hardtke only learned about the second photo array immediately before RH took the stand. (R. 73:9.) She said that she was prepping RH and told her "we were going to show her the photo array in the course of her testimony." In response, RH asked,"[W]hich one?" McNutt explained that "it was at that point that we realized there had been more than one." (R. 73:9.) She said she told Hardtke, who began contacting the police about it. (R. 73:9–11.) Hardtke asked Miscichoski, who was a court officer that day, to go to the police department and try to locate records of the second array. (R. 79:10–11.) McNutt said she conducted the direct examination of RH. Hardtke then asked for an in-chambers conference and told the court and Bihler what they learned about the second array. (R. 73:10–11.) When Miscichoski found the Jones array the parties had another in-chambers conference, and Bihler decided to ask for a mistrial. (R. 73:12–14.) After the mistrial, the District Attorney's Office made several requests of the police department to try to find any records of who had created or shown the second array to RH, and turned what they found over to the defense. (R. 73:14–15.)

On cross-examination, Anderson referred McNutt to the transcript showing that Bihler began his cross-examination before there was any indication that the court or Bihler was made aware of the second array. (R. 73:22–25.) McNutt agreed, noting that the record about the second array was made by Hardtke during the recess. (R. 73:25.)

Hardtke testified consistently with McNutt. She said when RH asked "which one" about the photo array, she began talking to the officers to learn whether they had shown her another array. (R. 73:35–36.) She said she did this before notifying Bihler about the statement because "the process is confusing for victims, and . . . I know sometimes

people use language that sounds like something happened that really wasn't the way it happened." (R. 73:35.) She said she did not alert him right away because she expected him to question the officers, not RH, about the array, and she was still trying to find out what happened. (R. 73:39.) Hardtke testified that "when I realized he was going to go into it with her, I asked for a side-bar and spoke with him then." (R. 73:39.) She said Bihler asked for the mistrial because of his opening statement, and because it would be better to start over than "on the fly now have to address this issue." (R. 73:45–46.)

Bihler testified that his "impression was that [the prosecutors] were as surprised as I was" to find out there was a second photo array shown to RH. (R. 73:59.) He said he believed there was "a danger of going ahead in the trial without knowing what actually happened in that photo array" (R. 73:60), and discussed moving for a mistrial with Miller (R. 73:61–62). Miller wanted Bihler to move to dismiss the charges and was displeased when Bihler told him the State was likely going to be able to retry the case. (R. 73:62–63.) Miller eventually consented to moving for a mistrial so Bihler could learn whether there was any defense value to the circumstances surrounding the other photo array. (R. 73:62–67.)

The parties submitted supplemental briefs on the double jeopardy issue, and the court denied the motion to dismiss. (R. 57; 58; 77.) The court said that the evidence showed that the police improperly handled the first array, and in all probability Officer Valuch showed the array, did not document it properly, and was not being forthright about it. (R. 77:8–9.) It also found that,

> . . . Ms. Hardtke, who should have known better, should have made everyone aware of this immediately, that there was a problem . . . .

> Ms. McNutt followed along. She was the trainee at the time. But, you know, I don't approve of trial in that manner either.
>
> . . . .
>
> Having said all of that, we have to actually look at the law, and the law is that a case can be retried if there is no purposeful reason for the mistrial. Could it have been handled better? Yes. Was somebody doing something sinister? No. And the only quote/unquote sinister thing that I see in this place is somebody in the police department is trying to cover their own skin for what happened here, but there was nothing that was prejudicial or sinister about any of it.

(R. 77:10–11.) The court found that "the long and short of this is that there was no reason for the police department or for the State to hide this evidence" (R. 77:11), but that "Mr. Bihler wisely asked for a mistrial in this case" (R. 77:12). It said the way the photo array was handled was egregious, but not from a prejudicial-to-the-defense standpoint. (R. 77:12.) It determined that the existence of the Jones array only made the State's case stronger, and "there was no reason for the State to look for a second kick at the cat." (R. 77:13.) The court therefore determined "that this matter can be retried." (R. 77:14.)

