STATE OF WISCONSIN

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

DISTRICT I

Case No. 2021AP267-CRLV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MITCHELL D. GREEN,

Defendant-Petitioner.

ON LEAVE TO APPEAL A NON-FINAL ORDER ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JANET C. PROTASIEWICZ AND DAVID J. BOROWSKI, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Did the Milwaukee County Circuit Court properly exercise its discretion when it determined that a mistrial in Defendant-Petitioner Mitchell D. Green's first trial for trafficking a child and related charges was a "manifest necessity" after Green sought to introduce *Denny*[1] evidence without notice to the court or the State and without the witness and alleged third-party perpetrator having the advice of counsel?

The circuit court declared a mistrial and allowed the State to re-try Green as a result of the mistrial being a "manifest necessity."

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. This Court can resolve this case by applying settled legal principles to the facts.

INTRODUCTION

In early 2020, Green went to trial on multiple charges stemming from his involvement in trafficking a child. On the second day of trial, Green presented testimony from Jonathan Cousin, who suggested that it was him—not Green—who committed the offense in this case. Cousin was unrepresented by counsel, and Green had never given the court or the State notice that it intended to introduce Cousin as a potential third-party perpetrator. Because of these shortcomings, the circuit court concluded that a mistrial was required. After the State re-charged Green, he moved to dismiss the case, arguing

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[1] *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984).

that the retrial would violate his constitutional right against double jeopardy. The circuit court denied his motion, and this Court granted leave for an interlocutory appeal.

This Court should affirm the circuit court's decision. Whether circumstances constitute a "manifest necessity" for a mistrial is a matter of discretion for the circuit court. Here, the court considered multiple relevant factors, including a lack of notice and concerns about Cousin's right to counsel, when it determined that the circumstances required a mistrial. This finding meant that the circuit court properly concluded that retrial would not violate Green's right against double jeopardy.

STATEMENT OF THE CASE

In a criminal complaint dated March 3, 2019, the State charged Green with one count each of trafficking of a child, physical abuse of a child, and disorderly conduct. (R. 1:1.) Police identified Green as a suspect when he entered the courtroom during a jury trial for a man named Kimeo Conley in February of 2019. (R. 1:2; 82:75.) Conley was on trial for trafficking the testifying witness, S.A.B., in late 2018. (R. 1:2.) Green's entrance caused S.A.B. to stop talking and ask for a break. (R. 1:2.)

During the break, S.A.B. identified Green to police as "Money Mitch," whom police knew to be a suspected co-actor in Conley's case. (R. 1:2.) On one occasion when Conley was out of town, Green instead drove her to a prostitution date at the Marriott in downtown Milwaukee. (R. 1:2.) S.A.B. remembered the evening distinctly because her abuser spit in her mouth, causing her to vomit. (R. 1:2.) After S.A.B. received payment and left the Marriott, Green took all of the money. (R. 1:2.) Then on December 4, 2018, police arrested Conley. (R. 1:2.) Green confronted S.A.B., accusing her of talking to the police. (R. 1:2.) Green punched S.A.B. in the face with a closed fist, pointed a gun at her, threatened to kill her,

and took her phone. (R. 1:2.) At the time of these incidents, S.A.B. was 17 years old. (R. 1:2.)

Green's case proceeded to trial. On August 21, 2019, Green filed a witness list that included two names, one of which was Green's cousin, Jonathan Cousin. (R. 18:1.) The next day, the State filed an omnibus pretrial motion in limine. (R. 21:1.) One of the items in the motion sought an order "[p]rohibiting the defense from introducing any other-acts evidence involving a third-party perpetrator" unless the evidence was previously ruled admissible by the court. (R. 21:2.) At a hearing that same day, the court acknowledged receipt of the State's motion; at no time did Green object to any of the State's requests. (R. 73:2.)

