STATE OF WISCONSIN

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

DISTRICT III

Case No. 2020AP2012-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

JAMES P. KILLIAN,

Defendant-Respondent.

ON APPEAL FROM AN ORDER OF DISMISSAL ENTERED IN TREMPEALEAU COUNTY CIRCUIT COURT, THE HONORABLE RIAN RADTKE, PRESIDING

BRIEF OF DEFENDANT-RESPONDENT

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INTRODUCTION

The State's first attempt at prosecuting James Killian for these child sexual assault allegations ended in a dismissal of all charges based on the court's finding of prosecutorial overreaching due to its "egregious conduct." The court, the honorable Anna Becker, specifically found that the prosecutor had intentionally provoked a mistrial in the original case in order to get a "second kick at the cat" and "an opportunity to add more charges"—as the prosecutor attempted and threatened to do before and during the trial. Accordingly, Judge Becker held that retrial was barred by Double Jeopardy to avoid rewarding the prosecutor's misconduct.

The State never appealed the order but instead followed up by doing exactly what it threatened to do, filing a new case with additional charges based on the exact same conduct. The Circuit Court, Judge Rian Radtke, dismissed because the new charges violated Double Jeopardy and Judge Becker's order in the previous case. The State now appeals, again asking to be rewarded for its misconduct.

ISSUES PRESENTED

I. Whether the Double Jeopardy Clause precludes the State from retrying this matter after intentionally causing a mistrial for the purpose of adding charges and starting over?

The circuit court answered, "yes."

This Court should affirm.

II. Whether the Court's dismissal was warranted under the doctrine of issue preclusion, implicit in the

Double Jeopardy Clause and the common law doctrine rooted in the Due Process Clause.

The circuit court did not explicitly address issue preclusion.

This Court should answer "yes," and affirm.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The Respondent does not request oral argument as the briefs of the parties should sufficiently address the issues.

Publication is warranted to provide guidance when the State seeks to gain an advantage by deliberately causing a mistrial.

STATEMENT OF FACTS

Albeit providing an accurate overview of the complex procedural history in this case, the State's brief glosses over the basis for the circuit court's ruling in dismissing this matter, what the court called, "the State's egregious conduct in 15-CF-47." (R. 84:12.) The facts establishing why this prosecution violates Double Jeopardy are better fleshed out below.

I. Allegations in 2015CF47 & 2016CF38

On March 17th, 2015, the State in a one-count Complaint charged that "…on or about Monday, August 18, 2014, [Mr. Killian] did have sexual contact with [Britney] who had not attained the age of twelve years." (R. 1.) The facts asserted in the Complaint included allegations that Mr. Killian touched Britney's butt on five different occasions and touched her "boobies." (R. 1.) During the trial, occurring over two years later, the State alleged additional conduct, the defendant

"rubbing his penis on her [in bed]," mentioned during opening statement (R. 78: 48) and "a vagina rub," stated to the court, (R. 82:20.) (hereinafter "the allegations involving Britney").

On March 15th, 2016, the State filed an additional Complaint, Case No. 2016CF38, charging Mr. Killian with repeated sexual assault of Ashley, occurring from April 1994 through December 1999. (R. 3.) As a factual basis, the State described assaults ranging from touching of intimate parts to intercourse, occurring "every day for several years," and that the assaults started in 1988 and ended "around December of 1999," (R. 3:2.) (Hereinafter "the allegations involving Ashley").

The two cases were joined for purposes of jury trial and all other proceedings, on November 2nd, 2016. (R. 8.)

II. Pretrial Proceedings

a. Motion Hearing October 5th, 2016

On October 5th, 2016, the court heard motions at a final pretrial conference, including the defendant's other acts motion (R. 73), ultimately resulting in the court continuing the trial. (R. 73: 81.) Regarding the defendant's other acts motion, the court found that grooming behavior was admissible but other acts of sexual assault were inadmissible at trial. (R. 73:73.)

b. Motion Hearing May 31, 2017

On May 31st, 2017, at the adjourned pretrial hearing, the court excluded the State's expert witness, criticizing the State for providing the expert's report only 3 days prior to the hearing and for the expert failing to attend prepared. (R. 72:71, 73.) The court also ruled that recordings of Britney's forensic interviews were inadmissible because the State did not

establish the necessary showing under Wis. Stat. § 908.08(4). (R. 21:6.)

III. Trial Day 1

On June 15th, 2017, two days before trial, the State filed a motion to increase the date range of the allegations involving Britney from August 18th, 2014, to the period between January and August 18th, 2014. (R. 21:8.) In an affidavit, the State claimed, "on June 13, 2017, in the course of witness preparation I met with [Britney]. In discussing with [her] when the sexual assault occurred, [she] disclosed *they* happened over a course of time staring in January 2014 and ending on August 18, 2014." (R. 21: 8.)(emphasis added). The motion was heard the morning of trial. (R. 75:17.)

The defense raised the concern that expanding the date range would open the door to other allegations identified in the Complaint. (R. 75:17-19.) The State replied, "interestingly, it appears to me that if more acts are disclosed at trial, the Information could be changed. And it could, in fact, I think naturally prejudice the defendant more. But I don't think that's unusual. It happens at trial that more facts are accused and Informations are changed and juries deliberate on multiple issues." (R. 75-20.)

