SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

Appeal 2021-AP-267-CR

vs.

Trial 19-CF-914

MITCHELL D. GREEN,

Defendant-Appellant.

Review of a Court of Appeals decision of March 22, 2022 reversing an order denying dismissal on Double Jeopardy grounds entered February 4, 2021 in the Circuit Court of Milwaukee County, Honorable David L. Borowski, Judge, presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and other authorities

STATEMENT OF THE ISSUE

The issue is whether the trial Court's mistrial declaration was manifestly necessary.

The trial Court determined that the mistrial was necessary, and that a new trial be scheduled. Apx. 103-110; 86: 26-33. The trial Court denied a motion to dismiss on Double Jeopardy grounds. Apx. 111-113; 88: 4-6. The trial Court denied reconsideration of the motion to dismiss. Apx. 114-120; 91: 35-41.

The Court of Appeals reversed, finding that the mistrial declaration was not supported by manifest necessity, and remanded with direction to dismiss the case with prejudice. Apx. 3-11.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication are requested in this appeal.

STATEMENT OF THE CASE

Procedural history

A complaint dated March 3, 2019 alleged three counts: trafficking a child in violation of Wis. Stat. §948.051(1); physical abuse of a child in violation of Wis. Stat. §948.03(2)(b) and disorderly conduct in violation of Wis. Stat. §947.01 and §939.63(1)(a). 1: 1-3.

After the Honorable Janet Protasiewicz sought a court to spin the case (79: 3), the case proceeded to jury trial before the Honorable David Borowski on January 27-28, 2020. The State called two witnesses: alleged victim SAB (82: 67-110) and an investigating police officer (83: 4-78). The State then rested. 83: 78.

The defense presented testimony of witness Jonathan Cousin. 83: 78-93 (described below, pp. 10-12). After a conference with counsel, the court, *sua sponte*, rendered a decision from the bench declaring a mistrial. Apx. 103-110; 86: 26-33 (described below, pp. 12-15). (Mr. Green is filing an appendix with this brief containing: 1) the written order denying dismissal; 2) the trial court's mistrial decision; 3) the decision denying dismissal on Double Jeopardy grounds, and; 4) the decision denying reconsideration of the motion to dismiss. Apx. 101-120.)

On February 18, 2020 Mr. Green filed a motion and supporting brief seeking dismissal on Double Jeopardy grounds. 42: 1; 43: 1-6. The State filed a response which not only opposed dismissal, but also opposed continued representation by the attorney representing Mr. Green at the mistrial. 46: 1-11. At a pretrial on June 22, 2020 Judge Borowski rendered a decision from the bench that the motion for dismissal be denied. Apx. 111-113; 88: 4-6.

Mr. Green's counsel later withdrew (89: 9), and the undersigned counsel assumed representation of Mr. Green. 90: 2.

On December 22, 2020 the undersigned counsel filed a motion for reconsideration of the motion to dismiss on Double Jeopardy grounds. 58: 1-28. On January 22, 2021 the State filed a response. 62: 1-3. On February 3, 2021 the Court heard oral argument on the motion and issued a decision from the bench that the motion for reconsideration be denied. Apx. 114-120; 91: 35-41. On February 4, 2021 the Circuit Court entered a written order denying reconsideration. Apx. 101-102; 63: 1-2.

The Court of Appeals accepted Mr. Green's petition to review the non-final order denying reconsideration. 81: 1. In a decision dated March 22, 2022 the Court of Appeals

reversed the denial of the motion to dismiss and remanded with directions to dismiss the complaint with prejudice. Apx. 3-11. This Court granted the State's petition for review.

Jonathan Cousin's testimony

After calling alleged victim SAB and an investigating officer in support of the prosecution theory that Mr. Green knowingly provided a ride to SAB to a downtown hotel to consummate a prostitution date, the State rested. 83: 78. Mr. Green then called Jonathan Cousin to testify for the defense. Although Mr. Cousin was listed on the defense witness lists (18: 1; 27: 1-2), and named on the record as a witness at the start of trial (80: 7-8), Mr. Green's counsel had not provided the written report of Mr. Cousin's anticipated testimony and had not filed any *Denny* or other-acts motion in support of Mr. Cousin's testimony.

Mr. Cousin testified that he agreed to give a ride to a family member, Delmar, as he frequently did because Delmar did not own a car. 83: 85. In return, Delmar agreed to provide gas money. 83: 85-86. After Delmar got in the passenger seat of Mr. Cousin's car, Delmar pointed to two other persons and asked if they could ride along with them;

Mr. Cousin agreed as long as he received gas money. 83: 86. These other two persons, SAB and JR, rode in the back seat, while Delmar was the front passenger. 83: 86.

Mr. Cousin drove them from an apartment building on Appleton Avenue to downtown in the area of 6th and Wisconsin and stopped in front of "the blue building." 83: 86-87. SAB and JR got out of the car, and Delmar asked Mr. Cousin to stay. 83: 87. Mr. Cousin was ready to leave, but Delmar promised more gas money if he stayed to drop them off, as they have no other way home. 83: 87. After fifteen minutes, SAB and JR reentered the car. 83: 87.

