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STATE OF WISCONSIN

IN SUPREME COURT

No. 2021AP267-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

MITCHELL D. GREEN,

Defendant-Appellant.

# PETITION FOR REVIEW AND APPENDIX

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## TABLE OF CONTENTS

INTRODUCTION ..... 4

ISSUE PRESENTED FOR REVIEW ..... 5

STATEMENT OF CRITERIA SUPPORTING REVIEW ..... 5

STATEMENT OF THE CASE ..... 6

ARGUMENT ..... 10

This petition meets the criteria for this Court's review because the issue presented is a real and significant question of federal constitutional law and is a question of law of the type that is likely to recur unless resolved by the supreme court. ..... 10

A. Double jeopardy does not preclude retrial in cases where manifest injustice merits a retrial, and a finding of manifest injustice is left to the discretion of the trial court. ..... 11

B. The court of appeals improperly reversed the circuit court's discretionary determination that there was a manifest necessity for a mistrial. ..... 12

CONCLUSION ..... 14

# TABLE OF AUTHORITIES

## Cases

*North Carolina v. Pearce*,
395 U.S. 711 (1969) ..... 11

*State v. Barthels*,
174 Wis. 2d 173, 495 N.W.2d 341 (1993) ..... 11

*State v. Collier*,
220 Wis. 2d 825, 584 N.W.2d 689 (Ct. App. 1998)..... 11

*State v. Denny*,
120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984)..... 8

*State v. Kelty*,
2006 WI 101, 294 Wis. 2d 62, 716 N.W.2d 886..... 11

*State v. Scheidell*,
227 Wis. 2d 285, 595 N.W.2d 661 (1999) ..... 13

*State v. Seefeldt*,
2003 WI 47, 261 Wis. 2d 383, 661 N.W.2d 822..... 11

## Statutes

Wis. Stat. § (Rule) 809.62(1r)(a)..... 5

Wis. Stat. § (Rule) 809.62(1r)(c)3. ..... 5

## Constitutional Provisions

U.S. Const. amend. V..... 11

Wis. Const. art. I, § 8(1)..... 11

## INTRODUCTION

During the trial of Defendant-Appellant Mitchell D. Green for sex trafficking a 17-year-old girl, the defense introduced testimony it had not noticed before trial as third-party perpetrator evidence—that of Green's cousin, Jonathan Cousin, who testified that it was he, not Green, who had driven the victim to a prostitution "date" on the night in question. The circuit court, concerned about the testimony both because it was not properly noticed as third-party perpetrator evidence and because Cousin testified without the advice of counsel, declared a mistrial *sua sponte*.

As the State prepared to re-try the case, Green moved to dismiss the charges against him on the basis that a second trial would violate his constitutional right against double jeopardy because, Green claimed, there was no manifest necessity for a mistrial in his first trial. The circuit court denied the motion, and Green petitioned the court of appeals for leave to appeal. The court of appeals granted Green's petition and reversed the circuit court's denial of Green's motion to dismiss. The court of appeals concluded that the circuit court erroneously exercised its discretion because the circuit court subsequently decided that Cousin's testimony would indeed be admissible at the second trial and because any issue with Cousin's testifying without counsel was an issue for any possible case against Cousin, not the case against Green. The court of appeals remanded the case with instructions to dismiss the charges against Green with prejudice.

The State asks this Court to grant review of the court of appeals' decision. The court of appeals incorrectly applied the erroneous exercise of discretion standard, ignoring the circuit court's key concerns about fairness to the State in declaring a mistrial and implicitly calling into question the ability of circuit courts to require certain evidence to be vetted ahead of

time. This Court's review will help clarify the law in the area of mistrials and double jeopardy by offering guidance to litigants and circuit courts.

## ISSUE PRESENTED FOR REVIEW

Did the circuit court erroneously exercise its discretion when it concluded that there was a manifest necessity for a mistrial after Green introduced unnoticed third-party perpetrator evidence at trial via the testimony of a witness who claimed to have committed the crime but was unrepresented by counsel?

## STATEMENT OF CRITERIA SUPPORTING REVIEW

The issue presented by this petition presents a "real and significant question of federal . . . constitutional law." *See* Wis. Stat. § (Rule) 809.62(1r)(a). Specifically, this case involves the State's ability to re-try Green for his role in a sex trafficking ring that victimized an underage girl. Without this Court's review, the court of appeals' erroneous decision will prevent the State from having even the opportunity to hold Green accountable.

The issue presented also "is a question of law of the type that is likely to recur unless resolved by the supreme court." *See* Wis. Stat. § (Rule) 809.62(1r)(c)3. Litigants and courts need clarity on the ability of a trial court to declare a mistrial when a defendant introduces evidence that was required to be noticed before trial. The court of appeals' opinion suggested that there was no manifest necessity for a mistrial because an eventual evidentiary hearing determined that the evidence would be admissible. But that hearing occurred after the fact—months after the mistrial. This Court should grant review and clarify whether a trial court must conduct an evidentiary hearing mid-trial in order to determine whether there is a manifest necessity for a mistrial.

## 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," who 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 drove S.A.B. to a prostitution meeting 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. (R. 86:2.) The court stated that it 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*[1] 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:

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

> 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.) 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.)

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 the court of appeals granted (R. 64).