The circuit court entered a written order on November 10, 2017. Miller petitioned this Court for leave to appeal the court's non-final decision, which this Court granted.

STANDARD OF REVIEW

The existence of a double jeopardy violation presents a question of law, reviewed de novo. *State v. Robinson,* 2014 WI 35, ¶ 18, 354 Wis. 2d 351, 847 N.W.2d 352. "Determining the existence or absence of the prosecutor's intent involves a factual finding, which will not be reversed on appeal unless

it is clearly erroneous." *Jaimes*, 292 Wis. 2d 656, ¶ 10. A finding of fact is clearly erroneous only if it is inherently incredible, in conflict with other fully established or conceded facts, or against the great weight and clear preponderance of the evidence. Wis. Stat. § 805.17(2); *see also Chapman v. State*, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975).

ARGUMENT

The circuit court correctly concluded that there was no prosecutorial overreaching in this case, and therefore double jeopardy does not bar Miller's retrial.

A. Relevant law

The United States and Wisconsin Constitutions both protect against subjecting any person "for the same offense to be twice put in jeopardy." *State v. Hill*, 2000 WI App 259, ¶ 10, 240 Wis. 2d 1, 622 N.W.2d 34. Normally, no bar exists to retrial when a defendant successfully requests a mistrial because "the defendant is exercising control over the mistrial decision or in effect choosing to be tried by another tribunal." *Jaimes*, 292 Wis. 2d 656, ¶ 7.

An exception exists "when a defendant moves for and obtains a mistrial due to prosecutorial overreaching." *Hill*, 240 Wis. 2d 1, ¶ 11. "Ordinarily, when the prosecutor injects error into the trial, grievous as that may be, the sanction is mistrial or reversal. It is only where the prosecutor deliberately subverts the right of the defendant to stay with the original tribunal that the double jeopardy bar becomes the appropriate relief." *West v. State*, 451 A.2d 1228, 1234 (Md. App. 1982).

To constitute prosecutorial overreaching, the prosecutor must act intentionally, that is, with a culpable state of mind and awareness that his action would prejudice

the defendant. *Jaimes*, 292 Wis. 2d 656, ¶ 8. The prosecutor must also act to create another chance to convict—to provoke a mistrial because the first trial is going badly, or to prejudice the defendant's rights to successful completion of "the criminal confrontation at the first trial, *i.e.,* to harass him by successive prosecutions." *Id*. The defendant bears the burden of proof on these points. *State v. Harrell*, 85 Wis. 2d 331, 337, 270 N.W.2d 428 (Ct. App. 1978).

In other words, when a defendant successfully obtains a mistrial, double jeopardy bars a retrial only if the prosecutor acted with intent to provoke the defendant into moving for mistrial. *See Oregon v. Kennedy*, 456 U.S. 667, 679 (1982); *State v. Quinn*, 169 Wis. 2d 620, 624–25, 486 N.W.2d 542 (Ct. App. 1992).

B. The circuit court's finding that the prosecutors did not act with intent to gain another chance to convict or to harass Miller with multiple prosecutions was not clearly erroneous.

The circuit court found that the prosecutors "should have known better" than to put RH on the stand while they investigated whether a second photo array had been shown to her. (R. 77:10.) However, it found that while the whole matter could have been handled better, "there was no reason for the police department or the State to hide this evidence," and there was nothing "sinister" going on." (R. 77:11–12.)

There was nothing clearly erroneous about the court's findings. There is nothing in the record indicating that Hardtke and McNutt attempted to hide this information in order to sabotage Miller's defense. Hardtke immediately told Miscichoski to find out whether RH had been shown more than one photo array. (R. 73:35–36.) She also immediately attempted to contact Valuch. (R. 73:36–38.) And as soon as she realized Bihler was about to question RH about the

photo array, she asked for a sidebar and let the court and the defense know that they had just learned there may be a second photo array and were attempting to find it. (R. 73:39–40.)

