FILED
08-19-2022
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

No. 2021AP1732-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

ERIC J. DEBROW,

Defendant-Appellant.

PETITION FOR REVIEW AND APPENDIX

JOSHUA L. KAUL
Attorney General of Wisconsin

JOHN A. BLIMLING
Assistant Attorney General
State Bar #1088372

Attorneys for Plaintiff-Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-3519
(608) 294-2907 (Fax)
blimlingja@doj.state.wi.us

TABLE OF CONTENTS

INTRODUCTION 5

ISSUE PRESENTED FOR REVIEW 6

STATEMENT OF CRITERIA SUPPORTING REVIEW 6

STATEMENT OF THE CASE 7

ARGUMENT 14

This petition meets the criteria for this Court's review because the issue presented is a question of law of the type that is likely to recur unless resolved by the supreme court. 14

A. The decision whether to declare a mistrial is left to the sound discretion of the circuit court. 14

B. Juries are presumed to follow the curative instructions given to them. 15

C. The decision below calls into question how an appellate court should analyze a circuit court's decision to deny a motion for a mistrial when it is possible to correct an evidentiary error with a jury instruction. 16

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Genova v. State,
91 Wis. 2d 595, 283 N.W.2d 483 (Ct. App. 1979)..... 16

Johnson v. State,
75 Wis. 2d 344, 249 N.W.2d 593 (1977) 16

Peters v. State,
70 Wis. 2d 22, 233 N.W.2d 420 (1975) 17

State v. Beamon,
2013 WI 47, 347 Wis. 2d 559, 830 N.W.2d 681..... 19

State v. Bunch,
191 Wis. 2d 501, 529 N.W.2d 923 (Ct. App. 1995)..... 15

State v. Collier,
220 Wis. 2d 825, 584 N.W.2d 689 (Ct. App. 1998)..... 16

State v. Deer,
125 Wis. 2d 357, 372 N.W.2d 176 (Ct. App. 1985)..... 15

State v. Ford,
2007 WI 138, 306 Wis. 2d 1, 742 N.W.2d 61..... 14

State v. Gary M.B.,
2004 WI 33, 270 Wis. 2d 62, 676 N.W.2d 475..... 17

State v. Givens,
217 Wis. 2d 180, 580 N.W.2d 340 (Ct. App. 1998)..... 15, 18

State v. Jennaro,
76 Wis. 2d 499, 251 N.W.2d 800 (1977) 15

State v. Lombard,
2003 WI App 163, 266 Wis. 2d 887, 669 N.W.2d 157..... 15

State v. Penigar,
139 Wis. 2d 569, 408 N.W.2d 28 (1987) 17

State v. Pharm,
2000 WI App 167, 238 Wis. 2d 97, 617 N.W.2d 163 15

State v. Schutte,
2006 WI App 135, 295 Wis. 2d 256, 720 N.W.2d 469 15

State v. Sigarroa,
2004 WI App 16, 269 Wis. 2d 234, 674 N.W.2d 894 16

State v. Sullivan,
216 Wis. 2d 768, 576 N.W.2d 30 (1998) 17

State v. Williamson,
84 Wis. 2d 370, 267 N.W.2d 337 (1978) 17

United States v. Clarke,
227 F.3d 874 (7th Cir. 2000) 15

Statutes

Wis. Stat. § (Rule) 809.62(1r)(c)3. 6

Wis. Stat. § 939.62(2m)(b)–(c) 8

INTRODUCTION

In March of 2020, a jury convicted Eric. J. Debrow of sexually assaulting his girlfriend's minor daughter. It was not Debrow's first sexual assault conviction; he was also convicted of first-degree sexual assault of a child in 2004. Pursuant to Wisconsin's persistent repeater statute, the 2020 conviction resulted in a sentence of life imprisonment without the possibility of extended supervision.

Debrow appealed. He argued, among other things, that the circuit court improperly denied his request for a mistrial after a witness—the victim's brother—made a reference during his testimony to having looked on CCAP. After stopping the brother from testifying further, the circuit court instructed the jury to disregard testimony and concluded that a mistrial was therefore not necessary. Debrow did not seek a different jury instruction; instead, he insisted that no jury instruction would be sufficient to overcome the prejudicial nature of the witness's comment.