In an opinion dated March 22, 2022, the court of appeals reversed the circuit court's denial of Green's motion to dismiss. (Pet-App. 3–12.) The court concluded that retrial would violate Green's constitutional right against double jeopardy because there was no "manifest necessity" for the mistrial during his first trial. (Pet-App. 4.) The court reasoned that because the circuit court eventually ruled that Cousin's testimony would be admissible, there was no need to "unring the bell" in the first trial. (Pet-App. 9.) The court also concluded that any issue with Cousin's testimony resulting from his being unrepresented by counsel was an issue for Cousin himself, not the State. (Pet-App. 10–11.) The court therefore remanded the case with instructions for the circuit court to dismiss it with prejudice. (Pet-App. 11.)

## ARGUMENT

### This petition meets the criteria for this Court's review because the issue presented is a real and significant question of federal constitutional law and is a question of law of the type that is likely to recur unless resolved by the supreme court.

This Court should accept review of the petition because the issue presented here—whether a mistrial caused by the defendant's own failure to abide by pre-trial requirements prohibits retrying the defendant—presents a significant question of federal constitutional law and is likely to recur unless the issue is resolved by this Court. Lower courts and litigants need guidance on how to proceed under similar circumstances.

### A. Double jeopardy does not preclude retrial in cases where manifest injustice merits a retrial, and a finding of manifest injustice is left to the discretion of the trial court.

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."

The protection against double jeopardy shields a criminal defendant from successive prosecutions under certain circumstances: "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.'" *State v. Kelty*, 2006 WI 101, ¶ 16, 294 Wis. 2d 62, 716 N.W.2d 886 (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)).

Where a "manifest necessity" dictates the need for a mistrial, retrial of the defendant will not violate his right against double jeopardy. *See State v. Seefeldt*, 2003 WI 47, ¶ 19, 261 Wis. 2d 383, 661 N.W.2d 822. 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 *State v. Barthels*, 174 Wis. 2d 173, 183, 495 N.W.2d 341 (1993). "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).

The circuit court properly 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.)

### B. The court of appeals improperly reversed the circuit court's discretionary determination that there was a manifest necessity for a mistrial.

The court of appeals erred in concluding that the circuit court erroneously exercised its discretion here. Key to the court of appeals' decision was the fact that the circuit court eventually found the *Denny* evidence admissible. (Pet-App. 9.) But the circuit court's decision had less to do with the admissibility of the evidence than it did with the fact that Green effectively ambushed both the State and the court by presenting Cousin's testimony without first providing notice during pre-trial proceedings.

The court of appeals' decision seemingly would have required the circuit court to hold the *Denny* hearing in the middle of trial, despite the fact that Green was required to present any third-party perpetrator evidence before trial. As support, the court of appeals cited this Court's decision in *Seefeldt*. (Pet-App. 9.) But *Seefeldt* decision does not impose such a requirement. Such an interpretation would leave meaningless pre-trial orders requiring the vetting of evidence ahead of time.

The court of appeals also disagreed that Green was required to present this evidence in advance. It reasoned that the State's motion in limine required only the disclosure of *unknown* third-party perpetrator evidence because it cited *State v. Scheidell*, 227 Wis. 2d 285, 595 N.W.2d 661 (1999), instead of *Denny*. (Pet-App. 10.) The court's reasoning on this point missed the mark for three reasons.

First, the State's motion in limine referred to "evidence involving a third-party perpetrator," not evidence involving an *unknown* third-party perpetrator. (R. 21:2.) Second, while *Scheidell* concerns unknown third-party-perpetrator evidence, it discusses *Denny* and known third-party-perpetrator evidence at length, making an interpretation that the motion in limine covered both types of evidence reasonable. *See Scheidell*, 227 Wis. 2d at 295–98. And third, the circuit court interpreted the pretrial motions and rulings—which were made in and by that court—as applying to *Denny* evidence.

The court of appeals also incorrectly dismissed the circuit court's concerns about the defense's treatment of Cousin as a witness. Although that treatment eventually led to the withdrawal of Green's counsel, the court of appeals simply dismissed the circuit court's concerns as being unimportant to the prosecution of Green; any remedy, the court of appeals reasoned, would flow to Cousin, not to the State. (Pet-App. 10–11.) However, the circuit court correctly pointed out that part of the reason that Cousin should have had the advice of counsel before testifying was to ensure that the jury did not hear evidence it would not have heard had the proper protocols been followed. More to the point, even if Cousin was entitled to a remedy because of his treatment by defense counsel, it was still reasonable for the circuit court to determine that Green should not benefit from that improper treatment of Cousin. In other words, the question with respect to Cousin is not simply one of protecting his rights; it is also

one of ensuring Green did not improperly leverage an unfair advantage in his trial.

At bottom, the court of appeals' decision calls into question several aspects surrounding circuit courts' decisions to declare mistrials. This Court's review is appropriate to clarify the implication of those questions, and to address a substantial constitutional issue affecting the State's ability to prosecute a serious sex offense.

## CONCLUSION

For the reasons discussed, the State respectfully requests that this Court grant its petition for review of the court of appeals' decision in this case.

Dated this 20th day of April 2022.

Respectfully submitted,

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## FORM AND LENGTH CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 3,098 words.

Dated this 20th day of April 2022.

Electronically signed by:

John A. Blimling
JOHN A. BLIMLING
Assistant Attorney General

## 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 Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 20th day of April 2022.

Electronically signed by:

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