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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

I. This prosecution does not expose Killian to double jeopardy.

A. The present charges are factually or legally different from the charges in the earlier case.

1. The present charge regarding Britney is factually different from the 2015 charge.

The State argued that, under the *Blockburger* test, the 2015 charge is factually different from the present charge involving victim Britney. (State's Br. 10–15.) The State explained that the 2015 charge prosecuted Killian only for an allegation that he grabbed Britney's buttocks, and Killian would be judicially estopped from arguing otherwise on appeal. (State's Br. 12–15.)

Addressing the State's judicial-estoppel argument, Killian focuses on *the prosecutor's* statements at trial. Killian notes that the prosecutor argued at trial that the 2015 charge was broader than just the single alleged grab of Britney's buttocks. (Killian's Br. 20.) But the issue here is whether Killian, not the State, is judicially estopped from asserting an inconsistent position. Killian does not apply the three-part test for judicial estoppel. Under that test, a party is judicially estopped from asserting a position on appeal if that party convinced a circuit court to adopt a contrary position. (State's Br. 13.) Killian convinced the circuit court to adopt his position that the 2015 charge related only to his alleged grabbing of Britney's buttocks. (State's Br. 13–14.) The circuit court granted Killian's motion for a mistrial because it agreed with Killian's narrow view of that charge. (State's Br. 13–14.) "On appeal, [Killian] adopts the state trial attorney's position in opposition. This presents a classic case of judicial estoppel." *State v. Edwardsen*, 146 Wis. 2d 198, 209–10, 430 N.W.2d 604

(Ct. App. 1988). Allowing Killian to broadly interpret the 2015 charge now would be fundamentally unfair. Had Killian viewed the 2015 charge as broadly as he does now, the circuit court almost certainly would not have declared a mistrial.

Judicial estoppel aside, the 2015 charge was limited to the buttocks grab. Killian seems to argue otherwise because the prosecutor referred to other sexual contact involving Britney at trial. (Killian's Br. 14–15.) Killian does not explain why the prosecutor's subjective views are dispositive, given that a circuit court decides which evidence is admissible and which jury instructions to give. "'Jeopardy' means exposure to the risk of determination of guilt." *State v. Williams*, 2004 WI App 56, ¶ 23, 270 Wis. 2d 761, 677 N.W.2d 691 (citation omitted). The circuit court determined that the 2015 charge was based only on the buttocks grab, and evidence about other sexual contact with Britney was inadmissible other-acts evidence. (State's Br. 13–14.) Killian was not exposed to the risk that the jury would convict him of this inadmissible other-acts evidence. (State's Br. 14–15.)

Killian alternatively argues that the State's reliance on *State v. Ziegler*, 2012 WI 73, 342 Wis. 2d 256, 816 N.W.2d 238, is misplaced because *Ziegler* involved a multiplicity claim. (Killian's Br. 19.) But the Double Jeopardy Clause has the same meaning in the multiplicity context as in the successive-prosecution context. *United States v. Dixon*, 509 U.S. 688, 704 (1993). Tellingly, Killian does not explain what legal analysis should apply here instead of *Ziegler*, nor does he explain why the buttocks grab would be factually identical to Count 10 under a different legal analysis. This Court should reject Killian's undeveloped argument about *Ziegler*.

Killian also argues that *State v. Clark*, 2000 WI App 245, ¶ 5, 239 Wis. 2d 417, 620 N.W.2d 435, is not factually analogous to his case. (Killian's Br. 19.) But the State merely relied on *Clark* for its statement that the Double Jeopardy Clause applies only to "a second prosecution begun on the

basis of the same offense." (State's Br. 9.) Killian does not seem to dispute this point, nor could he plausibly do so. "'The same offense' is the sine qua non of double jeopardy." *State v. Davison*, 2003 WI 89, ¶ 33, 263 Wis. 2d 145, 666 N.W.2d 1.

In short, the 2015 charge prosecuted only Killian's alleged grabbing of Britney's buttocks, and Killian is judicially estopped from arguing otherwise. Under the *Blockburger* test, this buttocks grab is factually different from Count 10. Killian has not developed an argument explaining why the buttocks grab is factually identical to Count 10 under the *Blockburger* test (or any other test).