The court of appeals reversed Debrow's conviction. The court acknowledged that the decision whether to declare a mistrial is discretionary. It assumed that the jury knew what "CCAP" was and that it must have inferred that Debrow had a conviction for child sexual assault. It then concluded that the curative instruction the circuit court gave was insufficient. In so holding, the court implied that a proper instruction may have obviated the need for a mistrial, but because a sufficient instruction was not given, the circuit court erroneously exercised its discretion in denying Debrow's request for a mistrial.

This Court should grant review to address the interplay between curative instructions and the necessity for a mistrial. Specifically, the court should clarify whether the sufficiency of a curative instruction is properly considered part of the mistrial analysis or if it is an independent issue. It is the

State's position that the latter is true: where it is possible for a curative instruction to overcome improper witness testimony, a court properly exercises its discretion by denying a mistrial, and the question of whether the curative instruction was in fact adequate is a separate issue. The court of appeals conflated these analyses and, in so doing, reversed a conviction for a serious offense. This Court should determine whether that reversal was based on a proper application of the law.

ISSUE PRESENTED FOR REVIEW

Did the court of appeals apply the proper legal standard to its review of the circuit court's decision to deny Debrow's motion for a mistrial when it considered the adequacy of the curative instruction given by the circuit court and, if not, did the circuit court properly exercise its discretion in denying the motion for a mistrial?

The court of appeals concluded that the circuit court erred in denying the motion for a mistrial because its decision was based on a putatively insufficient curative instruction having been given.

STATEMENT OF CRITERIA SUPPORTING REVIEW

This Court's review "will help develop, clarify or harmonize the law" because the issue presented "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. Disputes about mistrials will often occur in situations where evidence or testimony has been improperly introduced in front of a jury. In such circumstances, courts will need to weigh whether a curative instruction is sufficient, and parties will need to know how to frame their arguments with respect to the need for a mistrial and the adequacy of an instruction.

STATEMENT OF THE CASE

This appeal arises out of Debrow's conviction at trial of one count of second-degree sexual assault of a child as a persistent repeater in Dane County case number 2018CF202. (R. 106:1.) Debrow was also charged with a separate count of first-degree sexual assault of a child as a persistent repeater in Dane County case number 2018CF1787. (R. 63:1.) The Dane County Circuit Court joined the two cases for trial,[1] and the jury convicted Debrow on the count in 2018CF202 but acquitted him on the count in 2018CF1787. (R. 118:103.)

Investigation & Pre-Trial Proceedings

On the morning of January 22, 2018, Madison Police responded to Safe Harbor where staff were conducting an interview of Mary[2], who was then 13 years old. (R. 1:1.) Mary reported that about one week earlier, Debrow—her mother's boyfriend—came into her room while she was sleeping and touched her. (R. 1:2.) Mary awoke to discover that Debrow had flipped her covers up and was "rubbing her legs and gripping her butt." (R. 1:2.) Mary screamed at Debrow to get out of her room, which caused the family dogs to start barking. (R. 1:2.) Debrow left, closing the bedroom door as he did. (R. 1:2.)

In an information dated February 27, 2018, the State charged Debrow with one count of sexual assault of a child under the age of 16 as a persistent repeater. (R. 13:1.) Because Debrow had been convicted of first-degree sexual assault of a child in 2004, the persistent repeater charge carried with it a mandatory life sentence without the possibility of early

---

[1] The circuit court denied the State's motion to join Dane County case nos. 2018CF2282 and 2018CF2409, each of which involved multiple counts of bail jumping. (R. 63:2; 127:33–34.) Those cases are not at issue in this appeal.

[2] The State uses pseudonyms for the child victims and their family members.

release. *See* Wis. Stat. § 939.62(2m)(b)–(c). Debrow pleaded not guilty (R. 126:15), and the case moved toward trial. During the lead up to trial, Debrow violated the conditions of his release multiple times by contacting Mary and her mother, Kathy, by text and through Facebook. (R. 34; 38.) Debrow also changed counsel multiple times, resulting in significant delays to the trial schedule. (R. 65:1–2.)