During the ride back to drop them off on Appleton, Mr. Cousin heard SAB tell JR about a guy asking her if he can spit in her mouth, which she allowed, causing her to regurgitate. 83: 88. Finding this disgusting, Mr. Cousin turned up the radio. 83: 88. Mr. Cousin had assumed SAB and JR were boyfriend/girlfriend and did not know what was going on. 83: 88. He did not know he was driving an underage sex worker to a hotel. 83: 91-92. He had never seen SAB before that night and had not seen her since then. 83: 89, 91. He never conversed with SAB, but only with Delmar. 83: 91.

Mr. Cousin is a cousin of Mr. Green. 83: 79-80. Mr.

Cousin became aware that this incident was connected to Mr. Green's case only after Mr. Green was arrested, when Mr. Green showed Mr. Cousin paperwork from his case. 83: 83-84. In particular, reading an account of some guy spitting into a girl's mouth made him realize he was reading about an event in which he had taken part. 83: 85, 88.

The testimony recounted above occurred in the direct- and cross-examination of Mr. Cousin. As Mr. Green's counsel was about to commence re-direct examination, the Court declared a noon recess. 83: 93.

The mistrial

After the noon recess, proceedings resumed outside of the presence of the jury.

Ms. Kort, the prosecutor, asserted that Mr. Cousin's testimony amounted to a *Denny* defense, presented without prior notice, motion or ruling on its admissibility. 86: 3. She further asserted that Mr. Cousin's testimony amounted to an admission, at least to the level of probable cause, of child trafficking and that such admission was made without counsel or the opportunity to assert the privilege against self-incrimination. 86: 4-5.

Mr. Green's counsel asserted Mr. Cousin did not

admit to any crime. 86: 5. Thus, in speaking to Mr. Cousin, counsel saw no need to give him any warnings or to recommend that Mr. Cousin obtain counsel. 86: 5-6, 13. Counsel provided a written account of Mr. Cousin's statement to the Court; after paraphrasing the contents, the Court concluded Mr. Cousin was saying he, not Mr. Green, committed the crime. 86: 5-8.

The Court noted two issues: whether Mr. Cousin should have had counsel before testifying and the *Denny* issue. 86: 9.

Ms. Karshen, a second prosecutor appearing at the hearing, noted that the counsel issue might be mitigated if Mr. Cousin were to testify no further. 86: 10. She further asserted that the admissibility of Mr. Cousin's testimony under *Denny* should have been determined pretrial. 86: 10-11. While mentioning as possible remedies a curative instruction or striking testimony (but not mistrial), Ms. Karshen left to the Court's discretion what to do next. 86: 11.

The court and counsel engaged in a colloquy addressing the degree to which Mr. Cousin's testimony matched the events in the trafficking charge. 86: 12-16. The Court concluded that Mr. Cousin's testimony is

clearly *Denny* evidence offered to exculpate Mr. Green. 86: 16, 19. The Court further stated that had the evidence been proffered and allowed, the Court would have had an attorney speak to Mr. Cousin, and such attorney would have advised Mr. Cousin not to testify, although Mr. Cousin need not have followed such advice. 86: 19-21.

The Court inquired of the State as to a remedy, noting that the Court could not "unring the bell" since Mr. Cousin's testimony was nearly all *Denny* evidence. 86: 21-22, 29. Ms. Karshen again left the remedy to the Court. 86: 22. She further noted the failure to disclose Mr. Cousin's statement, and the Court noted that had the State done such a thing, the Court would have granted a mistrial and would have further expressed its displeasure to the parties. 86: 23.

In response, Mr. Green's counsel continued to argue that the testimony is not *Denny* evidence since Mr. Cousin denied knowledge of committing a crime; thus, there is nothing to fix, and the jury should be allowed to weigh Mr. Cousin's testimony. 86: 23-24.

The Court announced its decision. Apx. 103-110; 86: 26-33. The Court noted that *Denny* addresses parameters for presenting "a plausible theory of another

person that committed a crime" and that Mr. Cousin "put himself in the place of Mr. Green as the perpetrator of this offense." Apx. 103; 86: 26. The only reasons for presenting Mr. Cousin's testimony would be "*Denny* reasons." Apx. 107; 86: 30. The Court was not sure if it would have allowed Mr. Cousin's testimony, finding it "very problematic." Apx. 107; 86: 30. The Court concluded that as things stand, the jury heard the testimony and is thinking either that Mr. Green is clearly innocent, or that Mr. Cousin is implausibly taking the fall. Apx. 108; 86: 31. The Court declared a mistrial. Apx. 109; 86: 32.

Motion to dismiss

On February 18, 2020 Mr. Green filed a motion to dismiss on Double Jeopardy grounds and a supporting brief. 46: 1; 47: 1-6. On June 15, 2020 the State filed a response addressing not only the motion to dismiss, but also whether Mr. Green's trial counsel should continue to represent Mr. Green. 53: 1-11.