The State goes on to say, "[a]nd I think that if the jury watches the forensic interview [ruled inadmissible], it is possible that there will be other facts before them that could in fact lead to further counts which is, I think, allowed under the law. If more facts are introduced at trial, the court can amend the Information and give that instruction to the jury." (R. 75:21.)

The Court responded, "[w]ell, it sounds to me like that's not the intent of your motion to add things because we've

clearly had motions." (R. 75:21.) The State answers: "That's not the intent, I just want an abundance of caution. I want to be clear that that's possible."

Judge Becker, in her eventual order dismissing based on prosecutorial overreaching, found that the State increased the date range as part of a plan "…to pursue prosecution for sexual assault(s) on a range of other acts that occurred over a significantly larger time span." (R: 21:8.)

Thereafter, jury selection and opening statements occurred.

During the State's opening statement, the State focused on a "course of conduct," alleging repeated acts of sexual assault, without ever mentioning hand-to-buttocks contact: "She told her mother that the defendant was touching her inappropriately. …[H]e would rub himself on her. …What you're going to hear is that she then is confronted several times by behavior that is inappropriate and illegal. That he sexually had—he was motivated by sexual gratification. There was no other reason for him to be...touching her. And where it started to get very bad is when she started to sleep with him in the bed while her grandmother was working…. You'll also hear that he was rubbing himself on her. And by himself, I mean his penis…It's an unmistakable course of conduct that leads one to have no doubt that it was sexually motivated." (R. 78: 46-48.)

As the opening turned toward the Ashley allegations, the State said: "…her father had been molesting her since she was about 6. …[H]er father started molesting her at about 6 or 7 years old and didn't stop until she was about 17. …[S]he'll go into detail about it. She's going to go into detail about hand jobs. She's going to go into detail about oral sex. … about

sexual intercourse …about him ejaculating on her stomach..." (R. 78:50.)

IV. Trial Day 2

a. State Argues Admissibility Of Other Sexual Assaults

At 11:00 a.m., the State indicated that Britney was the next witness but requested a 5-minute recess. (R. 82:2.) During the recess, the State requested to introduce the inadmissible forensic interview through Britney, indicating "I want to make it clear that I plan to talk to her about that interview and her experience there and then admit [it] as an exhibit." (R. 82:5.)

After the court again ruled that the video is inadmissible, the State shifted to arguing the admissibility of the other allegations directly: "Actually, I re-reviewed the Criminal Complaint. What is on trial, the course of conduct… Although there is one incident charged, the State doesn't have to charge every incident. The State had discretion. But in the Complaint, the course of conduct is there." (R. 82:15.)

The State then admitted its intent to have Britney testify to several sexual assaults…(R. 82:17), specifically "a breast rub…alleged humping, penis rubbing on her leg…also a vagina rub, a butt rub, a breast rub (sic)…touching." (R. 82:19-20.) The state indicated, "I could have charged each touch but I charged one over a course of time." (R. 82:23.) The State also argued that the additional acts are admissible and were in fact charged because the State charged "on or about August 18th, so the State doesn't have to leave the date of the offense." (R. 82:26.) The State indicated, "[i]t's sort of a quandary. Because if she were to testify and she goes and tells her story, Mr. Killian is facing more charges." (R. 82:27.)

The Court then explained that if Britney testifies about allegations other than what is alleged on August 18th, then it will be a mistrial (R. 82:27), finding that the State is "changing how it wants to try the case." (R. 82:28.) The State responded, "I don't think it's a reason for a mistrial. I think it would be the defendant's worst-case scenario that we file an amended Information charging more assaults." (R. 82:29.) The court explained, "the target keeps moving is the problem." (R. 82:31.) The State again referred to "a course of conduct" constituting one sexual assault. (R. 82:31.) When asked by the court, which one is it, the State answered, "I figured you could take your pick." (R. 82:31.)

The Court then summarized the State's scheme: "…at the eve of trial, now you've changed to a date range. So now that buys…into your theory that we can charge one thing and have five different allegations, possibly six. They can take their pick. That is not how this case was brought. That's the problem. …. Now you've changed the parameter of the charge and the other acts by filing this last-minute Information that gives the date range and [Killian] addressed that yesterday. That's the concern." (R. 82:32-33.)

The State then shifted focus to a mistrial: "I understand, Judge. And so maybe what I can do to avoid a mistrial, is talk to the witness and make sure she understands we're going to talk about the butt grab." (R. 82:33-34.) As Judge Becker explained in her findings, that conversation never happened. (R. 21:19.)

b. State threatens more charges if Killian keeps objecting

During the lunch break, instead of working with Britney, the State opted to appeal to defense counsel to permit the other act evidence. (R. 83:39-40 *see also* R. 21:19).

Specifically the State threatened that if Killian did not acquiesce to the admission of the other charges, and there is a mistrial, then Killian will face more charges "unless he can prove prosecutorial misconduct." (R. 83:39-40.)