In November of 2019, the State moved to join the case involving the assault against Mary with a separate case involving an assault against Mary's younger sister, Nancy. (R. 63.) In that case, Nancy stated that Debrow entered her room one night and unbuttoned her pants. (R. 63:2.) Nancy also stated that she would sometimes sleep in bed with her mother when she was not feeling well, and that on multiple occasions when she was in bed with her mother, Debrow put his hand down her pants and rubbed her vagina. (R. 63:2.) The State also moved to join the two cases involving the bail jumping charges that resulted from Debrow's contact with Mary and Kathy following his release on bail. (R. 63:2–3.) Debrow opposed joinder (R. 68), and the circuit court held a hearing to discuss the matter on February 12, 2020 (R. 127). After argument by the parties, the circuit court determined that the cases involving the allegations by Mary and Nancy would be joined, but the bail jumping cases would remain separate. (R. 127:30–33.)

Before trial, the circuit court ruled on multiple evidentiary issues, including allowing the State to present various other-acts evidence to show the absence of mistake. (R. 120:38–40.) Following these rulings, the court took a break for lunch to allow Debrow to decide whether he would accept the State's final plea offer. (R. 120:61–62.) Following the break, Debrow told the court he rejected the State's plea offer

and proceed to trial. (R. 129:7–8.) The court called in the jury[3] and trial began. (R. 129:13.)

Trial

The State's first witness was Mary. (R. 129:37.) Mary testified that Debrow was her mother's boyfriend and lived with the family in early 2018. (R. 129:41.) She identified a diagram as a mirror image of the apartment the family and Debrow were living in at that time. (R. 129:44.) She identified the rooms where she, her mother, her sister Nancy, and her brother slept. (R. 129:47.)

Mary said that on January 17th, 2018, she woke up very early in the morning "to somebody touching [her] butt and thigh." (R. 129:50–51.) She screamed, which caused the dogs to start barking. (R. 129:51.) Mary then stayed awake until it was time for her to go to school. (R. 129:51.) Mary reported that she was "100 percent" sure that the person who touched her was Debrow. (R. 129:56.)

When Mary returned from school later that day, Kathy was telling Debrow to leave and that he should have been gone before Mary got home.[4] (R. 129:58.) At some point, Mary's brother called the police, who arrived and spoke with Mary and Nancy. (R. 129:58.)

Asked if there was ever another time she had awoken to Debrow in her room, Mary testified that when the family first moved into the apartment, she once woke up to Debrow sitting on her bed saying "shh, it's just a game" and instructing her not to tell her mother. (R. 129:60.) Mary also

---

[3] Jury selection occurred the previous day, but the court did not swear in the jury at that time. (R. 130.)

[4] Kathy later testified that she was awakened by the barking dogs and, after talking to Debrow, surmised that Debrow had been in the girls' room, which violated her "ground rule[s]" for him. (R. 119:66, 77–81.)

stated that she once had a discussion with her mother about what to do "if anything were to happen" while she was in her room in the night, and "[t]he general consensus was" that she should scream. (R. 129:65.)

Mary's brother Isaac testified next for the State. (R. 129:88.) Isaac stated that the arrangement of his bedroom in the apartment allowed him to see directly out his bedroom door. (R. 129:93.) He had been lying awake in bed on the morning of January 17th when he saw Debrow enter Mary and Nancy's bedroom. (R. 129:94.) Debrow was in the room for five to ten minutes when Isaac heard his sister scream. (R. 129:96.) Debrow then immediately left the room to go back to Kathy's room. (R. 129:96.) Isaac confirmed that the dogs began to bark after he heard his sister scream. (R. 129:99.) He testified that he was angry about what he saw all day while he was at school, so when he got home later that day, he called the police. (R. 129:97.)