At a final pretrial on June 22, 2020, the State noted that several issues needed to be addressed, including the motion to dismiss. 69: 3-4. Without inviting further argument, the Court decided the motion to dismiss on the

briefs:

> Well, dealing with the mistrial issue, this was a case that went to trial before this court. It was spun to me . . . and I granted a mistrial.
>
> The State had Ms. Kort and one of their other attorneys make arguments regarding the need or lack of need for a mistrial. The main issue here was whether or not testimony being offered by the defense was effectively *Denny*, D-E-N-N-Y, testimony, and I'm denying the motion for a request to dismiss. My mistrial . . . decision stands. It was absolutely appropriate.
>
> As the State argues there were no legitimate alternatives at that point in time other than a mistrial. The State was effectively blindsided by some of the testimony. It may or may not have been intentional, and, in fact, knowing Mr. Earle [Defense Counsel], I'm sure it was not intentional.
>
> Mr. Earle indicated that he did not think the testimony that was being offered or proffered wasn't actually *Denny* testimony. I think it was *Denny* testimony because the finger figuratively was being pointed at another potential individual other than Mr. Green as the culpable party, other than the defendant as the culpable party.
>
> There's not a basis for this to be dismissed based on the facts or the law in this case, and so I'm denying the request to dismiss this case. The case needs to be tried. It needs to be tried after any evidentiary issues are cleared up and discussed potentially regarding the *Denny* issue, and whether or not it's appropriate for the *Denny* evidence to come into trial when the case goes to trial, so I'm denying the motion to dismiss.

Apx. 111-113; 69: 4-6.

Reconsideration

At the pretrial on November 12, 2020, the undersigned Counsel informed Judge Borowski that the defense wished to seek reconsideration of the motion to dismiss filed by prior counsel, but that the transcript of the Court's decision was ordered but not yet prepared. 90: 4. Judge Borowski set a briefing schedule. 90: 9, 14. Mr. Green filed a motion for reconsideration. 58: 1-28. The State filed a response. 62: 1-3.

On February 3, 2021 Judge Borowski held a motion hearing. Judge Borowski first heard argument on Mr. Green's motion, in the event of a future trial, to admit Mr. Cousin's testimony in support of a third-party defense pursuant to *State v. Denny*, 120 Wis.2d 614, 357 N.W.2d 12 (Ct. App. 1984). 56: 1-7; 91: 4-22. Judge Borowski granted this motion. 91: 22-24.

Judge Borowski then addressed Mr. Green's motion to reconsider the motion to dismiss on Double Jeopardy grounds which was made by predecessor counsel. The Court heard argument from counsel for Mr. Green (91: 24-31) and for the State (91: 31-35). Judge Borowski then announced his decision. Apx. 114-120; 91: 35-41.

In his decision, Judge Borowski emphasized the need for courts to have a great deal of discretion in granting mistrials. Apx. 114-115; 91: 35-36. Mr. Green had argued that in the absence of any discovery demand or motion in limine, the State was not entitled to prior notice of the content of Mr. Cousin's testimony. 91: 26-29. In apparent response, Judge Borowski noted that the "culture in Milwaukee [courts]" could be described as: "we all shrug our shoulders or everybody goes along to get along." 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." Apx. 116; 91: 37.

Judge Borowski noted that Mr. Green's counsel at trial was a "good attorney" and "certainly more than competent," Apx. 116; 91: 37. Either counsel "made a mistake" or he engaged in "misconduct from the standpoint that he darn well knows that you can't spring a witness on the State, especially a witness of this nature." Apx. 116-117; 91: 37-38. Judge Borowski explained the reason for declaring a mistrial:

Now the State has time to send out their own

> investigator, send out more detectives, figure out a way that they can blow up or eviscerate or cross-examine Mr. Cousin and make it clear that he's lying; that he's making up the story only to cover for Mr. Green.

Apx. 117; 91: 38. Judge Borowski reaffirmed his decision to grant a mistrial, and declined to reconsider the prior decision denying dismissal. Apx. 119-120; 91: 40-41.

Decision on appeal

The Court of Appeals found that decision declaring a mistrial was not based upon a manifest necessity and retrial would violate Mr. Green's constitutional right prohibiting Double Jeopardy. Apx 4, ¶1; apx 11, ¶25. The Court of Appeals enumerated five respects in which the Circuit Court erred in finding manifest necessity. First, the Circuit Court failed, before granting the mistrial, to determine whether Mr. Cousin's testimony was inadmissible and thus tainted the jury. Apx 8-9, ¶18. Second, the Circuit Court's later determination that this testimony was admissible showed the jury was not tainted. Apx. 9, ¶19. Third, the Circuit Court's conclusion that the State was entitled to prior notice of Mr. Cousin's testimony was incorrect, since the State had not filed any discovery demand or applicable motion in limine or taken

any other action to seek to discover the substance of Mr. Cousin's testimony. Apx. 9-10, ¶¶20-22. Fourth, any violation of Mr. Cousin's right to counsel did not support finding manifest necessity, since a mistrial would not erase his testimony. Apx. 10-11, ¶23. Fifth, contrary to the State's assertions, the State and the Circuit Court have tools to require pretrial disclosure of third-party defense evidence. Apx. 11, ¶24.

STANDARD OF REVIEW

A reviewing Court must satisfy itself that the trial judge exercised "sound discretion" in concluding that the State had met its burden to show manifest necessity for declaring a mistrial. *State v. Seefeldt*, 2003 WI 47, ¶35, 261 Wis.2d 383, 661 N.W.2d 822. Sound discretion requires acting in a deliberate manner, giving adequate time and opportunity for the parties to respond to a mistrial motion, considering alternatives such as a curative instruction or sanctioning counsel, and applying the facts of record to the relevant law to reason to a rational conclusion. *Seefeldt*, ¶36. Review must do more than simply ensure the absence of any mistake of law or fact; it must assure "that an adequate basis for the finding of manifest necessity is on the record." *Seefeldt*, ¶37.

