STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP267-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

MITCHELL D. GREEN,

Defendant-Appellant.

ON APPEAL FROM A DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT I, REVERSING THE DENIAL OF A MOTION TO DISMISS CHARGES WITH PREJUDICE

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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Green largely follows the reasoning of the court of appeals, alleging that the circuit court erred in finding a manifest necessity for a mistrial primarily because it did not conduct a mid-trial admissibility analysis of evidence that should have been presented before trial, and because it was too concerned with whether a witness Green was attempting to implicate should have the advice of counsel. In its opening brief, the State addressed that flawed reasoning. Green fails to persuade that the circuit court erred in finding a manifest necessity for a mistrial: the circuit court's concerns were well-founded, and Green's disregard for the circuit court's process created a manifest necessity for a mistrial. This Court should reverse the court of appeals and allow Green's re-trial to go forward.

I. *Seefeldt* did not create an inflexible requirement that a circuit court must always make an admissibility determination before declaring a mistrial due to the introduction of evidence in violation of a pretrial order.

"Wisconsin has abandoned the concept of 'trial by ambush' where neither side of the lawsuit knows until the actual day of trial what the other side will reveal in the way of witnesses or facts." *State v. Guzman*, 2001 WI App 54, ¶ 22, 241 Wis. 2d 310, 624 N.W.2d 717 (quoting *Carlson Heating, Inc. v. Onchuck*, 104 Wis. 2d 175, 180, 311 N.W.2d 673 (Ct. App. 1981)). "The former system may have been one of great sport and mystery, but is hardly defensible as a means to determine the truth." *Carlson Heating, Inc.*, 104 Wis. 2d at 180. In addition to the legislature's adoption of discovery statutes, circuit courts facilitate this modern approach to litigation through pretrial orders.

Green maintains that *Seefeldt* imposes an absolute requirement that a circuit court determine whether evidence introduced in violation of a pretrial order would have been admissible had it been properly vetted ahead of trial before it can declare a mistrial based on the improper introduction of the evidence. (Green's Br. 29–31.) He suggests that when a defendant ignores a court's pretrial orders and instead requires a court to rule on the admissibility of evidence in the middle of trial, it creates only a "possible inconvenience." (Green's Br. 30.) As support, he reasons that the court in *Denny*[1] was able to rule on the admissibility of evidence mid-trial. (Green's Br. 30.)

Although this case involves *Denny* evidence, the implications of Green's position loom larger. While certain types of evidence might be amenable to an on-the-fly admissibility determination by a circuit court, others might not. For example, the State in this case sought a prohibition on the introduction of any evidence related to the victim's mental health because it would be irrelevant. (R. 21:2.) But it is not hard to imagine a scenario in which a defendant disagrees with the relevance argument and thinks that evidence related to his victim's mental health should be admissible. *See, e.g.*, *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993). And it is not hard to imagine that, in such a scenario, testimony from third parties—possibly including expert witnesses—would be required to accurately assess the admissibility of the evidence.

The U.S. Supreme Court has explained that the manifest necessity standard "abjures the application of any mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique

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

situations arising during the course of a criminal trial." *Illinois v. Somerville*, 410 U.S. 458, 462 (1973). Green seems to believe that *State v. Seefeldt*, 2003 WI 47, 261 Wis. 2d 383, 661 N.W.2d 822, ignores that case-specific analysis, allowing a defendant to wait and force the issue mid-trial even when a circuit court has ordered the evidence to be vetted in advance. The State believes that *Seefeldt* cannot be understood to have created such a rule.

It is far more likely that *Seefeldt* stands for the proposition that a circuit court should make an admissibility determination before declaring a mistrial *where it is reasonable to do so*. This reading dovetails with the court's concern in *Seefeldt* that the circuit court "did not provide sufficient opportunity for the parties to present, and for the judge to consider, arguments regarding whether a mistrial should be ordered and the possible alternatives to a mistrial." *Seefeldt*, 261 Wis. 2d 383, ¶ 38. That is to say, while the circuit court in *Seefeldt* may have been able to determine in short order that the evidence was admissible, that will not always be the case. Providing a defendant with a "sufficient opportunity" to present his argument should not require a circuit court to derail an entire trial.

Another way to look at the admissibility question in *Seefeldt* is to consider whether the underlying issue is one of process or substance. In *Seefeldt*, the State apparently knew about Bart's 15 warrants before they came up at trial. *See id.* ¶ 7. Realistically, the only way in which their introduction could have mattered was if the jury should not have heard about them—a question of substance. But where a defendant springs a surprise defense in the middle of trial, a circuit court may reasonably conclude that the evidence is not admissible because the proper process was not followed: advance notice

was not given.[2] *See Guzman*, 241 Wis. 2d 310, ¶ 22. That process mistake was a valid reason for mistrial even if a later admissibility determination reached a certain substantive determination.

Ultimately, courts must retain the ability to control the introduction of evidence and the progression of trials in their courtrooms. This Court should reject any interpretation of *Seefeldt* that effectively hands that control over to litigants, and it should hold that a circuit court may find a manifest necessity for a mistrial where a defendant has failed to provide the required advance notice of evidence that he introduces in front of a jury even if that evidence might be admissible at re-trial with proper notice.

II. Green's argument gives short shrift to the circuit court's legitimate concerns over legal representation for certain witnesses.

