STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP2012-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

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-PETITIONER

JOSHUA L. KAUL
Attorney General of Wisconsin

KARA L. JANSON
Assistant Attorney General
State Bar #1081358

Attorneys for Plaintiff-Appellant-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-5809
(608) 294-2907 (Fax)
jansonkl@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

I. This prosecution doesn't expose Killian to double jeopardy.

A. After a goaded mistrial, the Double Jeopardy Clause prohibits a second prosecution for the same offense—no more, no less.

The State's opening brief explained that after a goaded mistrial, the Double Jeopardy Clause prohibits a second prosecution for the same offense. (State's Br.26–27.) Contrary to Killian's apparent, atextual position, the Clause doesn't prohibit a second prosecution for *different offenses*. (Killian's Br.21.) This Court has made clear that "a subsequent prosecution must be for the 'same offense' in order to violate the right to be free from double jeopardy." *State v. Schultz*, 2020 WI 24, ¶ 20, 390 Wis.2d 570, 939 N.W.2d 519. In other words, "'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 (citation omitted). Therefore, when the prosecutor intends to terminate the trial—for whatever reason—the Clause speaks only to the State's ability to retry the defendant for the same offense. *See Oregon v. Kennedy*, 456 U.S. 667, 671–76 (1982).

Killian and the court of appeals have emphasized the circuit court's finding "that the prosecutor's conduct was designed" in part to receive "a chance to add more charges." (R.21:21; Killian's Br.9–10, 18, 20–21.) Under the controlling legal standard, that finding supports the conclusion that there's no double jeopardy problem here: if the prosecutor "intentionally engaged in misconduct expressly to achieve the opportunity to file additional charges against Killian, including those in the instant case" (Pet-App.5), that just confirms that the State's current offenses weren't on trial in the first prosecution. And if they weren't, this isn't a second

prosecution for the same offense. And if it's not, there's no double jeopardy violation. *See Schultz*, 390 Wis.2d 570, ¶ 20.

Killian's emphasis on the prosecutor's intention to "add more charges" (R.21:21) following a mistrial is a red herring.[1] For double-jeopardy purposes, "[t]he only relevant intent is intent to terminate the trial." *United States v. Oseni*, 996 F.2d 186, 188 (7th Cir. 1993). When the court finds an intent to abort the trial, as it did here (R.21:21), the Clause kicks in to do one thing: prevent a second prosecution for the same offense. *See Kennedy*, 456 U.S. at 671–76. It affords no other remedy.

B. The charges between the two prosecutions are different, and Killian doesn't claim otherwise.

The State has demonstrated that under the *Blockburger* test, the present charges are factually or legally different from the charges in the first prosecution. (State's Br.28–35.) In identifying the actual charges in the first prosecution, the State didn't "ignore the record and focus only on the charging document[ ]." (Killian's Br.9.) Rather, it consulted various aspects of the record in discerning the actual charge concerning Britney. (State's Br.30–31.) That's because it "agrees that when there's a mistrial, courts should be able to consider the entire record to decide what the *actual charges* were in the first prosecution." (State's Br.40.)

Killian hasn't refuted the State's *Blockburger* analysis. (Killian's Br.21–33.) He's therefore conceded that the charges between the two prosecutions are different. *See State v. Chu*,

---

[1] To be clear, the State's ability to bring more charges against Killian wasn't dependent on the first prosecution ending in a mistrial. The Double Jeopardy Clause doesn't require the State to bring all viable charges against a defendant in a single prosecution. (State's Br.26.)

2002 WI App 98, ¶ 41, 253 Wis.2d 666, 643 N.W.2d 878 ("Unrefuted arguments are deemed admitted.").

Instead, Killian effectively asks this Court not to apply the *Blockburger* test to resolve his double-jeopardy challenge. (Killian's Br.31–33.) Although *Blockburger*'s "definition of what prevents two crimes from being the 'same offense' . . . has deep historical roots and has been accepted in numerous precedents of" the U.S. Supreme Court, *United States v. Dixon*, 509 U.S. 688, 704 (1993), Killian claims that applying the test here would "not safeguard [against] the principal evils of double jeopardy." (Killian's Br.32.) He ably identifies those evils but misses the point: they're trigged by a second prosecution for the same offense. Since the *Blockburger* test alone determines when two prosecutions are for the same offense, *see Dixon*, 509 U.S. at 703–12, its straightforward application can't possibly "permit[ ] the chief evils against which the Double Jeopardy Clause protects." (Killian's Br.31–32.) Indeed, in refusing to depart from *Blockburger* in the successive prosecution context, this Court said that the test "adequately protect[s] the interests embodied in the Double Jeopardy Clause." *State v. Kurzawa*, 180 Wis.2d 502, 524, 509 N.W.2d 712 (1994).