2. The present charges regarding Ashley are factually or legally different from the 2016 charge.

Applying the *Blockburger* test, the State argued that the 2016 charge is factually or legally different from Counts 1 through 9, which involve victim Ashley. (State's Br. 16–18.) Killian "concedes that counts 1-6 of the subsequent Information would survive a *Blockburger* comparison of the two charging documents." (Killian's Br. 14.) Killian does not seem to refute the State's argument that Counts 7–9 survive a *Blockburger* analysis. "[U]nrefuted arguments are deemed conceded." *O'Connor v. Buffalo Cty. Bd. of Adjustment*, 2014 WI App 60, ¶ 31, 354 Wis. 2d 231, 847 N.W.2d 881. This Court should conclude that Killian conceded that Counts 1–9 survive a *Blockburger* analysis.

In one short paragraph, Killian suggests that the Double Jeopardy Clause bars Count 1 through 9 because, at trial, the State's opening statement said that Killian molested Ashley from 1988 through 1999. (Killian's Br. 15–16.) This Court should decline to consider that argument because it generally does not consider undeveloped arguments, especially constitutional ones. *Cemetery Servs., Inc. v. Wis. Dep't of Regulation & Licensing*, 221 Wis. 2d 817, 831, 586

N.W.2d 191 (Ct. App. 1998). Killian's conclusory argument does not apply the *Blockburger* test or any other legal analysis.

That argument is meritless anyway. Pretrial, the circuit court granted the State's motion to admit other-acts evidence of Killian's uncharged sexual assaults against Ashley between January 1988 and December 1999. (State's Br. 3.) A defendant is not in jeopardy for other-acts evidence. (State's Br. 14–15.) Killian has not refuted this argument. The State did not place Killian in jeopardy for the other-acts evidence involving Ashley by mentioning that evidence in its opening statement.

B. Killian's argument against applying the *Blockburger* test is undeveloped and has no legal basis.

Killian suggests that the *Blockburger* test does not apply to a second prosecution after a State-provoked mistrial. (Killian's Br. 17.) Killian argues that "[t]he State offered no precedent approving this scenario under the Double Jeopardy Clause or applying a *Blockburger* analysis to such a fact pattern." (Killian's Br. 17.) He makes a policy-based argument that applying the *Blockburger* test here would undermine a defendant's protection under the Double Jeopardy Clause and "reward[] the State" for provoking a mistrial. (Killian's Br. 18.)

This Court should reject Killian's argument as undeveloped. *Cemetery Servs., Inc.*, 221 Wis. 2d at 831. A policy-based argument for creating an exception to the law is not a substitute for a developed legal argument. *See Rutter v. Copper*, 2012 WI App 128, ¶ 22, 344 Wis. 2d 596, 824 N.W.2d 885 (finding policy-based argument for statutory exception undeveloped). Killian has not explained what legal test should apply here and why his double-jeopardy claim would prevail under that test. Is he implicitly urging this Court to

apply the defunct same-conduct test from *Grady v. Corbin*, 495 U.S. 508 (1990), *overruled by Dixon*, 509 U.S. 688? He does not say.

Nor has Killian developed his view that courts should treat a State-provoked mistrial differently than an acquittal. The Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal." *State v. Kurzawa*, 180 Wis. 2d 502, 515, 509 N.W.2d 712 (1994) (citation omitted). It also bars a second prosecution "for the same offense" after a prosecutor engaged in misconduct "to prevent an acquittal." *State v. Lettice*, 221 Wis. 2d 69, 89, 585 N.W.2d 171 (Ct. App. 1998). This latter protection is a "narrow exception" to the rule that the Double Jeopardy Clause does not bar a retrial if the defendant consented to a mistrial. *Oregon v. Kennedy*, 456 U.S. 667, 673 (1982). "The *Blockburger* test is used . . . to determine 'sameness' for situations involving successive prosecutions." *Davison*, 263 Wis. 2d 145, ¶ 24 n.11; *accord State v. Henning*, 2004 WI 89, ¶ 18, 273 Wis. 2d 352, 681 N.W.2d 871. Killian has not cited any authority limiting the *Blockburger* test to a successive prosecution after a conviction or an acquittal.

And courts do apply the *Blockburger* test in cases challenging successive prosecutions under *Kennedy*. Of course, allegations of State-provoked mistrials seem rare and sometimes hinge on whether the State intended to provoke a mistrial. *E.g., State v. Jaimes*, 2006 WI App 93, ¶ 10, 292 Wis. 2d 656, 715 N.W.2d 669; *State v. Hill*, 2000 WI App 259, ¶ 19, 240 Wis. 2d 1, 622 N.W.2d 34. But sometimes courts have gone a step further and analyzed whether the two prosecutions involved the same offense when that issue was in dispute. Those courts held that, even if the prosecutor committed misconduct to trigger a double-jeopardy analysis under *Kennedy*, the second prosecution was permissible under the *Blockburger* test. *See, e.g.*, *United States v. Elmardoudi*, 611 F. Supp. 2d 864, 870–71 (N.D. Iowa 2007);

United States v. Koubriti, 435 F. Supp. 2d 666, 675–77 (E.D. Mich. 2006), *aff'd*, 509 F.3d 746 (6th Cir. 2007).