When the parties returned to court, the State immediately resumed arguing for the admission of the other sexual assaults. (R. 82:34-48.) The court concluded: "the Court's going to rule, because I'm concerned about a mistrial, that the State can bring in anything that they would like to regarding other acts that are grooming type activities but not other sexual assaults…" (R. 82:48.)

c. State Causes a Mistrial

The State then called Britney, who waded unobstructed into the inadmissible evidence. (R. 83:28.) Britney clarified that she was referring to a conversation with her mother allegedly occurring "during Spring." (R. 83:27.) The State then asked her what she told her mother, to which she disclosed allegations of sexual contact involving "breasts" and "my private spot." (R. 83:28.)

The court found, "despite having been granted liberal questioning latitude by the court with the child, the prosecutor posed an open-ended question in a context where it was clear that she was not focused on the proper timeframe relevant to the charged conduct." (R. 21:20.)

The defense immediately moved for a mistral (R. 83:28), with prejudice, (R. 83:34). The State argued against the mistrial and in regards to the lunch recess threat stated, "we provided defense counsel a copy of the case *State v. Grande*, [169 Wis.2d 422, 485 N.W.2d 282 (Ct. App. 1992)]… and let them know that it would be difficult and possible that the witness would not follow perfectly the questions. And that if

they move for a mistrial, we would object of course. *But also attempt*—well, let me restate. If they move for a mistrial, we would object, period." (R. 83:34-35) (emphasis added).

Judge Becker found that the State "clearly educated himself that the only way he would be barred from retrial if a mistrial was declared was if there was prosecutorial overreaching and he discussed this research with the defense team moments before the child was to testify. There would be no other purpose to call in the defense counsel over lunch other than to lay out what he intended to do if they objected to the introduction and a mistrial was declared." (R. 21:18.)

V. Judge Becker Rules State Cannot Refile

After briefs and an evidentiary hearing, Judge Becker ordered that retrying Mr. Killian was prohibited by Double Jeopardy and made the following findings relevant to this appeal:

"…the prosecutor (despite disagreeing with the court's rulings) did in fact understand and know what the ruling was… This conclusion is supported by the history of the case and… the affidavit filed days before trial wherein the State placed its reasons for again amending the Information. The affidavit asserts 'the law permits amendments to charges…not only before the trial but at trial, to conform to the proof.'" (R. 21: 15-16.)

"…[T]his testimony was planned and in fact alleged to be part of the sexual assaults that were charged." (R. 21: 16.)

"The State plowed ahead with its original plan and that has become even more clear with the additional testimony provided…and…transcripts." (R. 21:17.)

"The discussion with the defense attorneys over the noon break and immediately preceding [Britney's] call to the…stand further supports the prosecutor's utter frustration with the Court's ruling and his intent to find a way around them." (R. 21:17.)

"The case was not going well for the prosecutor either." (R. 21:17.)

"The prosecutor knew that if he retried the case, he might fare better and the defendant could face more ominous charges…" (R. 21: 19.)

"There were numerous Informations filed, with various charges, changing dates, and changing penalties up to and during the trial itself." (R. 21: 20.)

"The facts viewed as a whole, and viewed objectively, point to the prosecutor taking direct and intentional action believing that one of two things would happen if he proceeded in his quest to introduce the other acts. One,…the defense would not object and he had gotten it before the jury; or, two, if the defendant objected and a mistrial was declared, the State could retry the case and add additional charges, thereby increasing its chance of conviction." (R. 21:21.)

"The Court finds…that the prosecutor's conduct was designed to create another chance to convict, and was an act done so as to allow the State another 'kick at the cat'—a chance to prepare more thoroughly and with a better understanding of the issues, a chance to file different motions and obtain more favorable pretrial rulings, and a chance to add more charges and incriminating evidence into the record in the hopes of solidifying the State's chances of a conviction." (R. 21:21.)

VI. State Refiles as Case No. 2019CF163

The State did not appeal Judge Becker's finding that it attempted to goad Mr. Killian into moving for a mistrial so that it could add charges. Rather it simply filed more charges a year and a half later, in Case No. 2019CF163, based on the same factual allegations. (R. 24.) The charges and exposure regarding Ashley increased from one count totaling 10 years exposure, (R. 14: 1), to nine counts totaling 140 years exposure, (R. 36:4). The charge regarding Britney alleged three or more violations of § 948.02(1), but the exposure remained 60 years. (R. 36: 4.) Judge Rian Radtke presided over 2019CF163.

VII. Judge Radtke Dismisses Case No. 2019CF163

Mr. Killian moved to dismiss 2019CF163, arguing (1) that it clearly violates Judge Becker's un-appealed order; (2) Double Jeopardy and Issue Preclusion prohibit retrying Killian; and (3) prosecutorial vindictiveness.[1] (R. 52.)

Judge Radtke dismissed 2019CF163 finding, "[t]he State's plan [at the initial trial] was to bring all of the alleged acts into trial and then seek to amend the Information after testimony to conform to the evidence." (R. 84:8.)

"It's clear from Judge Becker's order that its scope is meant to encompass future prosecutions involving the same

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[1] The lower court's findings of fact regarding whether the defendant established actual vindictiveness is reviewed under the clearly erroneous standard. *State v. Johnson*, 2000 WI 12, ¶ 18, 232 Wis.2d 679, 605 N.W.2d 646. Because Judge Radtke did not make factual findings on prosecutorial vindictiveness, the case should be remanded for determination of that issue if the dismissal is reversed.

facts alleged in 15-CF-47 where additional charges may be added in future prosecutions, and that's precisely what the State threatened to do in 15-CF-47. Accordingly, the Court here today finds that the scope of Jeopardy, in light of the record, which includes Judge Becker's order, includes all facts contained in the Complaints that were later joined and amended…" (R. 84:11.)