ARGUMENT

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

A. The Double Jeopardy Clause protects a defendant's right to have the first jury selected decide his case absent manifest necessity

The Fifth Amendment provides that: "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." Likewise, Article I, section 8 of the Wisconsin Constitution provides that "no person for the same offense may be put twice in jeopardy of punishment . . .." In the case of a jury trial, jeopardy attaches when the jury is sworn. *Serfass v. United States*, 420 U.S. 377, 388, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975); Wis. Stat. §972.07(2).

These Double Jeopardy provisions act as a shield to protect individuals against of power of the state:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and

> compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-188, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

In the event of a mistrial granted without the Defendant's consent, Double Jeopardy does not prohibit a retrial in all circumstances. Nearly two centuries ago, Justice Story pronounced what has come to be called the "manifest necessity" standard:

> We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.

United States v. Perez, 22 U.S. 579, 580, 9 Wheat. 579 (1824). Applying this standard to Mr. Perez, whose jury had been discharged without his consent after being unable unanimously to agree to a verdict, the *Perez* Court allowed retrial. However, the *Perez* Court urged restraint in ordering retrial after a mistrial:

> To be sure, the power ought to be used with the greatest caution, under urgent circumstances,

> and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner.

Perez, 22 U.S. at 580.

Retrial of a defendant is generally permitted in the event that Defendant's conviction is reversed on appeal. *United States v. Ball*, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896); *but see Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) (prohibiting retrial where reversal was based on insufficiency of the evidence). The rationale for this general rule is the Defendant was not deprived of the right to a verdict before the first jury:

> [T]he crucial difference between reprosecution after appeal by the defendant and reprosecution after a *sua sponte* judicial mistrial declaration is that in the first situation the defendant has not been deprived of his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal. On the other hand, where the judge, acting without the defendant's consent, aborts the proceeding, the defendant has been deprived of his valued right to have his trial completed by a particular tribunal.

United States v. Jorn, 400 U.S. 470, 484, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971) (plurality opinion; quotation marks,

citation and footnote omitted).

In some cases, mistrials granted without the Defendant's consent based on defense counsel's misconduct may result in a retrial. *Arizona v. Washington*, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978); *State v. Fosse*, 144 Wis.2d 700, 424 N.W.2d 725 (Ct. App. 1988); *State v. Duckett*, 120 Wis.2d 646, 358 N.W.2d 300 (Ct. App. 1984). In other such cases, retrial is prohibited. *State v. Moeck*, 2005 WI 57, 280 Wis.2d 277, 695 N.W.2d 783; *State v. Seefeldt*, 2003 WI 47, 261 Wis.2d 383, 661 N.W.2d 822; *State v. Troka*, 2016 WI App 35, 369 Wis.2d 193, 880 N.W.2d 161; *State v. Mattox*, 2006 WI App 110, 293 Wis.2d 840, 718 N.W.2d 281; *State v. Collier*, 220 Wis.2d 825, 584 N.W.2d 689 (Ct. App. 1998). A review these cases supports the generalization that retrial is allowed only in circumstances where either defense counsel's misconduct tainted the jury by introducing evidence which the jury never should have heard, e.g., *Washington*; or, the misconduct necessitated counsel being a witness, e.g., *Fosse* (defense counsel became witness); *Duckett* (prosecutor became witness).

Retrial is barred in circumstances where, even though counsel engaged in misconduct, the jury was not

thereby irreparably tainted, either because any taint could be remedied by actions less drastic than a mistrial, or there was no taint.

Seefeldt presents a case where there was no taint. In his opening statement, trial counsel in *Seefeldt* described outstanding arrest warrants involving a prosecution witness. *Seefeldt*, ¶5. This was in violation of a pretrial order, and prompted the State to move for a mistrial. *Seefeldt*, ¶¶6-7. The trial court granted the motion and disqualified trial counsel, finding that the violation of the pretrial order could not be ameliorated by a curative instruction. *Seefeldt*, ¶9. The Supreme Court noted that despite the violation of the pretrial order, evidence of the arrest warrants would likely have been admissible and that trial court failed to consider such admissibility. *Seefeldt*, ¶38. This distinguished the present circumstance from *Washington*:

> 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.

Moeck presents a case where, although defense counsel introduced in his opening statement evidence which was never presented, any taint of the jury was curable by means less drastic than mistrial. In his opening statement, trial counsel explained Mr. Moeck's account of events in his encounter with the alleged victim. *Moeck*, ¶46. However, at the close of the State's case Mr. Moeck elected not to testify, and the defense did not present any evidence to substantiate the account given in the opening statement. *Moeck*, ¶49. The trial court and counsel discussed a possible curative instruction, and the prosecutor sought clarification on what she could say in closing argument without improperly commenting on the defendant's choice not to testify. *Moeck*, ¶¶50-57. In response to the court's inquiry how she wished to proceed, the prosecutor requested, and the court granted, a mistrial. *Moeck*, ¶¶57-60. The Supreme Court affirmed the decision of the Court of Appeals that these circumstances did not rise to manifest necessity and that retrial was thus prohibited. The Supreme Court found that counsel did not act in bad faith in giving his opening statement, as Mr. Moeck had testified in two prior trials. *Moeck*, ¶¶49, 62.

The trial court failed to give adequate consideration to a curative instruction, and failed to recognize that defense counsel's opening statement opened the door to allow the prosecutor to make a measured response clarifying the distinction between argument and evidence. *Moeck*, ¶¶71-77.

