SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner

Appeal No. 2021-AP-267-CR

vs.

Trial No. 19-CF-914

MITCHELL D. GREEN,

Defendant-Appellant.

Opposing review of a Court of Appeals' decision of March 22, 2022 arising from an 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

RESPONSE TO PETITION FOR REVIEW

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REASONS FOR DENYING REVIEW

The issue the State seeks to raise does not meet any of the criteria for review set forth in Wis. Stat. §809.62(1r). None of the attempts to shoehorn this case into the criteria in this rule are persuasive.

The State suggests this case raises a real and significant question of federal constitutional law. Pet. 5. This case concerns Double Jeopardy, and specifically whether the mistrial declared during Mr. Green's trial was justified by a manifest necessity under the specific facts and circumstances of the case. The Court of Appeals simply held that the trial court's decision to grant a mistrial was not supported by manifest necessity, and that therefore Mr. Green may not be retried. Pet-apx. 8, ¶17.

As the State acknowledges in framing the issue, the State seeks to have this Court review whether the Circuit Court "erroneously exercise[d] its discretion when it concluded that there was a manifest necessity for a mistrial." Pet. 5. However, this Court has already set forth the standard for reviewing the exercise of discretion in determining whether manifest necessity supports declaring a mistrial. *State v. Seefeldt*, 2003 WI 47, ¶¶13 & 37, 261 Wis.2d 383, 661 N.W.2d 822. The Court of Appeals quoted *Seefeldt* and applied the standards this Court set forth. Pet-apx. 6, ¶16. The State does not challenge this standard or seek any modification of the legal standard this Court has

set forth. Thus, a review in this case calls for not for any new doctrine, but "merely the application of well-settled principals to the factual situation." Wis. Stat. §809.62(1r)(c)1.

The State suggests the issue it seeks to raise is a "question of law" of a type likely to recur unless this Court resolves it. Pet. 5. However, as this Court has observed, determining whether a manifest necessity for a mistrial exists is a fact-intensive question. *State v. Moeck*, 2005 WI 57, ¶37, 280 Wis.2d 277, 695 N.W.2d 783. The State also asserts this Court could provide clarity regarding "the ability of a trial court to declare a mistrial when a defendant introduces evidence that was required to be noticed before trial." This Court's decision in *Seefeldt* provides such clarity.

In *Seefeldt*, defense counsel told the jury in his opening statement of warrants outstanding against a prosecution witness. *Seefeldt*, ¶5. The trial court found that this disclosure violated a pretrial order and that no curative instruction could remove the prejudicial impact of the disclosure to the State; the trial court therefore granted the State's mistrial motion. *Seefeldt*, ¶9. This Court determined that the witness' warrants "would likely have been admissible during trial," a fact the trial court had failed to consider when granting the mistrial. *Seefeldt*, ¶38. This distinguished the facts from otherwise similar facts in *Arizona v. Washington*, 434 U.S. 497 (1978):

> Similar to the case at bar, the trial judge in *Washington* granted a prosecutor's motion for a mistrial because defense counsel made improper remarks during his opening statement. However, unlike the case at bar, there was no legal theory under which the remarks could be deemed relevant and admissible at trial. *Washington*, 434 U.S. at 510-511.

Seefeldt, ¶23. Thus, this Court determined that the crucial consideration in determining whether manifest necessity exists is not whether a pretrial order was violated, but whether counsel's actions tainted the jury. The error in *Washington* tainted the jury, for the jury heard of evidence that could never be admissible. In *Seefeldt*, however, this Court determined that "if the warrants were admissible, there is insufficient jury taint to create the requisite manifest necessity." *Seefeldt*, ¶40.

Seefeldt was decided based on the apparent conclusion that in mentioning the warrants in his opening statement, defense counsel had violated a pretrial order. *Seefeldt*, ¶40. However, Mr. Green did not violate any pretrial order. The State's repeated assertions to the contrary are incorrect and unsupported by the record, as will be shown in the next section.

MISSTATEMENTS OF FACT AND LAW IN THE PETITION

The mistrial in Mr. Green's case arose after the testimony of Jonathan Cousin. Pet-apx. 2-4, ¶¶4-9. Throughout the State's petition, the State repeatedly asserts or assumes that Mr. Green was required to provide pretrial notice to the State of the contents of Jonathan Cousin's testimony. In its criteria supporting review, the State asks this Court to clarify "the ability of a trial court to declare a mistrial when a defendant introduces evidence *that was required to be noticed before trial*." Pet. 5 (emphasis added). In its argument, the State asserts the mistrial was "caused by the defendant's own failure to *abide by pretrial requirements*." Pet. 10 (emphasis added). The State bemoans that the Court of Appeals' decision below would require a *Denny* hearing mid-trial "despite the fact that *Green was required to present any third-party perpetrator evidence before trial*." Pet. 12 (emphasis added). The State asserts, without citation to the record, that "the circuit court interpreted the pretrial motions and rulings - which were made in and by that court - as applying to *Denny* evidence." Pet. 13.