STANDARD OF REVIEW

Like double jeopardy analysis, whether issue preclusion applies involves a question of law subject to *de novo* review. *In Interest of T.M.S.,* 152 Wis.2d 345, 354, 448 N.W.2d 282 (Ct. App. 1989).

ARGUMENT

I. THE DOUBLE JEOPARDY CLAUSE PRECLUDES RETRYING THIS MATTER AFTER THE STATE INTENTIONALLY CAUSED A MISTRIAL TO ADD CHARGES AND START OVER.

Ultimately this is a case of first impression in the State of Wisconsin, perhaps the country. The State has not cited, nor has the defense found, a single case analyzing a State's deliberate sabotaging of a jury trial for the purpose of starting anew, under the guise of a different charging scheme, and then proceeding after a circuit court found doing so violates Double Jeopardy. Thus the court, Judge Rian Radtke, correctly found there was "more to this case," than that to which a typical *Blockburger* comparison of charges would suffice. (R. 84:8.)

The court correctly applied *State v. Schultz,* finding the scope of jeopardy to which Mr. Killian was exposed in the prior

trial is determined not by the charging documents alone but by an examination of "the entire record of the first proceeding." (R. 84: 6-7)(citing *State v. Schultz*, 2020 WI 24, ¶ 25, 390 Wis.2d 570, 939 N.W.2d 519).

Schultz held it is the judgment rather than the charging document that determines the scope of jeopardy. *State v. Schultz*, 2020 WI 24 at ¶ 30. "A double jeopardy violation exists when facts alleged under either of the indictments would, if proved under the other, warrant a conviction under the latter." *Id.* at ¶ 26 (internal citation omitted).

a. The charging documents do not contain the scope of jeopardy in this case.

Starting with the Informations, in the second charging document, 19-CF-163, the State charged Killian with repeated acts of sexual assault against Britney, specifying the predicate offenses as, the defendant "touched the breast and pubic mound of Britney and pressed his erect penis against her body." (R. 24:4 n. 8.) The Complaint also includes all of the allegations contained in the first prosecution. (R. 24.)

The amended Information in the first prosecution included one unspecified count of having sexual contact with Britney between January and August 18th of 2014. (R. 14:1.) However, as further discussed below, the State never elected or specified the basis for the amended count in the amended Information or at trial.

Therefore, with respect to Britney, comparing the amended Information in 2015CF47 and 2019CF163 does not establish that the unspecified sexual assault charged in the amended Information in 2015CF47 is separate in law and fact from the alleged repeated acts in the Complaint at issue here.

Regarding the allegations involving Ashley, Mr. Killian was charged (in the first prosecution) with repeated sexual assaults occurring between 1994-1999. (R. 3.) However, the criminal Complaint referred to sexual contact and sexual intercourse occurring from when Ashley was 6 or 7 until she was 17, thus occurring from 1988 to 1999. (R. 3:2.) The subsequent Complaint includes an increased charging scheme culled from the same factual basis as alleged in the original Complaint. (R. 24.) The defense concedes that counts 1-6 of the subsequent Information would survive a *Blockburger* comparison of the two charging documents.

b. The record demonstrates the State prosecuted Killian beyond the August 18th allegation contained in the original charging document.

The record as a whole, not the indictment, sets forth the conduct and time period to which the Double Jeopardy protection applies. *United States v. Roman,* 728 F.2d 846, 854 (7th Cir. 1984). The purpose in examining the record to determine the scope of jeopardy is to determine whether "the evidence required to support a conviction on one indictment would have been sufficient to warrant a conviction on the other indictment." *Schultz,* 2020 WI 24, ¶ 29.

As explained below, the State's emphasized assertion—that it "didn't *prosecute* Killian…for any crimes against Britney except for the one allegation of hand-to-buttocks contact" (State's br.: 15)—ignores the entire record.

During the trial, it was unclear with what specifically Killian was charged. The State explained, "what is on trial, the course of conduct…" (R. 82:15), which the State described as "a breast rub…some alleged humping, penis rubbing on her leg…a vagina rub, a butt rub, a breast rub (sic)…touching." (R.

82:20). The State admitted, "I could have charged each touch but I charged one over a course of time." (R. 82:23.) When asked by the judge "which one" was charged, the State responded, "I figured you could take your pick." (R. 82: 31.)

After deliberately causing the mistrial, the State testified that it intended all of the Britney allegations to constitute alternative bases to convict on the single count. (R. 74: 59-60.) During trial the State referred repeatedly to amending the Information midtrial (R. 75:20, R. 75:21, R. 82:27, R. 74:59), which the court found was the State's intent. (R. 84: 4.)

Looking at the actual evidence adduced at trial, the "hand-to-buttock contact," which the State now argues was the only source of jeopardy, was completely absent. Instead, the State presented evidence of all three of the acts specified as the bases of the new charge. (R. 24:4 n.8) ("rubbing his penis on her in bed" (R. 78: 48), and breast and pubic mound contact, (R. 83:28). The court found that this was not accidentally introduced, but rather that "this testimony was planned and in fact alleged to be part of the sexual assaults that were charged." (R. 57: 16.)