Killian's amorphous view, untethered from the *Blockburger* test, would create a windfall for defendants like him. Killian does not dispute that a second prosecution after an acquittal is permissible if it satisfies the *Blockburger* test. *E.g.*, *Kurzawa*, 180 Wis. 2d at 522–26. *Kurzawa* highlights the windfall problem with Killian's view. In *Kurzawa*, the defendant was acquitted of two counts of theft by fraud, the State subsequently charged him with 54 counts of uttering a forgery, and the two victims of these 54 forgery counts were the same victims of the two previous fraud counts. *Id.* at 506. Some of the 54 forged checks served as the basis for the prior fraud prosecution. *Id.* Applying the *Blockburger* test, the supreme court held that the second prosecution was permissible. *Id.* at 522–26. It noted that the *Blockburger* test and its progeny "adequately protect the interests embodied in the Double Jeopardy Clause." *Id.* at 524.

Killian's case is not materially different from *Kurzawa*. Each case involves a second prosecution that charged more counts than an earlier prosecution that had failed to produce a conviction. Because the *Blockburger* test applied in *Kurzawa*, it applies here too. The *Blockburger* test would indisputably apply here if the prosecutor had simply allowed Killian's first trial to end in an acquittal. Under Killian's logic, though, the *Blockburger* test should not apply here because the prosecutor caused a mistrial. But Killian has not explained why he should receive more protection against a second prosecution simply because his first trial ended in a State-provoked mistrial instead of an acquittal. Under Killian's reasoning, a defendant could commit 100 distinct crimes against a single victim and then, if the prosecutor intentionally causes a mistrial on three counts, the State could be barred from ever prosecuting the defendant for those other 97 crimes. The law does not and cannot work this way.

Killian's policy argument largely overlooks that the Fifth Amendment's "protections ensure that defendants will not be forced to unfairly 'run the gauntlet' a second time for the *same offense*." *Kurzawa*, 180 Wis. 2d at 524 (emphasis added). Killian's argument against the *Blockburger* test seems to assume that his two prosecutions involve the same offenses. This Court should reject Killian's argument as undeveloped because he has not applied or even identified an alternative legal test to reach that conclusion.

C. The circuit court's reasoning is wrong because it did not apply the well-established *Blockburger* test.

The State explained why the circuit court's reasoning was wrong. (State's Br. 21–23.) Without meaningfully responding, Killian offers three conclusory paragraphs that largely quote the circuit court's decisions. (Killian's Br. 16.) This Court should reject Killian's undeveloped attempt to defend the circuit court's reasoning.

II. Killian does not prevail under two issue-preclusion doctrines.

Killian alternatively argues that this prosecution is barred under the issue-preclusion doctrine from *Ashe v. Swenson*, 397 U.S. 436 (1970). His argument fails because the *Ashe* doctrine applies only after an acquittal, not a mistrial.

"*Ashe* forbids a second trial only if to secure a conviction the prosecution must prevail on an issue the jury necessarily resolved in the defendant's favor in the first trial." *Currier v. Virginia*, 138 S. Ct. 2144, 2150 (2018) (citing *Yeager v. United States*, 557 U.S. 110, 119–20 (2009)). Simply stated, "*Ashe*'s protections apply only to trials following acquittals." *Id.*

"In *Ashe*, [the Supreme Court] squarely held that the Double Jeopardy Clause precludes the Government from relitigating any issue that was necessarily decided by a jury's

acquittal in a prior trial." *Yeager*, 557 U.S. at 119. A "mistrial" is a "nonevent" under the *Ashe* doctrine because only "acquittals" can have preclusive effect under *Ashe*. *Id.* at 120. "Because a jury speaks only through its verdict, its failure to reach a verdict cannot—by negative implication—yield a piece of information that helps put together the trial puzzle." *Id.* at 121. "A mistried count is therefore nothing like the other forms of record material that *Ashe* suggested should be part of the preclusion inquiry." *Id.*

Stated differently, "a jury's failure to decide 'has no place in the issue-preclusion analysis.'" *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 357 (2016) (quoting *Yeager*, 557 U.S. at 121–22). "'[T]he burden is on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided' by a prior jury's verdict of acquittal." *Id.* at 359 (citation omitted). "When a jury acquits on one count while failing to reach a verdict on another count concerning the same issue of ultimate fact, *the acquittal, and only the acquittal, counts for preclusion purposes*." *Id.* at 360 (emphasis added).