Isaac acknowledged that he and Debrow would occasionally fight and that sometimes the fights involved punching and kicking. (R. 129:100.) He added, however, that he viewed Debrow as a sort of father figure "until all this stuff happened." (R. 129:100.)

On cross-examination, Isaac said that he stayed awake and watched Mary and Nancy's bedroom door after Debrow left it "just to see if he was going to go back in there." (R. 129:108.) He also noted that he generally could not control how he slept and was on medication for sleeping, which was why he was awake that night to begin with. (R. 129:108.)

During re-direct examination, the State requested a sidebar and sought permission to ask a leading question. (R. 129:110.) The State indicated that it wanted to address why Isaac was being particularly vigilant about Debrow and his sisters without Isaac responding in a way that told the jury that Debrow had previously been convicted of sexually

assaulting a minor. (R. 129:110–11.) Debrow's attorney opposed the State's request and said that if Isaac gave the "wrong answer," he would request a mistrial. (R. 129:112.) He further contended that the State should not be allowed to address Isaac's "feeling" about Debrow because the State originally brought it up during direct examination and the defense only followed up on it during cross-examination. (R. 129:113–14.) The State re-emphasized that it wanted to address why Isaac was watching his sisters' bedroom door "in a leading way so we don't accidentally get a mistrial about this." (R. 129:115.)

The court sustained Debrow's objection to the State asking a leading question. (R. 129:117.) It said that the State could "go into this area in not a directly leading fashion but in a very direct or indirect but not leading manner." (R. 129:116–17.) The State responded that it was concerned where Isaac's mind would go "with such a vague question," but would "try to be quick to interrupt" if need be. (R. 129:117.) The court said that it would "be happy to be on pins and needles as well to jump in if [Isaac] starts saying something" related to Debrow's criminal history. (R. 129:117.)

After the sidebar, the following exchange took place:

> Q [Isaac], I want to draw your attention to the timeframe of when you moved into [the apartment] with [Debrow] and your two sisters and your mom, okay?
>
> At any point from when you moved in, had you learned anything or heard anything that led you to be on alert that night on January 17th of 2018?
>
> A Yes.
>
> Q And were those based on things your sisters had mentioned?
>
> A No.
>
> Q Are those things that you heard from your mom?

A It's things that I - -

Q - - I don't want to get into that - -

(Unreportable simultaneous interjections by Counsel.)

(R. 129:118.)

Debrow moved to strike the response and indicated that he would make another motion shortly. (R. 129:118.) The court then said, "I'll - - I'll move to strike. The question was were those things you heard from your mother, and if you can just give yes or no as far as whether those were things you heard from your mother. We can't get into what they are, because that's hearsay." (R. 129:119.) Isaac began to respond with "Well, my mom did tell me - -" and the court cut him off, saying "we can't put her words into your mouth in front of the jury." (R. 129:119.) The State added, "that's why I had to speak over you, and I apologize for doing that." (R. 129:119.) The State then ended its re-direct examination, and the court directed the jury "to strike anything else that they . . . heard beyond the witness's statement that he heard from his mother but not the content of anything." (R. 129:119.)

Shortly thereafter, the court dismissed the jury and the parties stayed on the record to discuss what happened. (R. 129:121–22.) The court stated that the State asked a question that was not leading, and when Isaac started to interject, the court heard the words "I looked on CCAP." (R. 129:122.) At that, both attorneys and the court interrupted Isaac. (R. 129:123.) The court noted that it granted Debrow's motion to strike, and it said that it would "give that instruction in the end as well." (R. 129:123.)

Debrow moved for a mistrial. (R. 129:123.) He argued that even though the court struck Isaac's response, "the jury still heard it." (R. 129:123.) He contended that the jury would wonder what Isaac found on CCAP that led him to be so vigilant and concluded that the jury would surmise that

Debrow had previously been convicted of sexual assault. (R. 129:123–24.) And because Debrow believed that no curative instruction could correct the error, he felt the trial needed to start over with a new jury. (R. 129:124.)