Killian makes a policy-based argument that if this prosecution survives *Blockburger* analysis, "there is nothing preventing the State from repeating the same conduct." (Killian's Br.32.) By "conduct," he means "sabotaging the trial and starting over with deliberately withheld counts." (Killian's Br.32.) But a "concern that prosecutors will bring separate prosecutions in order to perfect their case" didn't persuade the U.S. Supreme Court to depart from the *Blockburger* test in *Dixon*. *Dixon*, 509 U.S. at 710 n.15.

In *Dixon*, after noting that *Blockburger* permitted the government to "abandon[ ], midtrial, prosecution of a defendant for burglary by breaking and entering and stealing goods, because it turned out that no property had been

removed" and successively prosecute "burglary by breaking and entering with intent to steal," Justice Scalia addressed the dissent's dissatisfaction with that result. *Dixon*, 509 U.S. at 710 & n.15. Justice Scalia said that the dissent's concern about "abusive, repeated prosecutions of a single offender for similar offenses" appeared "unjustified," both because there's "little to gain and much to lose from such a strategy," and given the "sheer press of other demands upon prosecutorial and judicial resources." *Id.* at 710 n.15. Moreover, Justice Scalia explained that even if the dissent's concerns "were well founded," the Double Jeopardy Clause provides no solution to the problem. *Id.*

In short, the U.S. Supreme Court in *Dixon* was clear: policy arguments aside, there's just one test for determining whether two prosecutions are for the same offense. This Court embraced that conclusion in *Kurzawa*, finding no double-jeopardy problem with the State charging the defendant with 54 counts of uttering a forgery after he was acquitted of two counts of theft by fraud involving the same checks. *Kurzawa*, 180 Wis.2d at 505–06, 522–26. Applying *Blockburger* here, Killian's double-jeopardy challenge fails.

C. A defendant isn't in jeopardy for uncharged conduct.

Since the Double Jeopardy Clause's only remedy for a goaded mistrial is a bar against a second prosecution for the same offense, and since this isn't a second prosecution for the same offense, Killian is left to endorse the court of appeals' novel conclusion that a defendant can sometimes be in jeopardy for uncharged conduct. (Killian's Br.21–31.) The State has explained why that's legally incorrect. (State's Br.36–41.)

Killian offers no persuasive response. He argues that this Court should disregard U.S. Supreme Court precedent showing that a defendant isn't in jeopardy for uncharged

conduct because, unlike in *Felix*, "the State presented the conduct underlying the subsequent prosecution not as other act evidence in the first trial but with the intent to include the evidence as charges in an amendment." (Killian's Br.25.) Even if this statement were accurate (it's not, because the State presented no evidence in Ashley's case, and only attempted to add a single, transactionally related incest charge before trial), the distinction Killian draws is inconsequential. *Felix* bases jeopardy on the "actual crimes charged" in the prosecution, not on evidence that isn't tied to an actual charge but maybe later could be. *See United States v. Felix*, 503 U.S. 378, 385–86 (1992).

Notably, in advocating for a rule that a defendant can sometimes be in jeopardy for uncharged conduct, Killian's brief doesn't even address the meaning of jeopardy. (Killian's Br.21–33.) Had he confronted it, he would have needed to explain how he faced actual danger of conviction for charges that the State indisputably didn't bring in the first prosecution. (State's Br.36–39.)

Killian's silence on the matter may be attributed to his belief that jeopardy shouldn't be based on actual exposure at trial, despite what this Court held in *Schultz*, 390 Wis.2d 570, ¶¶ 31, 55, but rather on hypothetical danger. He claims that's not the case (Killian's Br.29), but his contention rings hollow on closer inspection.