Killian argues that *Currier* and *Yeager* are inapposite here because they did not involve a State-provoked mistrial. (Killian's Br. 24.) But he has not explained how he gets around the language quoted in the three preceding paragraphs. Because the jury did not reach a verdict, Killian cannot show that the jury necessarily resolved anything about Britney or Ashley in his favor.

Nor has Killian shown that *Ashe* would foreclose the ten present counts if *Ashe* applies to mistrials. Killian cannot show that an acquittal on the 2016 charge (with a charging period of April 1994 through November 1998) would have necessarily resolved Counts 1–5 (with charging periods predating 1994) in his favor. Whether Killian had sexual contact with Ashley in 1990–1993 does not involve the "same issue of ultimate fact" as the 2016 charge. *Bravo-Fernandez*,

137 S. Ct. at 360. And, as Killian recognizes, the prosecutor caused a mistrial before introducing any evidence about Ashley. (Killian's Br. 15.) Killian has not explained how the jury resolved anything about Ashley without hearing evidence about her allegations.

Killian has not cited any authority holding that a State-provoked mistrial can have preclusive effect under *Ashe*. His citation to *Kennedy* is inapt because *Kennedy* did not involve the *Ashe* doctrine. If anything, *Kennedy* hurts Killian's argument. The *Kennedy* Court recognized two scenarios where a mistrial bars a retrial: (1) a court grants a mistrial over the defendant's objection without a manifest necessity, or (2) a prosecutor intentionally provokes a defendant into obtaining a mistrial. *Kennedy*, 456 U.S. at 671–73. The *Ashe* doctrine does not have preclusive effect under the first scenario, even if an acquittal would have precluded a retrial. *United States v. Carothers*, 630 F.3d 959, 964 (9th Cir. 2011). Because the *Ashe* doctrine requires an acquittal, it does not apply under the second scenario either. These two scenarios are functionally the same.

Killian's reliance on a different issue-preclusion theory does not fare any better. He argues that the State is precluded from challenging Judge Becker's order dismissing the first prosecution. (Killian's Br. 26–28.) Issue preclusion "limits the relitigation of issues that have been actually decided in a previous case." *State v. Miller*, 2004 WI App 117, ¶ 19, 274 Wis. 2d 471, 683 N.W.2d 485. "A threshold question in [Killian's] case is whether there is an identity of issues." *Id.* ¶ 20. Judge Becker did not decide the legal issue raised in this appeal.

Judge Becker declared a mistrial and initially found no "intentional prosecutorial misconduct." (R. 83:46.) Killian filed a motion to dismiss a retrial on double-jeopardy grounds, alleging prosecutorial misconduct. (R. 15.) Judge Becker held an evidentiary hearing on that motion. (R. 74.) She concluded

"that the State is barred from retrial in this matter due to prosecutorial overreaching." (R. 21:21.)

Judge Becker's finding of intentional misconduct means that a subsequent prosecution "for the same offense" is barred. *Lettice*, 221 Wis. 2d at 89; *accord State v. Dumars*, 154 P.3d 1120, 1129 (Kan. Ct. App. 2007) (noting that *Kennedy* "bars further prosecution for the same offense" after a State-provoked mistrial); *State v. T.S.*, 627 So. 2d 1254, 1255 (Fla. Dist. Ct. App. 1993) (per curiam) (noting a State-provoked mistrial bars "retrying the accused for the same offense or offenses").

On appeal, the State does not challenge Judge Becker's finding of prosecutorial misconduct or her conclusion barring retrial. The State instead argues that the ten present charges are not the "same offenses" as the two charges in the first prosecution. Whether the State committed misconduct that bars retrial under *Kennedy* is separate from whether the charges in two prosecutions are the same under the *Blockburger* test. *E.g., Elmardoudi*, 611 F. Supp. 2d at 869–71; *Koubriti*, 435 F. Supp. 2d at 672–77. Judge Becker resolved the former question, and the State here raises the latter question. Judge Becker's March 2018 order did not decide the propriety of charges that the State first filed in October 2019. That order does not preclude this appeal.

CONCLUSION

This Court should reverse the order dismissing this case and remand for further proceedings.

Dated this 11th day of May 2021.

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 2990 words.

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies 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 11th day of May 2021.

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