The State disagreed that a mistrial was necessary. (R. 129:124.) It noted that a mistrial was a "drastic" remedy, and that it would be sufficient to either issue another instruction to the jury to disregard the response, or, if Debrow preferred, to not address the issue again so as to call no further attention to it. (R. 129:124–25.) The State also commented on the court's statement to Isaac that the problem with his response was hearsay, which the State believed minimized the risk that the jury would understand that Isaac was likely referring to Debrow's criminal history. (R. 129:125.)

The court noted that a mistrial is "the most serious of remedies." (R. 129:128.) It said that a few reasons reduced the necessity of granting a mistrial in Debrow's case. (R. 129:128.) First, there was no way to know how many of the 14 jurors heard Isaac mention CCAP or whether they knew what CCAP was. (R. 129:128–29.) Regardless, the court noted that Isaac did not say what it was he saw on CCAP that caused him to be alert. (R. 129:129.) Second, the reason given to the jury for the interruption of Isaac's response was that it was getting into matters of hearsay, which were not allowed. (R. 129:129.) Finally, there were less drastic measures than a mistrial available to address Isaac's response. (R. 129:130–31.) For those reasons, the court denied Debrow's request for a mistrial. (R. 129:131.)

Debrow did not testify in his own defense, nor did he call any witnesses. (R. 118:3.) After closing arguments, the jury returned verdicts of not guilty on the count of second-degree sexual assault of a child (Nancy) under the age of 13 and guilty on the count of second-degree sexual assault of a child (Mary) under the age of 16. (R. 118:99–100.) The court entered judgment on the guilty verdict. (R. 118:103.)

Debrow appealed, arguing both that the circuit court erroneously denied his motion for a mistrial and that the court erred in many of its pre-trial evidentiary decisions. The court of appeals reversed Debrow's conviction and remanded the matter for a new trial. (Pet-App. 3.) The court held that the circuit court erroneously exercised its discretion in determining that a mistrial was not necessary because the circuit court's determination was based on the fact that it gave a curative instruction, but that instruction was inadequate. (Pet-App. 22.) The court further held, however, that the circuit court's pre-trial evidentiary decisions were correct. (Pet-App. 23–31.)

ARGUMENT

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

This Court should accept review because the issue presented here—the correct way to analyze a circuit court's decision to deny a mistrial where a curative instruction is given—is likely to recur unless it is resolved by this Court. Lower courts and litigants need guidance on how to proceed under similar circumstances.

A. The decision whether to declare a mistrial is left to the sound discretion of the circuit court.

"A motion for mistrial is committed to the sound discretion of the circuit court." *State v. Ford*, 2007 WI 138, ¶ 28, 306 Wis. 2d 1, 742 N.W.2d 61. "An erroneous exercise of discretion may arise from an error in law or from the failure of the circuit court to base its decisions on the facts in the record." *Id.* "The trial court must determine, in light of the entire proceeding, whether the basis for the mistrial motion

is sufficiently prejudicial to warrant a new trial." *State v. Givens*, 217 Wis. 2d 180, 191, 580 N.W.2d 340 (Ct. App. 1998).

However, "not all errors warrant a mistrial." *Id.* In fact, the law favors less-extreme alternatives when they are available and practical. *Id.* When a defendant seeks a mistrial on grounds unrelated to the prosecution's conduct, appellate courts give the circuit court's decision "great deference." *State v. Bunch*, 191 Wis. 2d 501, 507, 529 N.W.2d 923 (Ct. App. 1995) (citation omitted). A circuit court "is in the best position to determine the seriousness of the incident in question, particularly as it relates to what has transpired in the course of the trial." *United States v. Clarke*, 227 F.3d 874, 881 (7th Cir. 2000).

B. Juries are presumed to follow the curative instructions given to them.

Curative instructions are sufficient to cure prejudice resulting from an errant comment. As the court of appeals has noted, "not all errors warrant a mistrial and 'the law prefers less drastic alternatives, if available and practical.'" *Givens*, 217 Wis. 2d at 191 (quoting *Bunch*, 191 Wis. 2d at 512). Thus, "[a] trial court has broad discretion to decide when to give a curative instruction and what it should contain." *State v. Schutte*, 2006 WI App 135, ¶ 37, 295 Wis. 2d 256, 720 N.W.2d 469 (citing *State v. Lombard*, 2003 WI App 163, ¶ 18, 266 Wis. 2d 887, 669 N.W.2d 157).