As the State discussed in its opening brief, one of the circuit court's main concerns in declaring a mistrial was the fact that Cousin testified without receiving advice or representation from counsel. Green does not seem to argue that Cousin did not need or should not have had the advice of

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[2] Green argues that the State cannot claim surprise at Cousin's testimony because he was disclosed on the defense's witness list. But a witness list is no substitute for the disclosure of testimony required to be noticed in advance. Yes, the State could have investigated Cousin to see if it could find out what his testimony would be in advance of trial. Cousin, on the other hand, would have had a constitutional right not to implicate himself to the State's investigators. More to the point, in a situation where a circuit court has issued an order requiring advance notice of certain defenses, there is no reason to require the State to conduct an independent investigation in order to confirm whether a particular witness might testify about a particular defense that has not been noticed.

counsel prior to testifying.[3] He joins the court of appeals in dismissing this concern, however, arguing that any remedy for such a violation flows to Cousin, not to the State. (Green's Br. 40.) This position shows an undue lack of consideration for the rights of testifying witnesses and for the ability of courts to control trials.

Green suggests that a *Denny* determination is a small matter that can be decided mid-trial with no need for advance notice to the court or the State. (Green's Br. 29–31.) But in addition to the general problems presented by allowing defendants to disregard pretrial orders, this case presented a unique difficulty: Cousin was placing himself in Green's position as the person who committed the crime. For this reason, the circuit court expressed a desire to have had Cousin consult with an attorney before testifying. (R. 86:19.) Of course, had Green provided advance notice of the *Denny* defense, this would not have been an issue.

The court noted that Cousin may not have testified but for Green's evasion of the pretrial order. (R. 86:19.) The court's concern relative to Cousin testifying without the advice of counsel was thus, like the failure to provide the State with notice, one of process. Even if the State is not entitled to a remedy for any violation of Cousin's rights, what may entitle the State to a remedy is Green's disregard of the appropriate procedures in order to leverage an unfair advantage at trial. Moreover, apart from any remedial considerations for the State, the circuit court's ruling reflects a reasonable position

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[3] Green does suggest that Cousin "admitted no crime and [trial] counsel was not accusing him of any crime." (Green's Br. 40.) The State disagrees; for what reason could Cousin's testimony have been even remotely relevant if not to attempt to create reasonable doubt by suggesting that it was he, not Green, who trafficked the victim on the night in question?

that a defendant should not benefit from his mistreatment of a witness who should be, but is not, represented by counsel.

Green's argument about the evidence being the same in retrial, even if Cousin elected not to testify, is also concerning. (Green's Br. 41–42.) Green effectively argues that a defendant can evade a circuit court's desire to have a *Denny* witness represented by counsel by simply not informing the court or the State about the *Denny* defense. Once the witness testifies, Green's reasoning continues, the defendant is insulated from any type of remedial action because even if, after consulting with counsel, the witness determines he will not testify, his earlier testimony will be admissible statements from an unavailable witness. (Green's Br. 41–42.) The upshot of Green's argument is that once uncounseled testimony has made it in front of the jury, the court can do nothing about it because it will be admissible in an eventual re-trial anyways.

This argument is flawed for two reasons. First, it ignores the process aspect: a witness whose testimony inculpates himself should have the opportunity to decide whether to testify with the benefit of counsel and time. When this process is not followed, it supports the idea that there is a manifest necessity for a mistrial. Second, it encourages bad behavior. If a defendant can lock a defendant in to uncounseled testimony that may be more beneficial to him than counseled testimony without fear of recourse, he has an incentive to circumvent a court's pretrial orders to do so. The ability of a court to at least consider the possibility that the testimony would have been different in determining whether there is a manifest necessity for a mistrial may serve to temper that incentive.

III. Green's introduction of Cousin's testimony violated the circuit court's pretrial order.

Green criticizes both the State and the circuit court for insisting that the introduction of *Denny* evidence was improper because, he claims, there was no pretrial order forbidding the introduction of *Denny* evidence. (Green's Br. 32–39.) In addition to its argument in its opening brief that there was such an order and that it did apply to *Denny* evidence, the State reiterates two points in response.

First, *Seefeldt* demonstrates that a court's pretrial order need not be reduced to writing or otherwise contained in the record in order to have effect. There, this Court acknowledged that the pretrial order in question "was not transcribed or otherwise memorialized in the record." *Seefeldt*, 261 Wis. 2d 383, ¶ 6. It nevertheless went on to recognize that it appeared defense counsel's statement regarding the warrants violated a pretrial order. *Id.* ¶ 40. The absence of an order memorialized in the record is thus not dispositive to the question of whether there was one.

Second and relatedly, Green's trial counsel never argued that there was no pretrial order forbidding the introduction of *Denny* evidence without the court's first ruling on its admissibility. Instead, counsel simply argued that Cousin's testimony was not *Denny* evidence. (R. 86:5–6, 12–13.) Thus, to the extent Green now argues that there was no pretrial order because none appears in the record, that may be simply because counsel's tacit admission below obviated the need for the State or the court to create such a record. Indeed, in discussing *Seefeldt*, Green's own brief acknowledges that "[d]efense counsel's arguments against the prosecutor's objection did not question the existence of the pretrial order." (Green's Br. 35.) Such is the case here: Green's trial attorney's argument did not question the existence of the

pretrial order the circuit court said he was violating, and neither should this Court.

CONCLUSION

For the reasons discussed, this Court should reverse the court of appeals.

Dated this 12th day of October 2022.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,154 words.

Dated this 12th day of October 2022.

Electronically signed by:

John A. Blimling
JOHN A. BLIMLING

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

Dated this 12th day of October 2022.

Electronically signed by:

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