Green's trial began on January 27, 2020. (R. 80.) On the first day, S.A.B. testified about her experiences with Conley and Green. (R. 82:68–78.) S.A.B. specifically stated that Green drove her to the prostitution meeting at the downtown Marriott and said that although she did not remember the specific date that the meeting occurred, it stood out to her because of the man spitting in her mouth. (R. 82:70.) On the second day of trial, Milwaukee Police Officer Gerardo Orozco testified about his work with the FBI Human Trafficking Task Force and his investigation into Green. (R. 83:4–7, 18–24.) Following Officer Orozco's testimony, the State rested. (R. 83:78.)

Green's first witness was Cousin. (R. 83:78.) Cousin testified that he was the one who gave S.A.B. the ride to the Marriott on the evening she described. (R. 83:85.) He claimed that he agreed to give a man named Delmar and two other people—S.A.B. and a man named J.R.—a ride downtown in exchange for gas money. (R. 83:85–86.) According to Cousin, when they arrived downtown, Delmar asked him to wait in exchange for more money, and Cousin agreed. (R. 83:87.) About 15 minutes later, Cousin said, S.A.B. and J.R. returned to the car and S.A.B. mentioned the man spitting in her

mouth to J.R. (R. 83:87–88.) The State then briefly cross-examined Cousin about inconsistencies in his story, his knowledge that prostitution was occurring, and his relationship with Green. (R. 83:90–93.) The court then took a recess for lunch. (R. 83:93.)

After the break, the court stated that there had been an off-the-record discussion for about five minutes in which the State expressed concern about Cousin's testimony, and that the court shared the State's concern. (R. 86:2.) The State noted that it was never notified that Green intended to use Cousin as a *Denny* witness and that there was "no *Denny* investigation, no *Denny* motion hearing, and no ruling on the admissibility of that evidence." (R. 86:3.) The State further commented that Cousin had effectively admitted to his involvement in trafficking S.A.B. without having been advised by counsel. (R. 86:4–5.)

The court explained that it saw two main issues: whether Cousin "did or did not need . . . counsel before he testified," and "the *Denny* issue, which wraps together with the whole, both sides have a right to a fair trial issue." (R. 86:9.) Green argued that Cousin was not necessarily offering *Denny* evidence because there was no specificity as to the dates on which Green and Cousin allegedly drove S.A.B., but the court replied that if Cousin's testimony was not meant to suggest that Cousin had driven S.A.B. instead of Green, then Cousin's testimony was completely irrelevant. (R. 86:13–14.) Green continued to argue that Cousin had not actually admitted to committing a crime, but the court disagreed, saying that "the State has enough to arguably get past probable cause right now based on what [Cousin] said on the stand." (R. 86:19.)

After further discussion by the parties, the court recapped Cousin's testimony, concluding that "[t]he only purpose for Mr. Cousin to testify is to take the fall for Mr. Green . . . ." (R. 86:26–28.) The court considered a curative

instruction, but it reasoned that an instruction would be ineffective because it would require the jury to disregard approximately 25 minutes of testimony. (R. 86:29.) It also noted that it was not fair to the State for Cousin's testimony to be offered without notice, and that it should have been vetted in advance:

> I'm not sure that I would have allowed Mr. Cousin to testify. I would have needed it to be vetted bit more. I would have wanted to hear more of an argument and briefing from both sides as to the *Denny* issues. It strikes me as very, very problematic, and I agree with the State that it clearly is *Denny* evidence.

(R. 86:30.)

Most importantly, the court reasoned, there was no way "that that bell can be unrung, because of the gravity of the testimony, because of *Denny* evidence, [and] because there were only three witnesses in this case." (R. 86:31.) Thus, the court concluded, "the circumstances require[d] a mistrial." (R. 86:32.) It said that the matter would be reset for a new trial date, and that the *Denny* issue should be resolved before the second trial. (R. 86:33.)

After the mistrial, Green filed a motion to dismiss the case, arguing that retrial would violate his constitutional right against double jeopardy. (R. 42.) The State responded, arguing that the mistrial was necessary. (R. 46:2–6.) The State also argued that the defense's treatment of Cousin as an uncounseled party should disqualify Green's attorney from continuing on the case. (R. 46:6–10.) The court denied the motion to dismiss at a hearing on June 22, 2020. (R. 88:5.)[2] The court stated that Cousin's testimony had "blindsided" the State, and that "there were no legitimate alternatives at that point in time other than a mistrial." (R. 88:5.)