The State does not dispute that once Hardtke and McNutt learned that RH may have been shown another photo array, the proper action would have been to immediately alert Bihler and the court rather than letting RH take the stand. But prosecutorial error alone is not enough to show intent to provoke a mistrial. *State v. Copening*, 100 Wis. 2d 700, 713–14, 303 N.W.2d 821 (1981). There is no evidence in the record that Hardtke or McNutt manufactured this information or hid it until they could use it to provoke a mistrial; they did not know about the photo array because the police never informed them of it, and when they learned of it they attempted to find out what happened. (R. 77:8.) That they erred by not informing the defense immediately does not prove intent to "goad" the defendant into a mistrial. *Kennedy*, 456 U.S. at 673.

The court also found that there was "no reason for the State to look for a second kick at the cat. . . . [T]he State had already put on a pretty strong case or was in the process of doing that, and . . . this information only made the State's case stronger." (R. 77:13.) And the court was correct. The State had an extremely strong case against Miller. The victim gave a consistent and harrowing tale about her abduction and robbery. She identified Miller in court. There was surveillance footage showing Miller's face on it and corroborating RH's story. And there was no reason for the State to want to withhold the information that RH was shown another photo array but did not identify anyone. That only made RH's identification of Miller stronger; instead of picking him out of six people, she picked him out of twelve.

Miller makes no meaningful argument that the court's findings on these points were clearly erroneous. Instead, he

merely makes the conclusory assertion that the combination of the police misconduct and "the subsequent silence of the prosecution upon discovery of such evidence constitutes 'egregious' conduct under this case law." Therefore, he claims, the mistrial must be blamed on the State and jeopardy must attach. (Miller's Br. 7.) He is wrong.

First, as will be explained in section C, police misconduct is not imputed to the prosecutors unless there is some evidence of collusion between the prosecution and law enforcement to pressure the defendant to move for a mistrial or subvert his due process protections. *Jaimes*, 292 Wis. 2d 656, ¶ 13. There is no evidence that the police and the prosecutors colluded to withhold the photo array. Miller cites to nothing in the record to support his claim. (Miller's Br. 7–8.)

Second, the Wisconsin Supreme Court has rejected the notion that the "egregiousness" of the prosecutor's conduct alone is enough to show prosecutorial overreaching to impel a mistrial. *Copening*, 100 Wis. 2d at 713 ("We would have little doubt that the error committed by the prosecutor . . . was egregious in the dictionary sense. . . . But we doubt that the term, 'egregious,' is a sufficient or appropriate description of what is meant by prosecutorial overreaching."). But "egregiousness" is all Miller has argued. (Miller's Br. 7.)

Third, Miller does not explain how he was prejudiced by the prosecutors' failing to immediately inform Bihler of the Jones photo array and instead allowing RH to testify. (Miller's Br. 7–8.) He says that "the prosecution knew it had to tell the defense what it learned prior to putting RH on the stand and failed this basic duty to disclose . . . with an awareness that the information it was withholding was prejudicial to Miller's theory of defense announced in [his] opening statement to the jury." (Miller's Br. 8.) Therefore, he says, "this state action was designed" to prejudice his right

to "successfully complete the criminal confrontation at the first trial." (Miller's Br. 8 (citation omitted).)

But that does not make sense. The prosecutors did not learn about the second array until after Bihler's opening statement. There was no way to disclose this information to Bihler in time to avoid his making that opening statement. After the prosecutors learned that there was a second array, the only way the State could avoid undermining his theory of defense would have been to hide this information from the defense and the jury entirely. In other words, the prosecution learned this information too late to avoid undermining Bihler's opening statement. Had the State intentionally withheld this information until Bihler questioned RH about the photo array in front of the jury and his entire theory of defense was destroyed, perhaps Miller's argument would have some weight. But that is not what happened. The prosecution should have disclosed this information to Bihler right away instead of waiting until he began to ask questions to RH about her photo identification, but that is not sufficient to show intent to provoke a mistrial.

C. This Court should not impute the police mishandling of the Jones photo array to the prosecutor absent proof of collusion between the two to provoke the defendant to move for a mistrial.