It is well established that when assessing prejudice to a party due to improper evidence, an appellate court "should presume that the jury followed the instructions given to them by the trial court." *State v. Pharm*, 2000 WI App 167, ¶ 31, 238 Wis. 2d 97, 617 N.W.2d 163; *State v. Deer*, 125 Wis. 2d 357, 364, 372 N.W.2d 176 (Ct. App. 1985). Furthermore, "the general rule in this state [is] that limiting and admonitory instructions are presumed to cure the prejudicial effect of erroneously admitted evidence." *State v. Jennaro*, 76 Wis. 2d

499, 508, 251 N.W.2d 800 (1977); *see also State v. Collier*, 220 Wis. 2d 825, 837, 584 N.W.2d 689 (Ct. App. 1998) ("Potential prejudice is presumptively erased when admonitory instructions are properly given by a trial court.").

Because of this presumption, appellate courts generally defer to a circuit court's determination that a curative instruction cures any prejudice unless the record shows the jury disregarded the trial court's instructions. *See, e.g.*, *Genova v. State*, 91 Wis. 2d 595, 622, 283 N.W.2d 483 (Ct. App. 1979); *State v. Sigarroa*, 2004 WI App 16, ¶ 24, 269 Wis. 2d 234, 674 N.W.2d 894. For example, in *Sigarroa*, a State's witness improperly implied to the jury that the defendant had a criminal record. *Id.* ¶ 23. The defendant moved for a mistrial and argued that the "statement informed the jury that Sigarroa had a prior criminal conviction." *Id.* ¶ 11. Ultimately, the trial court concluded that a "curative instruction was sufficient" to cure any prejudice. *Id.* The court of appeals agreed and concluded that the trial court immediately "striking" the improper testimony as well as providing a "jury instruction at the close of testimony" was "sufficiently curative." *Id.* ¶ 26. Similarly, in *Johnson v. State*, this Court affirmed a circuit court's decision to deny a defendant's motion for mistrial based on the "steps taken by the trial court to mitigate any prejudice." *Johnson v. State*, 75 Wis. 2d 344, 366, 249 N.W.2d 593 (1977).

C. The decision below calls into question how an appellate court should analyze a circuit court's decision to deny a motion for a mistrial when it is possible to correct an evidentiary error with a jury instruction.

The court of appeals, in reversing Debrow's conviction and remanding the matter for a new trial, focused largely on the curative instruction issued by the circuit court. The court held that the instruction was insufficient because it did not tell the jurors exactly what information to "strike" or what

exactly it meant by "strike." (Pet-App. 19–20.) It therefore concluded that the circuit court erroneously exercised its discretion because the circuit court's determination that a mistrial was not necessary was based, in part, on the curative instruction that it gave to the jury. (Pet-App. 22.) As the basis for its decision, the court cited multiple cases, including *Gary M.B.*[5], *Williamson*[6], *Penigar*[7], *Sullivan*[8], and *Peters*.[9]

While the cases cited by the court discuss the standard necessary for a proper curative instruction, they are notably distinguishable from this case in one key regard: none of them considered a curative instruction in the context of a motion for a mistrial. In *Penigar*, for example, this Court noted that the defendant opted for a curative instruction instead of requesting a mistrial after the State amended the charge in the information, resulting in previously introduced evidence becoming inadmissible. *State v. Penigar*, 139 Wis. 2d 569, 578, 408 N.W.2d 28 (1987). In *Sullivan*—Wisconsin's seminal other-acts case—this Court considered the adequacy of a curative instruction in the context of the admission of other-acts evidence. *State v. Sullivan*, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). That is to say, those cases dealt with whether a curative instruction was sufficient or not; they did not consider whether a curative instruction obviated the need for a mistrial.

---

[5] *State v. Gary M.B.*, 2004 WI 33, 270 Wis. 2d 62, 676 N.W.2d 475.

