STATE OF WISCONSIN :: COURT OF APPEALS :: DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 2021-AP-267-CRLV

vs.

Trial No. 19-CF-914

MITCHELL D. GREEN,

Defendant-Appellant.

Appeal from a non-final order denying dismissal on Double Jeopardy grounds entered February 4, 2021 in the Circuit Court of Milwaukee County, Honorable David L. Borowski, Judge, presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

JOHN T. WASIELEWSKI
Bar ID No. 1009118
Attorney for Defendant-Appellant

Wasielewski & Erickson
1429 North Prospect Avenue
Suite 211
Milwaukee, WI 53202

(414) 278-7776
jwasielewski@milwpc.com

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ARGUMENT

Because Mr. Green's trial was aborted without either his consent or manifest necessity, Double Jeopardy bars retrial

Mr. Green argued that, in the absence of any discovery demand or motion in limine, his counsel was not required to provide the prosecutor advanced notice of the content of Mr. Cousin's testimony. Brief 20-24. In response, the State asserts that one of the State's motions in limine encompasses Mr. Cousin's testimony and required prior notice. State's br. 8-9. This Court should reject this contention for any of three reasons. First, although the State was reminded of the motion in limine in question in Mr. Green's motion for reconsideration (58: 22), the State never argued below that Mr. Green violated the motion in limine, and thus raises this argument for the first time in this appeal. Second, the State is incorrect in asserting that Mr. Cousin's testimony falls within the scope of the motion in limine. Third, even were Mr. Cousin's testimony within the scope of the State's motion in limine, the motion in limine was never addressed or granted, and thus never became an *order* in limine.

When Mr. Green moved for reconsideration of the

order denying dismissal on Double Jeopardy grounds, he noted that the State had filed a set of motions in limine. 58: 22, citing 21: 1-3. He further noted that paragraph 9 of the motions in limine sought an order that Mr. Green not introduce

> *Scheidell* evidence, which concerns admission of the acts of an *unknown* third party to show that based on the similarity of the acts, the unknown third person committed the charged acts. 22: ¶9, citing *State v. Scheidell*, 227 Wis.2d 285, 595 N.W.2d 661 (1999).

58: 22. In its written response to the reconsideration motion, the State never sought to contradict Mr. Green's argument that this motion in limine did not apply to Mr. Cousin's testimony. 62: 1-3. In oral argument on reconsideration, Mr. Green argued that "*Denny*" appeared nowhere in the State's motions in limine, and that the motion in limine based on *Scheidell* did not apply. 91: 28-29. The State made no effort to rebut this argument. 91: 31-35. Nor did Judge Borowski. Apx. 114-120; 91: 35-41. Now, for the first time on appeal, the State seeks to argue that the *Scheidell* motion in limine applies. State's br. 8-9. Issues raised for the first time on appeal are waived and should not be considered; failure to raise the issue below

deprived the postconviction court of the opportunity to decide the issue and perhaps avoid the necessity of an appeal. *State v. Van Camp*, 213 Wis.2d 131, ¶25, 569 N.W.2d 577 (1997).

The State is incorrect that *Scheidell* applies to Mr. Cousin's testimony for two reasons. First, as argued previously, *Scheidell* applies to a defense based on pointing to an *unknown* third-party perpetrator. The factual question in Mr. Green's trial was the identity of the driver who transported SAB. SAB said the driver was Mr. Green, while the Mr. Cousin testified that he was the driver. No one suggested the driver was some unknown person. Second, *Scheidell* concerns other acts evidence. Mr. Scheidell wished to present evidence about another act that occurred weeks after his charged conduct. *Scheidell*, ¶¶11-13. In Mr. Green's case, no *other* act is at issue. Both the State's evidence and Mr. Cousin's testimony are about the *same* act, and differ only in the identity of the driver. As the State argues:

> 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.)

State's br. 9. However, other acts were simply not at issue.

Finally, the motion in limine had no legal effect. As the State notes in the above quotation, the motion "sought a prohibition." No such prohibition came into effect. At a pretrial on August 22, 2019, the Court noted that the State's motions in limine were filed, along with other pretrial filings, but did not address them. 73: 2. At the commencement of the proceedings that resulted in the mistrial, the Court started by allowing the parties to address "any preliminaries." 80: 2. The prosecutor addressed another issue, but never sought any order based on the motions in limine. 80: 2-4.

The State argues that Mr. Green's position "would eviscerate any ability for courts to require defendants to present *Denny* evidence through pretrial proceedings." State's br. 10. The Court below made no effort to do so prior to trial, but created and imposed a *Denny* disclosure requirement only after the fact. Judge Borowski noted what he thought was an *option*: to enter a pretrial or scheduling order. Apx. 116; 91: 37. In fact, Judge Borowski had ignored the *requirement* to enter a pretrial order: "In any case scheduled for trial . . . a Pretrial Scheduling Order, in a form prescribed by the felony division, shall be completed and filed." Milw. Cir. Ct.

Rule 4.25 A. Judge Borowski could have entered a pretrial order requiring pretrial disclosure of *Denny* evidence. Similarly, the State could have sought an order *in limine*, and Judge Borowski could have imposed an order *in limine*, requiring pretrial disclosure of *Denny* evidence. The State could have filed a discovery demand for any written or recorded statement of Mr. Cousin (who was listed on both defense witness lists). None of these events occurred. Presenting Mr. Cousin's testimony without prior notice of its content violated no rule, law or court order. Judge Borowski's *post hoc* displeasure with the presentation of Mr. Cousin's testimony did not present a manifest necessity requiring a mistrial.

CONCLUSION

Defendant-Appellant Mitchell D. Green prays that this Court remand his case with instruction that the Circuit Court dismiss the case with prejudice.

Respectfully submitted,

_____

John T. Wasielewski
Attorney for
Mitchell D. Green

FORM AND LENGTH CERTIFICATION

I hereby certify that this reply 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 reply brief is 1215 words.

_____
John T. Wasielewski

CERTIFICATE OF COMPLIANCE

I hereby certify that I have submitted an electronic copy of this reply brief, identical to the printed form of the reply brief, as required by Wis. Stat. §809.19(12).

_____
John T. Wasielewski