Likewise, the State's opening referred to Mr. Killian "touching her" (R. 78:47), that "he was rubbing himself on her," "that she was confronted *several times* by behavior that is inappropriate and illegal," (R. 78: 47)(emphasis added), "an unmistakable course of conduct" (R. 78:48).

The record thus completely contradicts the State's assertion and demonstrates that Mr. Killian was zealously prosecuted for the exact conduct with which he is again charged here. As Judge Becker found, the State intentionally deprived Mr. Killian of any option of having a trial limited to one alleged sexual assault. (R. 57:21.)

While the State intentionally caused a mistrial prior to entering any evidence regarding Ashely, the State's opening

referred to Mr. Killian "molesting" his daughter from when she was 6-7 years old until she was 17, from 1988 until 1999. (R. 78:50.) The evidence the State sought to introduce preceded 1994 and would have been sufficient to support a conviction for everything that is currently charged in this Complaint (R. 24), because it is the same alleged fact-pattern.

c. Judge Radtke correctly upheld Judge Becker's Order.

The judgment, not the indictment establishes the scope of the Double Jeopardy Clause protection. *State v. Schultz,* 2020 WI 24 at ¶ 30. In evaluating the ruling, "[f]orm is not to be exalted over substance." *Sanabria v. United States,* 437 U.S. 54, 66 (1978).

Judge Becker explicitly prohibited this prosecution: "[T]he State is barred from retrial in this matter due to prosecutorial overreaching." (R. 57: 21.) What is meant by "this matter" is set forth in the court's order: "The Court finds also that the prosecutor's conduct was designed to create another chance to convict, and was an act done so as to allow the State another 'kick at the cat'—a chance to prepare more thoroughly and with a better understanding of the issues, a chance to file different motions and obtain more favorable pretrial rulings, and a chance *to add more charges*..." (R. 57: 21.)(emphasis added).

Judge Radke found, "it's clear from Judge Becker's order that its scope is meant to encompass future prosecutions involving the same facts alleged in 15-CF-47 where additional charges may be added in future prosecutions…" (R. 84: 10.)

d. The State's elementary *Blockburger* analysis ignores the chief evils against which the Double Jeopardy Clause protects and the State's egregious conduct.

The most extreme cases in the history of double jeopardy violations are "cases in which a prosecutor requests a mistrial in order to buttress weaknesses in his evidence." *Arizona v. Washington,* 434 U.S. 497, 507 (1978). The Double Jeopardy Clause thus bars retrial only where "bad-faith conduct...threatens declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict." *Id.* at 508. To that end, retrial is barred only where the State acted with intent to provoke a mistrial request. *United States* v. *Dinitz,* 424 U.S. 600, 611 (1976).

Assuming, *arguendo*, that the charges in the current prosecution satisfy the *Blockburger* test in comparison to the charging document in the previous trial, the principal evils of double jeopardy still exist. The State still considered a fact pattern for years, made (and repeatedly amended) a charging decision, initiated a lengthy jury trial, deliberately sabotaged the jury trial when things went badly, and then reanalyzed the same fact pattern to start over under the guise of a different charging scheme.

The State offered no precedent approving this scenario under the Double Jeopardy Clause or applying a *Blockburger* analysis to such a fact pattern. Indeed, the State urges this Court to adopt, on first impression, a Double Jeopardy interpretation that permits the State to initially withhold charges in an indictment, play by its own rules during the trial, and then coerce defendants to acquiesce to the State's misconduct under the constant threat of having to run the gauntlet again. That is exactly what happened here.

If the Court permits this trial under Double Jeopardy analysis, there is nothing preventing the State from repeating the same conduct. The State could have 10 trials all involving the same evidence, until Mr. Killian stops objecting. So as not

to lose the Double Jeopardy Clause for the *Blockburger* analysis, it bears noting that "[f]ear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization." *State v. Schultz,* 2020 WI 24 at ¶ 20 (quoting *Bartkus v. Illinois*, 359 U.S. 121, 151 (Black, J., dissenting)).

Accordingly, parsing through the fact pattern underlying the two prosecutions to determine which charges the State withheld from the first prosecution does nothing to guard against the chief evils of Double Jeopardy: the defendant's right to have the trial completed by the first tribunal, *Arizona v. Washington,* 434 U.S. 497, 503 (1978); precluding the State "with all its resources and power" from repeatedly subjecting a defendant to the emotional and financial expense of trial, *United States v. Jorn*, 400 U.S. 470, 479 (1971); preventing the State from "using superior resources" to "harass or achieve a tactical advantage over the accused," *Washington,* 434 U.S. at 508; and promoting the public interest in the finality of judgments, *Washington*, 434 U.S. at 503.

The State's proposed analysis also rewards the State for deliberately sabotaging a lengthy jury trial. As the Maryland Court of Appeals noted, discussing Double Jeopardy: "[a] scheming prosecutor cannot be rewarded by being handed the very thing toward which he connived." *Fields v. State,* 96 Md.App. 722, 744, 626 A.2d 1037 (Md. App. 1992).