The cases involving prosecutorial overreaching do not extend to law enforcement conduct, absent proof of collusion between the prosecutor and the officer to provoke the defendant to move for a mistrial or subvert his due process protections. There is no evidence whatsoever that the prosecutors "intended to 'goad' [Miller] into moving for a mistrial" in this case, let alone that they colluded with the police to do so. (Miller's Br. 6 (quoting *Kennedy*, 456 U.S. at 676).) Miller cites no double jeopardy cases to support his

theory of imputed overreaching. (Miller's Br. 6–8.) The circuit court properly denied Miller's motion.

This case is squarely in line with *Jaimes*. In *Jaimes*, a law enforcement witness improperly testified to an uncharged drug sale involving the defendant. 292 Wis. 2d 656, ¶¶ 2–3. Like Miller, Jaimes sought to impute the officer's improper testimony to the prosecutor, making it "binding on the prosecutor so as to attach double jeopardy." *Id.* ¶ 11. But this Court explicitly rejected that argument. This Court determined that, in the absence of prosecutorial misconduct like collusion between the prosecutor and the law enforcement witness, an officer's inappropriate trial testimony does not bind the State and therefore does not preclude retrial on double jeopardy grounds. *Id.* ¶ 13. No principled reason exists not to extend this determination to other situations where no collusion occurred, and the prosecutor shoulders no blame.

When a defendant asks for or consents to a mistrial and then asks the circuit court to bar retrial on double jeopardy grounds due to prosecutorial overreaching, the defendant must show bad faith, that is, an intent to provoke the defense into requesting a mistrial. *Jaimes*, 292 Wis. 2d 656, ¶ 8.

But it is the prosecutor's intent that matters. Law enforcement officers and prosecutors "have different scopes of employment and authority; their responsibilities are different per se." *State v. Maddox*, 365 S.E.2d 516, 518 (Ga. App. 1988). Once jeopardy attaches and trial begins, the prosecutor discharges the State's prosecutorial function. She represents the interests of the State in the courtroom. She controls the presentation of the State's case. When, as here, no evidence exists that the person controlling the prosecution colluded with a state agent in order to provoke the defendant into moving for a mistrial, double jeopardy does not bar retrial. It "would be too simplistic to reach out

and ensnare within the term 'prosecutor' every state agent involved in a criminal matter, including those involved in the collection of evidence and the preparation for trial." *State v. Traylor*, 642 S.E.2d 700, 703 (Ga. 2007) (citation omitted). And here, there is not even any evidence that the bad acts of the police themselves were calculated to prejudice Miller's defense or to subvert Miller's due process rights. The evidence showed that someone in the police department simply did not follow the proper procedures for accurately documenting the photo array, and then likely did not own up to it in order to avoid personal repercussions. And there is no evidence that the prosecutors had anything to do with it.

It is unfair and inappropriate to impute a law enforcement officer's bad act to provoke a mistrial to a prosecutor who had no knowledge of, and did not participate in, the alleged misconduct. This is particularly true given the consequences of a double jeopardy violation as opposed to a discovery violation. "Absent a showing of good cause, the evidence the State failed to disclose must be excluded." *State v. DeLao*, 2002 WI 49, ¶ 51, 252 Wis. 2d 289, 643 N.W.2d 480. But a proven double jeopardy violation requires a mistrial and precludes retrial altogether.

The prosecution paid a price—mistrial—for not discovering the second lineup and disclosing its existence to the defense in timely fashion. No need exists "to add gratuitously the extreme sanction of double jeopardy in the absence of genuine prosecutorial overreaching or similar judicial conduct." *Maddox*, 365 S.E.2d at 518. With no prosecutorial involvement in the alleged misconduct committed by the police and no evidence that the prosecution intended to cause a mistrial, no compelling reason exists to support dismissal with prejudice. *Jaimes* calls for proof of collusion to impute police misconduct to the prosecutor—proof not present here. This Court should affirm the circuit court.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the decision of the circuit court.

Dated this 9th day of August, 2018.

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 6,368 words.

Dated this 9th day of August, 2018.

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LISA E.F. KUMFER
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 9th day of August, 2018.

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