The circumstances leading to the mistrial in Mr. Green's case arose from the testimony of Jonathan Cousin that he, and not Mr. Green, was the driver of the car that took SAB to a prostitution date, although Mr. Cousin denied knowing the purpose of the journey.

The State asserts that the Court of Appeals erred in three respects in reversing the Circuit Court: First, by holding that the Circuit Court should have determined the admissibility of Mr. Cousin's testimony before declaring a mistrial. State's br. 14-16. Second, by misreading the State's motion in limine and failing to see that it addressed Mr. Cousin's testimony. State's tr. 16-17. Third, by failing to find that Mr. Cousin's lack of counsel gives rise to a manifest necessity. To these assertions, Mr. Green responds in parts B., C., and D., below, followed by an argument in part E. that the State has failed to establish manifest necessity for the mistrial.

B. The Court of Appeals correctly determined that the Circuit Court erred by failing to determine whether Mr. Cousin's testimony was admissible

In the colloquy leading to the decision to declare a mistrial, Judge Borowski made several references to Mr. Cousin's testimony as being *Denny* evidence. *See, State v. Denny*, 120 Wis.2d 614, 357 N.W.2d 12 (Ct. App. 1984). After reiterating Mr. Cousin's account, Judge Borowski concluded that in essence Mr. Cousin "said he committed the crime instead of the defendant." 86: 8. He agreed with the prosecutor that the specifics shared by SAB's testimony and Mr. Cousin's testimony, involving a john spitting in SAB's mouth, "completely makes it *Denny* evidence." 86: 15. "It is *Denny* evidence clearly." 86: 16. "[T]here was nothing in [Mr. Cousin's testimony] that wasn't *Denny* evidence." 86: 22.

However, in his decision declaring a mistrial, Judge Borowski never clearly determined that Mr. Cousin's testimony is, or is not, *admissible* under *Denny*. Apx. 103-110; 86: 26-33. The Court of Appeals found this to be an

erroneous exercise of discretion and cited *Seefeldt*, ¶40 for the proposition that determining the admissibility of Mr. Cousin's testimony was "'critical.'" Apx. 8-9, ¶18. The State takes issue with this conclusion. State's br. 14-16.

In particular, the State asserts that "*Seefeldt* should not be read as establishing a bright-line rule that circuit courts must make an admissibility determination before declaring a mistrial." State's br. 15. Certainly, not every mistrial must be preceded by an admissibility determination. Some mistrials occur even when no evidentiary error occurs, such as when a jury is unable to reach a verdict after lengthy deliberations. *E.g.*, *United States v. Perez*, 22 U.S. 579, 9 Wheat. 579 (1824). However, *Seefeldt* makes clear that when a court contemplates a mistrial based on a claim that the jury was tainted by hearing particular evidence, the judge must determine as a preliminary matter whether that evidence is actually inadmissible. The trial court in *Seefeldt* erred in failing to consider whether evidence of outstanding warrants against a prosecution witness, mentioned during the defense opening statement, would have been admissible. *Seefeldt*, ¶38. This is what distinguishes *Seefeldt* from an otherwise factually similar case:

> 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 held that an admissibility determination "is critical in determining whether manifest necessity exists because, if the warrants were admissible, there is insufficient jury taint to create the requisite manifest necessity." *Seefeldt*, ¶40.

The State maintains that a court considering a mistrial based on certain evidence heard by the jury need not consider the admissibility of that evidence. The State's cites no law to support this proposition, but merely points to possible inconvenience a trial court might encounter in determining admissibility during trial. State's br. 15. The State suggests a trial court may have to hold an "evidentiary hearing" with "multiple witnesses" to determine whether third party defense evidence is admissible under *Denny*. State's br. 15. Such concerns are unfounded. 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. No undue burden was noted in determining admissibility of *Denny* evidence at trial.

In Mr. Green's case, Judge Borowski heard Mr. Cousin's entire direct- and cross-examination without any objection from the State. 83: 79-93. After a noon recess, the State objected to Mr. Cousin's testimony as improper *Denny* evidence. 86: 3-4. Judge Borowski heard argument from the parties. 86: 3-25. When the Judge Borowski decided what action to take based on Mr. Cousin's testimony, he was looking at the *Denny* decision and described its requirements. Apx. 103; 86: 26. Despite having the issue and the controlling authority before him, Judge Borowski made no determination that Mr. Cousin's testimony was, or was not, admissible under *Denny* before declaring a mistrial. Apx. 103-110; 86: 26-33. The Court expressed a desire for more vetting, argument and briefing as to *Denny*, and found the issue "problematic." Apx. 107; 86: 30. Thus, the decision to declare a mistrial was based

not on the criteria of *Denny*, but due to the lack of vetting in advance. Apx. 109; 86: 32. Thus, the Court of Appeals correctly concluded that the trial court had erred under *Seefeldt* in failing to determine the admissibility of Mr. Cousin's testimony before declaring a mistrial.

Several months after declaring the mistrial, the trial court determined that Mr. Cousin's testimony would be admissible under *Denny* in the event of a future retrial. 91: 22-24. Thus, a second jury would hear the same evidence as in the first trial. There was no taint caused to the first jury by hearing Mr. Cousin's testimony, and thus no basis to find that this testimony supported a manifest necessity to declare a mistrial.