In this case, the scheme was to goad Killian into requesting a mistrial so that the State could start over with a different charging strategy, not because there was new evidence or additional acts discovered, but simply because the strategy settled-upon after the case pended for years was not going well. (R. 21:21.)

e. The State's arguments do not pertain to dismissals with prejudice after intentionally causing a mistrial.

The arguments in the State's brief all assume the ultimate issue that This Court must decide. Essentially the State argues that since the original charging document, with respect to Britney, was limited to an allegation on August 18th, and since the defense sought unsuccessfully to limit the State's case to an August 18th allegation, then this Court should ignore what actually occurred: that the State zealously sought to prove numerous sexual assaults outside the scope of August 18th and then intentionally caused a mistrial to start over.

In the one sentence where the State acknowledges that the State goaded Mr. Killian into moving for a mistrial, the State cites dicta in *State v. Clark* as guiding this Court on how to address the attempt to retry Killian. (State's Br., 9.) *Clark* narrowly held that retaking a guilty plea in a continuous proceeding did not violate Double Jeopardy. *State v. Clark,* 2000 WI App 245, ¶ 6, 239 Wis. 2d 417, 620 N.W.2d 435. It has nothing to do with the Double Jeopardy issue before this Court.

The State claims *State v. Ziegler* is "highly instructive" in determining whether the Double Jeopardy Clause permits retrying Mr. Killian for the same allegations involving Britney. (State's Br.: 11.) *State v. Ziegler* dealt with multiplicity. *State v. Ziegler*, 2012 WI 73, ¶ 73, 342 Wis.2d 256, 816 N.W.2d 238. The issue here is whether the Double Jeopardy Clause permits the State to re-prosecute Killian regarding an identical fact pattern after deliberately causing a mistrial. *Ziegler* provides no direction on that issue.

The State suggests "it does not matter" that evidence of multiple allegations of sexual assault was entered at the trial because "Killian was not prosecuted for those other acts." (St.

Br. 12-13.) As discussed above, a review of the record demonstrates that *both* circuit court judges found that the State intended to amend the charges against Mr. Killian during the trial. (R. 82:32-33; R.84:8.) It was the State that refused to limit the prosecution, first claiming it charged one count "over the course of time," (R. 82:23) and then arguing it *did* in fact charge all allegations because it used the language "on or about August 18th." (R. 82: 26.)

Jeopardy attached at the time the jury was sworn. Wis. Stat. § 972.07(2); *see also Crist v. Bretz*, 437 U.S. 28, 38 (1978). From that moment until the moment the State intentionally aborted the trial, the State was prosecuting Mr. Killian for all of the allegations involving Britney. That the State failed in its mission does not mean Mr. Killian was free from jeopardy.

The State suggests Killian is judicially estopped "if he argues…that the 2015 charge prosecuted him for conduct besides touching Britney's buttocks." (State's Br.: 13). Under a different record, this argument would warrant consideration. If the State limited its prosecution to the August 18th allegation, if it followed court orders, if it did not open with "a course of conduct," if it did not introduce multiple counts of sexual assault, if it did not expand the charging dates under false pretenses to backdoor the other charges, and most importantly if it did not deliberately sabotage the trial, preventing the empaneled tribunal from deciding only the August 18th allegation—then, if the State sought to prosecute Killian for the other allegations, Killian could not argue that the August 18th allegation included the omitted other allegations. But the State's premise never happened.

In reality, Killian argued that the trial *should* be limited to the August 18th allegation. But the State defied the rulings until intentionally causing a mistrial specifically to add the charges at issue today. (R. 57: 21.) Based on the State's strategy, the court recognized, Killian was in jeopardy not only for the August 18th charge but "all facts contained in the

Complaints that were later joined and amended…and also facts raised at trial." (R. 84:11.) Killian is not estopped from arguing that the two trial court judges' findings are correct.

The State, quoting *Smith v. Massachusetts,* argues that its plan to amend the Information during the trial is irrelevant to the Double-Jeopardy analysis because "double jeopardy analysis focuses on the individual 'offense' charged." (State's Br.: 19.) The footnote upon which the State relies simply notes that where a court dismisses one of three counts based on insufficiency of evidence and then reverses its ruling, the focus of the Double Jeopardy analysis is isolated to that count, not the two counts that proceeded to verdict. *Smith v. Massachusetts*, 543 U.S. 462, 469 (2005). Ignored is *State v. Schultz*, which holds: "…it is the judgment and not the indictment alone which acts as a bar, and the entire record may be considered in evaluating a subsequent claim of double jeopardy." *State v. Schultz,* 2020 WI 24 at ¶ 30.

The State finally argues that Judge Radtke erroneously mistook the same-conduct test for the *Blockburger* test. (State's Br.: 22.) Judge Radtke's oral ruling correctly recited the *Blockburger* test. (R. 84: 7-8.) Judge Radtke reached a "contrary conclusion," because, unlike the State, Judge Radtke could not ignore the record or the "State's egregious conduct." (R. 84:10-12.)

II. THE COURT'S DISMISSAL WAS WARRANTED UNDER THE DOCTRINE OF ISSUE PRECLUSION, IMPLICIT IN THE DOUBLE JEOPARDY CLAUSE AND THE COMMON LAW DOCTRINE OF ISSUE PRECLUSION ROOTED IN THE DUE PROCESS CLAUSE.