Killian's test focuses exclusively on whether the prosecutor "intended to amend the charges." (Killian's Br.27.) It's beyond dispute, though, that the prosecutor was powerless to add charges at trial. *See State v. Conger*, 2010 WI 56, ¶ 22, 325 Wis.2d 664, 797 N.W.2d 341 ("[T]he prosecutor's unchecked [charging] discretion stops at the point of arraignment."). So, the State hardly "assumes the issue" when it refers to uncharged conduct. (Killian's Br.24.) And Killian's many statements that the State already "prosecuted" him for its current offenses is just code for a

(fruitless) attempt to charge.[2] (Killian's Br.25–27, 29–30.) Since the prosecutor couldn't control whether charges were added in the first prosecution, Killian's narrow focus here belies his claim that he defines jeopardy as actual danger of conviction.

And in fact, Killian reveals his true conception of jeopardy when he argues that the likelihood of additional charges absent the mistrial is "irrelevant" to whether he was in jeopardy for uncharged conduct. (Killian's Br.30.) This notion of jeopardy—seemingly embraced by the court of appeals given its silence on the chances that Judge Becker would have allowed amendment of the information—is remarkable. Under Killian's reasoning, his first trial could have gone to verdict without any amendment of the information, and he'd still be able to argue that the Clause bars this successive prosecution for different crimes due to the prosecutor's conduct. Considering that a "defendant cannot be convicted of a crime for which is he is not charged," *State ex rel. Winnie v. Harris*, 75 Wis.2d 547, 553, 249 N.W.2d 791 (1977), query how Killian's position squares with precedent defining jeopardy. (State's Br.36–40.) And where do courts draw the line? How many comments about amendment are too many? Is it enough to simply comment on uncharged conduct during opening statements? To try to add counts before trial?

The State's rule is simple and follows precedent: a defendant isn't in jeopardy for uncharged conduct. Killian's rule is vague, confusing, and unprecedented.[3] And as for

---

[2] Or in the case of Ashley, Killian's use of the term "prosecuted" is code for referring to admissible other-acts evidence during opening statements. (Killian's Br.29.)

[3] For example, Killian insists that the State "zealously prosecuted" him for these offenses but also intentionally provoked

Killian's policy-based argument that under "the State's reasoning, [a defendant] would not be in jeopardy until he had no opportunity to defend against the charges" (Killian's Br.31), Wis. Stat. § 971.29(2) addresses that concern by requiring a finding of no prejudice before allowing amendment at trial.

D. Even if a defendant could sometimes be in jeopardy for uncharged conduct, this case wouldn't qualify.

As argued, even if a defendant could sometimes be in jeopardy for uncharged conduct, this case wouldn't qualify because the chances were slim to none that the court would have allowed amendment of the information absent the mistrial. (State's Br.41–44.) By not refuting the State's argument, Killian concedes that there was virtually no chance of the court's adding charges. (Killian's Br.30.) Thus, there was virtually no chance of Killian risking conviction on the State's current offenses. Surely then, this case doesn't meet the requirement of "real" jeopardy. *State v. Witte*, 243 Wis. 423, 429, 10 N.W.2d 117 (1943).

Finally, if this Court were to agree with Killian that "the active pursuit of convictions" alone placed him in jeopardy for the uncharged conduct (Killian's Br.30), that conclusion would result in continuing jeopardy on those offenses. As explained, prosecutorial misconduct aimed at getting a conviction doesn't trigger *Kennedy*'s rule barring retrial. (State's Br.27.) *Kennedy* requires an intent to abort the trial. Here, the court never found that the prosecutor intentionally provoked a mistrial on the State's *current offenses* (and of course it couldn't have, since they weren't charged). Thus, even accepting Killian's unprecedented

---

a mistrial because he couldn't prosecute Killian for these offenses. (Killian's Br.9–10, 21–33.) Which is it?

argument that he was in jeopardy for uncharged conduct, there's no double jeopardy problem here given the intent to convict on those offenses. *See Martinez v. Illinois*, 572 U.S. 833, 841 (2014) (jeopardy must end in a manner that bars retrial).

II. Killian doesn't prevail under two issue-preclusion doctrines.

A. The State isn't relitigating an issue actually decided in the first proceeding.

Killian alternatively argues that this prosecution is barred under the issue-preclusion doctrine of *Ashe v. Swenson*, 397 U.S. 436 (1970).[4] (Killian's Br.33–40.) He's wrong because no issue of ultimate fact was decided in his favor in the first prosecution.

"Under the collateral estoppel doctrine an issue of ultimate fact that is determined by a valid and full judgment cannot again be litigated between the same parties in a subsequent lawsuit." *State v. Vassos*, 218 Wis.2d 330, 343, 579 N.W.2d 35 (1998).