C. In the absence of any discovery demand or order in limine, no law required prior notice of the content of Mr. Cousin's testimony

The State had filed a set of motions in limine. 21: 1-3. This document requested that the Court order that certain specified categories of evidence not be admitted without prior notice and a prior determination of admissibility. The State argues that one of these motions in limine compelled Mr. Green to disclose the substance

of Mr. Cousin's testimony prior to trial. State's br. 16-18. This motion requested an order:

> Prohibiting 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*, 227 Wis. 2d 285, 595 N.W. 2d 661 (1999), *State v. Sullivan*, 216 Wis.2d 768, 576 N.W. 30 (1998) and §904.04(2) Stats.

21: 2 (motion in limine #9).

The State is incorrect that this *Scheidell* motion in limine applies to Mr. Cousin's testimony for two reasons. First, *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, and *Sullivan* and §904.04(2) (cited in the motion quoted above) both concern other acts. 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. Other acts were simply not at issue. The motion in limine, by its own terms, applies to "other acts" evidence, does not mention *Denny* and does not extend to *Denny* evidence. Motions in limine are intended to obviate the need to object to evidence in front of the jury, and are construed according to their terms:

> We caution that if the issue raised by appeal is different in fact or law from that presented by the motion *in limine,* then waiver may be found if no objection was made at trial. Whether the motion *in limine* relieves the party from having to object depends on whether the motion alerted the trial court to the same issue of fact or law that arises at trial.

State v. Bergeron, 162 Wis.2d 521, 529, 470 N.W.2d 322 (Ct. App. 1991).

Finally, even if the motion in limine encompassed Mr. Cousin's testimony, the motion had no legal effect. As the State notes, the motion "sought a prohibition." State's br. 16. No such prohibition came into effect. At a pretrial on August 22, 2019, the Court mentioned in passing that the State had filed several documents including motions in limine, but did not address any of them. 73: 2. At the

commencement of the trial proceedings that ended 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 suggests that the Circuit Court, by failing to address the motions in limine, granted them. State's br. 16-17 (footnote 5). The State cites *Seefeldt* for this remarkable proposition. State's br. 16-17 (footnote 5). In *Seefeldt*, the prosecutor objected to defense counsel's opening statement because violated a pretrial order prohibiting other acts evidence without a prior ruling on admissibility. *Seefeldt*, ¶6. This Court noted the pretrial order "was not transcribed or otherwise memorialized in the record." *Seefeldt*, ¶6. Defense counsel's arguments against the prosecutor's objection did not question the existence of the pretrial order. *Seefeldt*, ¶8. The trial court "determined that defense counsel had violated the pretrial order." *Seefeldt*, ¶9. Thus, while the precise language of the pretrial order was not in the record, the *existence* of the pretrial order was not in dispute.

In Mr. Green's case, however, nothing the record at shows that the Court entered any order based on any

motion in limine. Thus, whatever the scope of the *motion* in limine, it never became an *order* in limine. On this record, the Court of Appeals correctly concluded that the motion in limine did not require disclosure of the substance of Mr. Cousin's testimony. Apx. 10, ¶¶21-22.

While the substance of Mr. Cousin's testimony undoubtedly came as a surprise to the prosecutor, Mr. Green did not violate the discovery statute by failing to disclose the substance of this testimony before trial. The discovery statute provides for disclosing a witness list and any written or recorded statement of a witness. Wis. Stat. §971.23(2m)(a) and (am). However, the obligation to provide these items is limited to "Upon demand." Wis. Stat. §971.23(2m); see also *State v. Harris*, 2004 WI 64, 272 Wis. 2d 80, 680 N.W.2d 737 (granting relief for discovery violation where material not disclosed was within the scope of the discovery demand filed with the court).

No State discovery demand appears in the e-filing system, nor could the undersigned counsel find any State discovery demand in the file received from predecessor counsel. 91: 26-27. At the February 3, 2021 motion hearing, the prosecutor noted that a discovery demand is

typically sent with the discovery, but she could produce no such discovery demand in Mr. Green's case, and had no knowledge that one was ever prepared or served. 91: 33-34. Thus, so far as is apparent, the State never demanded discovery so as to trigger any rights or obligation under the discovery statute.

Months before trial Mr. Green's counsel provided Mr. Cousin's name and address in his witness list and his amended witness list. 18: 1; 27: 1-2. The State was aware of the defense witness list, as in proceedings at the start of trial the prosecutor brought up a potential issue with another listed defense witness. 30: 5-6. Also, at the outset of trial, the defense identified Jonathan Cousin as a witness the defense intends to call. 30: 7-8. In the absence of any demand from the State, filing the witness lists was beyond counsel's statutory obligation. Judge Borowski, in noting that the State should have filed a discovery demand "in a perfect world," implicitly found that that State had not filed any discovery demand. Apx. 116; 91: 37. Thus, counsel's assertion that he committed no discovery violation was correct. 86: 24.

When Mr. Cousin was called to testify for the defense, the prosecutor made no inquiry as to the

substance of Mr. Cousin's testimony. 83: 78-79. She requested neither any witness statement nor an offer of proof. Mr. Cousin's direct examination proceeded without a single objection. 83: 79-90. Upon conclusion of the direct examination, when the scope and substance of Mr. Cousin's testimony were clear, the prosecutor neither objected nor requested a sidebar. 83: 90. Rather, the prosecutor proceeded with, and in fact completed, her cross-examination of Mr. Cousin. 83: 90-93. Before Mr. Green's counsel could pursue re-direct examination, the case adjourned for the noon recess. 83: 93. Only upon returning from the noon recess did not prosecutor for the first time voice any objection to Mr. Cousin's testimony. 86: 2.