The parties briefed issue preclusion[2] when litigating Killian's motion to dismiss to the trial court. (R. 52:16, R. 58:9.) Judge Radtke found that Judge Becker's order controlled the scope of jeopardy, stating "essentially the Court here today is affirming and following Judge Becker's order in 15-CF-47." (R. 84: 10-12.) But the court did not explicitly discuss issue preclusion. (R. 84.) However, Killian, as the prevailing party, may assert any grounds to support the judgment. *Dandridge v. Williams,* 397 U.S. 471, 476 n. 6 (1970).

Issue preclusion is routed in the Double Jeopardy Clause but "operates beyond double jeopardy's bar against a second prosecution for the same offense." *State v. Henning,* 2004 WI 89, ¶ 24, 273 Wis.2d 352, 681 N.W.2d 871. "Collateral estoppel'…stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *United State v. Ashe*, 397 U.S. 436, 443 (1970).

Collateral estoppel applies where the State "*lost* an earlier *prosecution* involving the same *facts*." *United States v. Dixon,* 509 U.S. 688, 705 (1993)(emphasis only on 'lost' supplied).

In applying issue preclusion, courts should avoid a hyper-technical analysis and instead, "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue

[2] Pursuant to *State v. Jacobs,* 2000 WI App. 71, ¶ 2 n.1, 234 Wis. 2d 151, 610 N.W.2d 512, the term "issue preclusion" is used in place of collateral estoppel except when directly quoting a decision.

other than that which the defendant seeks to foreclose from consideration." *Id.* at 444 (Internal citations omitted).

The "legal theory" in the first trial, not the *Blockburger* test, determines the issue precluded in a second trial. *State v. Vassos*, 218 Wis.2d 330, 344, 579 N.W.2d 35 (Wis. 1998).

Had the original trial resulted in a complete acquittal, issue preclusion would preclude this prosecution under the *Ashe* doctrine. *Ashe* held that when an ultimate issue, such as identity, is determined by a verdict, then the State cannot retry a defendant on that issue in a subsequent trial involving a separate offense. *Ashe*, 397 U.S. at 446.

Here, the State's theory of the case was that Mr. Killian committed a "course of conduct" involving Britney that included numerous instances of sexual contact (78: 46-48), and that he "had been molesting [Ashley]" since she was 6 years old until she was 17. (R. 78: 50.) The theory of defense was that the allegations never happened, that Britney was susceptible to biased interviewing from her mother, tainted by her mother's own sexual assault history, and that Ashley fabricated the allegations against Killian after Britney's mother questioned Ashley about a documented extortion attempt, where Ashley, during her parents' divorce, threatened to accuse Killian of sexual assault if he did not pay her $20,000. (R. 79:5-14.) Thus, it would be irrational to believe an acquittal turned on confusion about how many times or during which dates the alleged assaults occurred or upon whether Ashely and Killian were relatives. An acquittal would mean the jury did not find the accusations sufficiently credible or reliable to meet the burden.

If the jury was not convinced beyond a reasonable doubt that Killian had sexual contact with Britney between January and August of 2014 or that he had sexual contact with Ashley

three or more times between 1994 and 1998, it would be irrational to convict on any of the charges in the new Information because they are based on the exact fact pattern the jury would have rejected. By forcing a mistrial, the State deprived Killian from having this tribunal determine this ultimate issue.

a. Allowing the State to avoid the perils of issue preclusion by intentionally bailing out of the jury trial violates the fundamental principles of Double Jeopardy.

In determining whether issue preclusion applies to a judgment, "[r]requirements of fundamental fairness under the due process clause ultimately control." *United States v. Kaytso*, 868 F.2d 1020 (9th Cir. 1989).

The State argued below that judicial estoppel did not apply only because the case did not reach a jury verdict. (R. 58: 10.) In addition to *Ashe*, the State cited *Yeager v. United States*, 557 U.S. 110 (2009) and *Currier v. Virginia*, 138 S.Ct. 2144 (2018). (R. 58:10.) Neither apply to this issue.

Yeager held that issue preclusion applied to a deadlocked count, despite it being dismissed without prejudice, because the count shared a common element with an acquitted count. *Yeager v. United States,* 557 U.S. at 120. The State cited *Yeager* out of context, arguing incorrectly that it held that all mistrials were "nonevents" for purposes of issue preclusion. (R. 58:10.) Rather, the case in no way decided whether a dismissal with prejudice based on prosecutorial misconduct warranted issue preclusion.

Similarly, the State cited *Currier* for the proposition that the *Ashe* doctrine does not apply to mistrials. (R. 58:10.)

Currier, however, rested upon the fact that the defendant moved to sever two counts, thereby *consenting* to a second trial only to then claim the *Ashe* doctrine forbade it. *Currier*, 138 S.Ct. at 2152. The holding does not preclude applying issue preclusion here, and the language in fact supports it. *Currier* recognized "the vast power of the sovereign, the ordeal of a criminal trial, and the injustice our criminal justice system would invite if prosecutors could treat trials as dress rehearsals until they secure the convictions they seek." *Id.* at 2149. Providing further guidance, the Court continued, "at the same time, this Court has said, the Clause was not written or originally understood to pose an insuperable obstacle to the administration of justice *in cases where there is no semblance of these types of oppressive practices.*" *Id.* at 2149 (emphasis added). *Currier* in no way condones the State's actions in this case or its attempt to treat trials as dress rehearsals.