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[2] The June 22 hearing took place via videoconferencing due to the COVID-19 pandemic.

Following the court's denial of the motion to dismiss, Green's counsel withdrew in light of the State's request to disqualify him. (R. 89:5.) After a delay for a change in counsel, Green moved the circuit court to reconsider its decision. (R. 58.) The State filed a response (R. 62), and the circuit court denied reconsideration (R. 63). Green then filed a petition for leave to appeal the circuit court's decision (R. 66), which this Court granted (R. 64).

STANDARD OF REVIEW

This Court reviews a circuit court's decision to declare a mistrial due to a "manifest necessity" for an erroneous exercise of discretion. *State v. Barthels*, 174 Wis. 2d 173, 183, 495 N.W.2d 341 (1993).

ARGUMENT

The circuit court's decision to allow retrial of Green did not violate his constitutional right against double jeopardy.

A. Double jeopardy does not bar retrial of a defendant where his first trial resulted in a mistrial due to a "manifest necessity."

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution states: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend. V. The Wisconsin Constitution contains the same protection in article I, section 8(1): "[N]o person for the same offense may be put twice in jeopardy of punishment." Wisconsin courts have said these provisions are "identical in scope and purpose," such that they are coterminous. *See State v. Kelty*, 2006 WI 101, ¶ 15, 294 Wis. 2d 62, 716 N.W.2d 886.

The protection against double jeopardy is two-fold: It protects a criminal defendant from successive prosecutions

and from multiple punishments for the same offense. *United States v. Dixon*, 509 U.S. 688, 696 (1993). Only the former protection is at issue here. "Protection against successive prosecutions precludes both 'a second prosecution for the same offense after acquittal[ ]' and 'a second prosecution for the same offense after conviction.'" *Kelty*, 294 Wis. 2d 62, ¶ 16 (alteration in original) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)).

Jeopardy generally attaches to a criminal prosecution when the jury has been empaneled and sworn in. *See State v. Seefeldt*, 2003 WI 47, ¶ 16, 261 Wis. 2d 383, 661 N.W.2d 822. "The protection against double jeopardy limits the ability of the State to request that a trial be terminated and restarted." *Id.* ¶ 17. However, where a "manifest necessity" dictates the need for a mistrial, retrial of the defendant will not violate his right against double jeopardy. *Id.* ¶ 19. It is the State's burden to show the existence of a manifest necessity in such a case. *Id.*

Whether a manifest necessity exists "is a matter of discretion for the trial court" because "[w]hether circumstances warrant the granting of a mistrial can best be ascertained by the trial court judge." *Barthels*, 174 Wis. 2d at 183. "In exercising its discretion, the trial court must examine the circumstances leading to the state's motion and should consider the alternatives before depriving the defendant of the right to have the original tribunal render a final verdict." *State v. Collier*, 220 Wis. 2d 825, 835, 584 N.W.2d 689 (Ct. App. 1998). A court need not use the words "manifest necessity" when permissibly declaring a mistrial. *Arizona v. Washington*, 434 U.S. 497, 516–17 (1978).

B. The circuit court properly exercised its discretion when it determined there was a manifest necessity for a mistrial.

Here, the circuit court soundly exercised its discretion when it determined that a manifest necessity required a mistrial in Green's original trial. The court's concern was twofold. First, the court noted the distinct possibility that if Cousin received the advice of counsel before testifying, as he should have, the jury would not have heard his testimony because Cousin likely would have been advised not to testify. (R. 86:9; 91:17.) Second, the court was concerned that Green's raising of a *Denny* defense without proper notice to the State was unfair to the State. (R. 86:9; 91:39–40.) For those reasons, the court concluded that there was no way to undo the effect of Cousin's surprise testimony, and that a mistrial was therefore "a manifest necessity." (R. 91:40.)