Thus, the prosecutor elected to proceed with cross-examination rather than object. The prosecutor failed to elicit any admission from Mr. Cousin that he had conversed directly with SAB or that he had any knowledge that SAB was engaging in prostitution. 83: 90-92. Nor did Mr. Cousin agree that Mr. Green was present in the car. 83: 90. The prosecutor decided to object on *Denny* and notice grounds only after her cross-examination failed to inflict any substantial damage to Mr. Cousin's credibility.

The court noted that "it's impossible to unring that bell" and that Mr. Cousin provided "25 minutes of pretty compelling testimony." 86: 29. However, the trial court failed to consider that it had reached that point only after the State elected not to object throughout Mr. Cousin's entire direct examination, and then made what can only be construed as a strategic decision to proceed with, and to complete, its cross-examination of Mr. Cousin.

The State complains that not being provided with advanced notice of the substance of Mr. Cousin's testimony was unfair. However, the Court of Appeals correctly determined that State found itself in this position only after failing to avail itself of its rights under the discovery statute, failing to investigate Mr. Cousin and failing to request an offer of proof before he testified. Apx. 9-10, ¶20.

D. Any violation of Mr. Cousin's right to counsel did not support granting a mistrial

Early in the discussion leading up to the mistrial, the Court identified as an issue whether Mr. Cousin did need or will need counsel, and noted that he may or may not be done testifying. 86: 9. Defense counsel did not advise Mr.

Cousin as to a need for counsel, and saw no need to do so as Mr. Cousin admitted no crime and counsel was not accusing him of any crime. 86: 5-6, 13-14. Attorney Christian Thomas appeared during the hearing at the Court's behest to advise Mr. Cousin. 86: 20, 25-26. While Attorney Thomas was present, he apparently did not confer with Mr. Cousin. 91: 19-20. The Court noted that Mr. Cousin, after being advised of the risks, might have nonetheless chosen to testify. 86: 20. Mr. Green's counsel indicated that he would ask nothing further of Mr. Cousin, and therefore Attorney Thomas was excused. 86: 25.

Of course, any right to counsel to advise Mr. Cousin of the risk of testifying was a right belonging to Mr. Cousin. If it was violated, any remedy should flow to Mr. Cousin. The Court of Appeals properly so found. Apx. 10-11, ¶23. At the point the State finally raised an objection to his testimony, Mr. Cousin's direct and cross-examination were completed. To the extent he may have incriminated himself, once his testimony was deemed completed, this could not be undone or ameliorated by continuing, or terminating, Mr. Green's trial. Thus, the issue of counsel for Mr. Cousin cannot support manifest necessity.

The State maintains that the Court of Appeals' rejection of Mr. Cousin's lack of counsel as a basis for finding manifest necessity was "shortsighted." State's br. 17. However, as the Court of Appeals notes: "By the time this issue was raised, Cousin had already testified. Cousin's testimony could not be erased by terminating Green's trial." Apx. 10-11, ¶23. The State's failure to raise any objection until after Mr. Cousin's direct- and cross-examination were complete meant his testimony became a matter of record. The State now asks this Court to speculate about whether Mr. Cousin would have testified had he been provided counsel in advance of being called to the stand. State's br. 17-18. Such speculation would be purely hypothetical. What is not hypothetical is the Mr. Cousin did testify, however much the State might wish otherwise.

Mr. Cousin indicated to a defense investigator that at a retrial, he would testify again. 91: 20. In the event Mr. Cousin were to change his mind and decline to testify by asserting privilege, his testimony is in the record. A witness who is exempted from testifying by a ruling of the Court on privilege is an unavailable witness. Wis. Stat. §908.04(1)(a). When a witness is unavailable, his former

testimony is not precluded by the hearsay rule. Wis. Stat. §908.045(1). The trial court has already determined that Mr. Cousin's testimony is admissible under *Denny*. 91: 22-24. Thus, in the event of any retrial, the jury would hear either live testimony from Mr. Cousin or his former testimony in the record. Since any future jury would hear the same testimony as the prior jury, Mr. Cousin's lack of counsel during his testimony did not give rise to a manifest necessity for a mistrial.

E. The decision to grant a mistrial is not supported by manifest necessity

Mr. Green's trial was short. The State called only the alleged victim SAB and a police officer as witnesses. Mr. Green then called Mr. Cousin. Analyzing Mr. Cousin's testimony under *Denny* (and putting aside questions of notice), Judge Borowski found his testimony admissible. He testified as to his motive to drive SAB: Delmar's promise of gas money. His recounting of events further explained his opportunity and his direct connection to the event underlying the charge against Mr. Green. His testimony was admissible under *Denny*.

The Court granted a mistrial because, referring to Mr. Cousin's testimony, it could not unring the bell.

However, such a rationale applies only when evidence is presented which tainted the jury. In *Washington,* the Court found that the mistrial was due to manifest necessity because the evidence which defense counsel proffered in his opening statement was inadmissible. As the Court in *Seefeldt* explained, "there was no legal theory under which the remarks could be deemed relevant and admissible at trial." *Seefeldt*, ¶23, citing *Washington*, 434 U.S. at 510-511. Thus, in *Washington*, only a mistrial could unring the bell, for the jury was tainted by hearing of evidence in an opening statement that could never be admitted.