[6] *State v. Williamson*, 84 Wis. 2d 370, 267 N.W.2d 337 (1978).

[7] *State v. Penigar*, 139 Wis. 2d 569, 578, 408 N.W.2d 28 (1987).

[8] *State v. Sullivan*, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998).

[9] *Peters v. State*, 70 Wis. 2d 22, 233 N.W.2d 420 (1975).

In the normal course of a situation like the one confronting the circuit court here, the court will first need to determine whether a mistrial is necessary. That is, the court "must determine, in light of the entire proceeding, whether the basis for the mistrial motion is sufficiently prejudicial to warrant a new trial." *Givens*, 217 Wis. 2d at 191. Part of that determination will be whether a curative instruction may suffice in lieu of the "drastic" step of declaring a mistrial. *See id.*

If the court determines that a complained-of error is amenable to being overcome by a curative instruction, then the circuit court properly exercises its discretion by denying the request for a mistrial. *See id.* The court should then consider, in consultation with the parties, the proper wording and scope of the curative instruction. This instruction should meet the standards discussed in cases like *Penigar*, *Peters*, and *Sullivan*. However, as the discussion of curative instructions in these cases demonstrates, the content of the curative instruction is a distinct issue.

At trial, Debrow forfeited any complaint about the content of the curative instruction by putting all of his eggs in the mistrial basket. Defense counsel argued that there was "no way around [a mistrial], not even a curative instruction." (R. 129:124.) The State argued that a mistrial was not necessary, and that Debrow could either opt for an additional curative instruction or elect to leave things as they were so as to draw no further attention to it. (R. 129:124–25.) Defense counsel responded, doubling down on his position that no curative instruction would suffice:

> I don't care how much we strike it, let's not be ignorant. They're not going to unlearn what they learned. They're not going to not think about what they just heard. . . . So I know you're not going to grant the mistrial, but that's - - but that's my motion. You can't un-correct that.
>
> (R. 129:126.)

The court of appeals suggested that a different curative instruction could have obviated the need for a mistrial. (Pet-App. 17–21.) That should have been enough for the court to conclude that the circuit court properly exercised its discretion in determining that a mistrial was not necessary. Yet the court of appeals, despite Debrow forfeiting any argument that the circuit court should have offered a different instruction and the parties not having briefed the same, reversed on that separate basis by simply folding it into the mistrial analysis. (Pet-App. 21–22.)

This is more than an academic concern; Debrow's approach of focusing on the court's mistrial decision foreclosed a harmless error analysis. The court of appeals noted that the State did not "make a harmless error argument regarding the circuit court's denial of Debrow's mistrial motion." (Pet-App. 22 n.13.) That is true, inasmuch as the State did not believe it could reasonably argue that the jury still would have convicted Debrow even if the circuit court had declared a mistrial.

However, Debrow's choice to remove harmless error from the equation also removed the content of the curative instruction from the equation. As discussed, the sufficiency of the curative instruction is a separate issue raised for the first time by the court of appeals. That issue *is* subject to harmless error analysis, s*ee State v. Beamon*, 2013 WI 47, ¶ 3, 347 Wis. 2d 559, 830 N.W.2d 681, and the State has not forfeited any arguments related to it because it was not raised below.

This Court should grant review to address whether the court of appeals' approach to the analysis was proper, to give guidance to courts and litigants alike on how these arguments must be framed, and to provide the parties the opportunity to brief the issue on which the court of appeals' decision rested.

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 19th day of August 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

JOHN A. BLIMLING
Assistant Attorney General
State Bar #1088372

Attorneys for Plaintiff-Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-3519
(608) 294-2907 (Fax)
blimlingja@doj.state.wi.us

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 4,702 words.

Dated this 19th day of August 2022.

JOHN A. BLIMLING
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULES) 809.19(12) and 809.62(4)(b) (2019-20)

I hereby certify that:

I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(12) and 809.62(4)(b) (2019-20).

I further certify that:

This electronic petition is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 19th day of August 2022.

JOHN A. BLIMLING
Assistant Attorney General