The court's deliberative process evinced a proper exercise of discretion with regard to the manifest necessity for a mistrial. The court did not abdicate its responsibility by permitting the State to decide whether there would be a mistrial, nor did it fail to consider alternatives to declaring a mistrial. *Cf. State v. Moeck*, 2005 WI 57, ¶¶ 69–72, 280 Wis. 2d 277, 695 N.W.2d 783. It considered issuing a curative instruction or striking Cousin's testimony. (R. 86:21–22, 28–29.) But after weighing all of the circumstances, it concluded that there was no way to "unring the bell"—that is, there was no possibility to cure the error—mid-trial. (R. 86:29, 31–32.)

Green argues that the circuit court incorrectly determined that the State was entitled to notice of the *Denny* defense because the State never filed a pretrial motion related to *Denny* evidence. (Green's Br. 20–23.) However, item 9 in the State's pretrial motions in limine sought an order "[p]rohibiting the defense from introducing any other-acts evidence involving a third-party perpetrator, unless and until defendant satisfies his burden and such evidence is ruled

admissible by the court pursuant to *State v. Scheidell*,[3] . . ., *State v. Sullivan*,[4] . . . and [section] 904.04(2) Stats." (R. 21:2.) Green did not oppose the State's motion, and the court acknowledged it at a pretrial conference on August 22, 2019. (R. 73:2.)

Green contends that the State's motion concerned only *Scheidell* evidence relating to *unknown* third-party perpetrators, not *known* third-party perpetrators under *Denny*. (Green's Br. 21.) The State disagrees. The motion sought a prohibition on the introduction of "any other-acts evidence involving a third-party perpetrator" unless the court ruled the evidence admissible. (R. 21:2.) The reference to *Scheidell* in the motion in limine is not describing the evidence to be excluded, it is describing one way third-party perpetrator evidence could become admissible.

Green also argues that because the State failed to object to Cousin's testimony until after completing its cross-examination of him, "the State's claim of surprise and lack of notice was untimely." (Green's Br. 23–24.) Green cannot and does not argue that the State actually had notice of the nature of Cousin's testimony before it happened; he argues only that the delay somehow matters to the analysis. But regardless of whether and when the State objects to a particular issue, a circuit court may declare a mistrial of its own volition. *See State v. Copening*, 100 Wis. 2d 700, 709, 303 N.W.2d 821 (1981) ("it is not infrequent that a trial court discerns sua sponte the necessity for a mistrial"). Even if the State never objected to Green's offer of a *Denny* defense via Cousin's testimony, the court still could have declared a mistrial.

Green argues further that any issue related to Cousin's right to counsel has no effect on this case and that any remedy

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[3] 227 Wis. 2d 285, 595 N.W.2d 661 (1999).

[4] 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

flows to Cousin, not to the State. (Green's Br. 24–25.) This argument is related to Green's claim that there was no need to declare a mistrial because the court decided after the mistrial that Cousin's testimony would be admissible as *Denny* evidence. (Green's Br. 25–29.) But if Cousin had the advice of counsel and understood the legal jeopardy he placed himself in by testifying, as he should have, he may have elected not to testify. It is of no importance that Cousin's standby counsel ended up not advising Cousin after Cousin already testified; the question is what would have happened if the proper procedure was followed and Cousin's rights were respected. As the circuit court noted, there is a strong chance that the jury would not have heard Cousin's testimony had Cousin received legal counsel before taking the stand. (R. 86:19.)

But even if Green is correct that Cousin's testimony would have eventually ended up in front of the jury, his position would eviscerate any ability for courts to require defendants to present *Denny* evidence through pretrial proceedings. If courts have no ability to declare a mistrial when a defendant presents an otherwise admissible *Denny* defense with no advanced notice, then any requirement courts establish that defendants give pretrial notice of a *Denny* defense means nothing. In other words, what could not be undone in this case—the bell that could not be "unrung"—was not the testimony but the process. There was no alternative for that process; once Green had circumvented it, there was no way to undo it. *See Collier*, 220 Wis. 2d at 835.

CONCLUSION

For the reasons discussed, this Court should affirm the circuit court's order denying Green's motion to dismiss the charges against him.

Dated this 7th 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 2,877 words.

Dated this 7th day of May 2021.

Electronically signed by:

s/ John A. Blimling
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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 7th day of May 2021.

Electronically signed by:

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