In contrast, the other acts cited by defense counsel in opening statements in *Seefeldt* were cited in violation of a pretrial order prohibiting other acts evidence without first seeking a ruling on admissibility. *Seefeldt*, ¶40. However, the court in *Seefeldt* also found that the other acts evidence would likely have been admissible during the trial. *Seefeldt*, ¶¶38-39. Thus, since the jury would eventually hear the evidence cited by defense counsel in his opening statement, there was no need to "unring the bell" (although the *Seefeldt* Court does not use that expression). Because the jury would hear the evidence anyway, and because the court failed to consider less

drastic alternatives to declaring a mistrial, the State in *Seefeldt* failed to meet its burden to show manifest necessity.

Mr. Green's jury heard Mr. Cousin's testimony. While Judge Borowski did not expressly determine the admissibility of this testimony under at the time of the mistrial, he later determined that *Denny* did not preclude this evidence. 91: 22-24. If Mr. Green were to be retried, a second jury could hear this same testimony. Thus, there was, in fact, no need to "unring the bell."

Judge Borowski's actual ground for declaring a mistrial was to give the State an opportunity to "send out more detectives, figure out a way that they can blow up or eviscerate or cross-examine Mr. Cousin." Apx. 117; 91: 38. The State made no showing that it could, if given more time, find such evidence. *Cf. Angus v. State*, 76 Wis. 2d 191, 196, 251 N.W.2d 28 (1977): "Where the surprise is caused by unexpected testimony, the party who sought the continuance must have made some showing that contradictory or impeaching evidence could probably be obtained within a reasonable time." However, assuming the State could, by "send[ing] out more detectives" find a way to "blow up or eviscerate" Mr. Cousin's testimony,

this undercuts Double Jeopardy protections. The State may not get a second chance to try a defendant after failing to prepare by insuring all essential witnesses were available for the first trial. *State v. Barthels*, 174 Wis.2d 173, 495 N.W.2d 341 (1993). Likewise, the State should not be allowed a second trial after failing, prior to and during the first trial, to take any action to investigate or prepare to address the witnesses listed by the defense until after one of those witnesses has testified. Basic failure to prepare for the first trial does not create a manifest necessity for a second trial. Yet that is the basis upon which the State seeks a second trial

The State had an opportunity to investigate Mr. Cousin well before trial. Despite the absence of any discovery demand, Mr. Cousin was listed in a defense witness list filed more than five months before the trial started. 18: 1. The State had only to demand any "written or recorded statement" of Mr. Cousin. Wis. Stat. §971.23(2m)(am). The State never did so.

Even during trial, the State made no effort to know the substance of Mr. Cousin's testimony. The State made no discovery demand during trial, even after the defense announced its intent to call Mr. Cousin as a witness. 30: 7-

8. The State did not request an offer of proof of the nature or relevance of Mr. Cousin's testimony prior to Mr. Cousin taking the witness stand. The State never objected at any time during Mr. Cousin's direct examination. Upon conclusion of direct examination, the prosecutor still did not object, or request a sidebar or recess; rather, she proceeded to cross-examine Mr. Cousin.

Judge Borowski was clearly displeased with Mr. Green's counsel, noting that when viewed in a worst-case scenario, counsel "darn well knows you can't spring a witness, on the State, especially a witness of this nature." Apx. 117; 91: 38. However, he found no discovery violation. Rather, he conceded that the State should have filed a discovery demand "in a perfect world." Apx. 116; 91: 37. He made no finding of a violation of any pretrial order or order in limine. The State's assertion that Mr. Cousin was "testifying in violation of the court's pre-trial orders" is unsupported by the record, and the State cites no such pretrial order in the record. Judge Borowski's ruling appears based not on the law of discovery and disclosure, or upon violation of a pretrial order, 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." Apx. 115-116; 91: 36-37.

Mr. Green's short trial was nearly at its end when it was terminated, and Mr. Green was improperly denied his "right to have the original tribunal render a final verdict." *Seefeldt*, ¶41 (citation omitted). The jury in Mr. Green's trial heard nothing which a jury in a second would not hear. While the State may have been surprised by Mr. Cousin's testimony, his testimony was not inadmissible. The reason for the surprise is the State's failure to investigate or to avail itself of the benefits of the discovery statute or to take any action to determine the content of Mr. Cousin's testimony. Thus, the mistrial trial declaration was not supported by manifest necessity.

CONCLUSION

Defendant-Appellant Mitchell D. Green prays that this Court affirms the decision of the Court of Appeals and remands his case with instruction that the Circuit Court dismiss the case with prejudice.

Respectfully submitted,

Electronically signed by
John T. Wasielewski

_____

John T. Wasielewski
Attorney for
Mitchell D. Green

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 8901 words.

Electronically signed by
John T. Wasielewski

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John T. Wasielewski

APPENDIX CONTENTS

APPENDIX CERTIFICATION

I hereby certify that filed with this brief is an appendix that complies with s. 809.19 (2) (a) and that contains a table of contents and the oral decisions and order of the circuit court.

This appeal does not arise from judicial review of an administrative decision.

I further certify that the portions of the record included in the appendix are reproduced using one or more initials of the juvenile victim.

Electronically signed by
John T. Wasielewski

John T. Wasielewski