Failing to apply issue preclusion to dismissals *without* prejudice is consistent with Double Jeopardy jurisprudence. Allowing a retrial after a deadlocked jury promotes "society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws." *Arizona v. Washington*, 434 U.S. at 509. Likewise, when a defendant requests a mistrial, even due to error on the part of the judge or the prosecutor, the defendant is deemed to have waived his right to proceed with the first jury, so long as "the defendant retains primary control" over the decision to abandon the trial. *United States v. Dinitz*, 424 U.S. at 609. Thus where there is a dismissal without prejudice there is no final adjudication and no jury verdict.

Double jeopardy jurisprudence draws a sharp distinction where a prosecutor takes the control away from the defendant by intentionally goading him into requesting a mistrial, in which case the matter cannot be retried. *Oregon v.*

Kennedy, 456 U.S. 667, 676 (1982). The State cited no authority limiting Double Jeopardy protection in this scenario to the *Blockburger* analysis rather than to the resulting issue-precluding effect an acquittal would have warranted. (R. 58.) There is no compelling interest served by distinguishing between a State losing to a jury and a State losing to a judge's finding that the State deliberately caused a mistrial to avoid a jury verdict. To hold otherwise allows a prosecutor, upon believing the trial is going badly, to intentionally goad the defense into moving for a mistrial and then remain free from the perils of issue preclusion, which is exactly what happened in this case.

The double jeopardy interests in prohibiting this practice are fundamental: preventing the state from causing a mistrial to buttress its case, *Arizona v. Washington,* 434 U.S. at 497; preventing the State from "refin[ing] his presentation in light of the turn of events at the first trial," *Ashe v. Swenson*, 397 U.S. at 447; preventing the State from prosecuting charges seriatim, *Ohio v. Johnson*, 467 U.S. 493, 500 n.9 (1984); protecting the defendant's right to have the original tribunal render a final verdict, *State v. Seefeldt*, 2001 WI App 149, ¶ 15, 256 Wis.2d 410, 647 N.W.2d 894.

b. Because the State litigated, lost and did not appeal Judge Becker's Order prohibiting adding charges and refiling, the common law doctrine of issue preclusion precludes the State from relitigating it here.

Under the doctrine of issue preclusion, "a judge's ruling on an issue of law or fact in one proceeding binds in a subsequent proceeding the party against whom the judge had ruled, provided that the ruling could have been…challenged on

appeal...” *Loera v. United States,* 714 F.3d 1025, 1029 (7th Cir. 2013).

Issue preclusion is a common law principle with due process roots that is applicable in a criminal case beyond the topic of double jeopardy. *Id.* at 1029. A judgment based on “substantive law,” has the same preclusive effect as a judgment “upon the ground of innocence.” *United States v. Oppenheimer*, 242 U.S. 85, 87 (1916).

Issue preclusion also applies to decisions that do not resolve the factual merits. *United States v. Kaytso*, 868 F.2d 1020, 1022 (9th Cir. 1989); see also *United States v. Harvey*, 900 F.2d 1253, 1257 (8th Cir. 1990)(applying collateral estoppel to the government’s attempt to relitigate the existence of an immunity agreement).

Judge Becker originally dismissed case number 2015CF47, knowing that the State intended to add charges and refile. (R. 83: 46.) The parties then litigated whether doing so violated double jeopardy. (R. 15:10, R. 83:46-47.) Judge Becker considered the briefs of the parties and held an evidentiary hearing (R. 74), ultimately deciding that Double Jeopardy precluded the State from getting “…another ‘kick at the cat’—a chance to prepare more thoroughly … and a chance to add more charges…” (R. 21: 21.)

Judge Radtke found that Judge Becker’s Double Jeopardy order prevented the State from filing this case. Although Judge Radtke did not use the term issue preclusion, he stated, “essentially the Court here today is affirming and following Judge Becker’s order in 15-CF-47 as Judge Becker in that order essentially found the scope of jeopardy extended to future prosecutions from the facts that were part of 15-CF-47; and, therefore, the Court finds that double jeopardy

bars…19-CF-163 consistent with Judge Becker's ruling." (R. 84:11-12.)

Because the State did not appeal Judge Becker's order, the judgment has issue-precluding effect. Specifically, the State is estopped from asserting here that Double Jeopardy permits adding charges and retrying Killian on charges that could have been added prior to Killian's first trial because the State already litigated that issue in front of Judge Becker and lost. (R. 21:21.) Having lost and having failed to appeal the decision, the State cannot simply ignore the judgment and relitigate it here.

CONCLUSION

For the above-stated reasons, the defendant-respondent respectfully requests that the trial court's order dismissing this matter be AFFIRMED.

Dated this 28th day of April, 2021.

Respectfully submitted,

Electronically signed by:

s/ Todd E. Schroeder

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CERTIFICATION AS TO FORM/LENGTH

I 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 the brief is 8381 words.

CERTIFICATE OF COMPLIANCE

I hereby certify that:

I have submitted an electronic copy of this brief in compliance with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that:

A copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 28th day of April, 2021.

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