In *Ashe*, the U.S. Supreme Court held that "collateral estoppel" is "part of the Fifth Amendment's guarantee against double jeopardy." *Ashe*, 397 U.S. at 442–45. Its "suggestion that the relitigation of an issue can sometimes amount to the impermissible relitigation of an offense represented a significant innovation in [the Court's] jurisprudence," and "[s]ome have argued that it sits uneasily with [the] Court's double jeopardy precedent and the Constitution's original meaning." *Currier v. Virginia*, 138 S.Ct. 2144, 2149–50 (2018).

---

[4] Like Killian, the State refers to issue preclusion instead of collateral estoppel except when quoting an opinion. (Killian's Br.33 n.4.)

Regardless, the Court has "emphasized that [*Ashe*'s] test is a demanding one," and that it "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." *Id.* at 2150. Succinctly, "*Ashe*'s protections apply only to trials following acquittals." *Id.*; *see also Yeager v. United States*, 557 U.S. 110, 119 (2009) ("In *Ashe*, we 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."). This Court has recognized the requirement of an acquittal for the issue-preclusion doctrine to apply in the double jeopardy context. *See Vassos*, 218 Wis.2d at 342 ("[A]n acquittal in the first prosecution may bar subsequent prosecution under the collateral estoppel doctrine.").

Thus, the requirement of an acquittal for issue preclusion to apply here is not just the State's idea, as Killian hopes. (Killian's Br.36.) It's how the law works: "a jury's failure to decide 'has no place in the issue-preclusion analysis.'" *Bravo-Fernandez v. United States*, 580 U.S. 5, 8 (2016) (citation omitted).

Killian's suggestion that a government-provoked mistrial should somehow turn undecided issues of ultimate fact into decided issues of ultimate fact is devoid of any legal support. (Killian's Br.36–40.) And his reliance on double-jeopardy principles in advocating for an unprecedented (and illogical) expansion of the issue-preclusion doctrine doesn't persuade considering that it's already debatable whether the *Ashe* doctrine is consistent with "the Constitution's original meaning." *Currier*, 138 S.Ct. at 2149–50. Indeed, the textual hook for the *Ashe* doctrine is the notion that sometimes the "relitigation of [an] issue . . . would be tantamount to the forbidden relitigation of the same offense resolved at the first trial." *Id.* at 2149. But Killian can't claim that textual hook here, where there's no relitigation of an issue actually decided

in the first proceeding. Therefore, his position finds zero support in the Clause's text. This Court should reject it.

B. Judge Becker didn't decide whether the Double Jeopardy Clause bars the State's current prosecution.

Killian's reliance on a different issue-preclusion theory fares no better. He argues that in the *first* prosecution, Judge Becker decided that the Clause bars the State's *second* prosecution, and because the State didn't appeal that purported ruling, it cannot "relitigat[e]" the issue now. (Killian's Br.40–42.)

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.)

As already explained at length, Judge Becker's finding of intentional misconduct means that the State cannot bring a subsequent prosecution for the same offense. (State's Br.26–27.)

On appeal, the State does not challenge Judge Becker's finding of prosecutorial misconduct or her conclusion barring retrial of the offenses charged in the first prosecution. 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. 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. While Killian argues that Judge Becker "clearly ruled that the State could not bring these charges," he can't point to any *Blockburger* analysis that Judge Becker ran in the first prosecution. (Killian's Br.40–42.) And since the "same offense" is the essential feature of double jeopardy, it's wholly inequitable to suggest that the State should've understood Judge Becker's order barring "retrial in this matter" as prospectively applying the Clause to bar a subsequent prosecution for *different offenses*. (Killian's Br.42.) Judge Becker's order does not preclude this appeal.

CONCLUSION

This Court should reverse the court of appeals.

Dated this 29th day of March 2023.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Kara L. Janson
KARA L. JANSON
Assistant Attorney General
State Bar #1081358

Attorneys for Plaintiff-Appellant-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-5809
(608) 294-2907 (Fax)
jansonkl@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,999 words.

Dated this 29th day of March 2023.

Electronically signed by:

Kara L. Janson
KARA L. JANSON

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Supreme Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 29th day of March 2023.

Electronically signed by:

Kara L. Janson
KARA L. JANSON