No rule, law or pretrial order required pretrial disclosure of third-party perpetrator evidence in Mr. Green's case. The Court of Appeals in *Denny* adopted a rule that a trial court may prohibit the introduction of evidence of third-party guilt unless there is "a 'legitimate tendency' that the third person could have committed the crime." *State v. Denny*,

120 Wis.2d 614, 623, 357 N.W.2d 12 (Ct. App. 1984). This is a court-make rule adapted from *Alexander v. United States*, 138 U.S. 353 (1891). In adopting this rule, however, the *Denny* court announced no pretrial disclosure rule. The trial court in *Denny* had apparently ruled during trial after an offer of proof. *Denny*, 120 Wis.2d at 625. This Court reaffirmed *Denny* in a subsequent case involving a third-party perpetrator defense. *State v. Wilson*, 2015 WI 48, ¶52, 362 Wis.2d 193, 864 N.W.2d 52. As in *Denny*, the third-party defense issue arose during trial after the State objected and the defense made an offer of proof. *Wilson*, ¶37. Nothing in *Wilson* suggests that the issue was not timely raised, or should have been raised prior to trial.

The State suggests that Mr. Green violated some pretrial order requiring disclosure of *Denny* evidence. The Court made no such pretrial order. At a pretrial hearing, the court noted that the State had filed motions in limine and other documents, but did not otherwise address the motions in limine. 73: 2. As the Court of Appeals explained, these motions in limine do not address *Denny* evidence and, even if they did, the State's motions in limine never became pretrial orders. Pet-apx. 8, ¶¶21-22.

Nor did the trial court ever cite any pretrial order violated by introducing Mr. Cousin's testimony. Certainly, the trial court expressed a desire to have had more argument and briefing on the *Denny* issue.

Res-apx. 107; 86: 30. (Mr. Green is filing an appendix with this response containing the trial court's mistrial decision, the decision denying dismissal on Double Jeopardy grounds and the decision and written order denying reconsideration of the order denying dismissal. Res-apx. 101-120.) The trial court asserted "this needs to be vetted in advance." Res-apx. 109; 86: 32. However, nowhere in the decision declaring a mistrial did the trial court ever cite a violation of a rule or order in introducing Mr. Cousin's testimony; further, the trial court never determined whether this testimony was admissible under *Denny*. Res-apx. 103-110; 86: 26-33.

At the hearing denying reconsideration of the motion to dismiss, the trial court never cited any rule or pretrial order which required the pretrial disclosure of Mr. Cousin's testimony. Res-apx. 114-120. Instead, the trial court noted that the "culture in Milwaukee [courts]" could be described as: "we all shrug our shoulders or everybody goes along to get along." Res-apx. 115-116; 91: 36-37. Thus, courts do not employ scheduling orders because they are "routinely ignored," and witness lists and discovery demands are frequently not filed, although the State "should" have filed a discovery demand "in a perfect world." Res-apx. 116; 91: 37. The trial court's ruling appears based not on the violation of any law of discovery and disclosure, but on the "culture in Milwaukee" in which, as in the movie *My Cousin Vinny*, evidence is

simply turned over "because that's how it works." Res-apx. 115-116; 91: 36-37.

The Court of Appeals properly rejected the State's assertions that Mr. Green was somehow required to disclose before trial the contents of Mr. Cousin's testimony despite the State's failures: to investigate Mr. Cousin (who was listed on a defense witness list five months before trial); to file a discovery demand requesting Mr. Cousin's statement; to seek an order in limine to provide *Denny* evidence; or, to demand an offer of proof of Mr. Cousin's testimony prior to his testifying. Pet-Apx. 107-109, ¶¶20-24.

The State's repeated assertions that Mr. Green was obligated to make a pretrial disclosure of Mr. Cousin's testimony are legally incorrect and factually unsupported by the record.

CONCLUSION

Defendant-Appellant Mitchell D. Green prays that the Wisconsin Supreme Court denies review.

Respectfully Submitted:

Electronically signed by
John T. Wasielewski

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John T. Wasielewski
Attorney for Mitchell D. Green

FORM AND LENGTH CERTIFICATION

I hereby certify that this response to petition for review complies with Wis. Stat. §809.62(4) with respect to form and length. This petition contains 1736 words.

Electronically signed by
John T. Wasielewski

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John T. Wasielewski

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