STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP1732-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

ERIC J. DEBROW,

Defendant-Appellant.

ON APPEAL FROM A DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT IV, REVERSING A JUDGMENT OF CONVICTION ENTERED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE JOHN D. HYLAND, PRESIDING

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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INTRODUCTION

Debrow's response brief highlights the fundamental issue in this appeal: when a circuit court has denied a request for a mistrial based on both an instruction given to the jury and the defendant's opportunity to have the jury receive further instruction, how should a reviewing court assess that denial? In arguing for mistrial, Debrow mixes and matches two issues, arguing both that the instructions were irrelevant, on the theory no instruction could have cured Isaac's fleeting reference to CCAP, but also that mistrial was warranted on the theory that a different instruction should have been given. Debrow's response also ignores that the circuit court offered the defense an additional instruction and ultimately gave the pattern jury instruction on stricken testimony before deliberations. And he adds a new assertion, suggesting for the first time that Isaac's testimony was the result of prosecutorial overreach. Throughout, the underlying premise is that the circuit court's mistrial decision is not, in fact, entitled to the deference it is actually owed.

There are very good reasons for deferring to a circuit court's judgment about the ability of a curative instruction to resolve an evidentiary issue. Circuit courts view trials as they occur in real time. When a circuit court determines that an instruction can fix an evidentiary issue and that a mistrial is therefore unnecessary, it has appropriately exercised its discretion even if it then allows the defendant to decide whether a further instruction should be given. That is what occurred here: the circuit court considered the circumstances, concluded that Isaac's testimony did not irreparably taint the jury, and allowed Debrow to decide whether he wanted a curative instruction. That was an appropriate exercise of discretion, and this Court should reverse the court of appeals.

ARGUMENT

The court of appeals erred in reversing the circuit court's denial of the mistrial motion. It failed to apply the appropriate test for whether a mistrial was warranted and instead applied case law from challenges to particular jury instructions. Debrow's arguments run counter to established case law: he advances an erroneous theory that great deference to the circuit court is not warranted and continues the court of appeals' error of conflating mistrial and jury instruction issues. And standing alone, his complaints about the court's jury instruction are both forfeited and wrong under harmless error analysis.

I. The circuit court appropriately exercised its discretion in denying a mistrial.

A. The circuit court's decision to deny Debrow's motion for a mistrial is entitled to great deference.

Debrow begins by attacking the State's assessment of the standard of review, arguing that this Court should instead review the decision under "strict scrutiny" because the prosecutor overreached in asking the question that led Isaac to mention CCAP. (Debrow's Br. 17–19.) Debrow challenges the State's assertion "that the circuit court's denial of Debrow's mistrial is owed 'great deference.'" (Debrow's Br. 17.) But that is not just the State's position. Debrow's own court of appeals brief conceded that "the trial court's ruling on a defense motion for a mistrial is accorded *great deference* on appeal" and argued only that the circuit court's decision was an erroneous exercise of discretion. (Debrow's COA Br. 20) (emphasis added). The court of appeals agreed with this assessment. (Pet-App. 12–13.)

Debrow now argues that a different standard should apply on the theory that his motion for a mistrial "was prompted by the [S]tate's overreaching questions that elicited the prejudicial and inadmissible testimony from Isaac." (Debrow's Br. 18.) As support, he points to a portion of *State v. Bunch*, 191 Wis. 2d 501, 507, 529 N.W.2d 923 (Ct. App. 1995), which says that "[w]hen the basis for a defendant's mistrial request is the State's overreaching or laxness, we give the trial court's ruling strict scrutiny out of concern for the defendant's double jeopardy rights." Debrow seems to believe that this language means this Court should afford less deference to the circuit court's decision simply because he has alleged prosecutorial overreach.

Debrow is mistaken.

The language cited in *Bunch* stems in large part from this Court's decision in *State v. Barthels*, 174 Wis. 2d 173, 184, 495 N.W.2d 341 (1993), *abrogated on other grounds by State v. Seefeldt*, 2003 WI 47, 261 Wis. 2d 383, 661 N.W.2d 822. In *Barthels*, this Court noted that "[t]he standard by which [it] reviews the discretion exercised in granting a mistrial varies according to the facts of the particular case." *Barthels*, 174 Wis. 2d at 184. Generally, a defendant's request for a mistrial waives a claim of double jeopardy at retrial. *Id.* "If, however, the prosecutor requests the mistrial, or the judge determines that the defendant's request was occasioned by prosecutorial overreaching or laxness, then this [C]ourt gives stricter and more searching scrutiny to *the judge's decision to grant a mistrial*." *Id.* (emphasis added).

In other words, when a circuit court *grants* a mistrial, either at the request of the prosecutor or because the prosecutor has overreached or been negligent, "strict scrutiny" applies to the review to preserve a defendant's double-jeopardy rights. In *Barthels*, for example, this Court considered a circuit court's order granting a mistrial over the

defendant's objection because of the absence of a witness for the prosecution. *Id.* at 184–85. This Court determined that the circumstances warranted "review [of] the decision of the circuit court with marked strictness." *Id.* at 185. Similarly, in *Copening*, this Court considered the double jeopardy implications of a mistrial at the defendant's request following a prosecutor's "egregious" error. *State v. Copening*, 100 Wis. 2d 700, 713–14, 303 N.W.2d 821 (1981); *see also State v. Seefeldt*, 261 Wis. 2d 383, ¶ 20 ([A] higher degree of scrutiny may be appropriate because "the granting of the mistrial implicated the interests protected by the double jeopardy clause").

The underlying reasoning for the rule is that the ordinary outcome of a mistrial ruling—that the defendant is retried—is unfair if the second trial was occasioned by the prosecutor's overreach or if the defendant objected to the mistrial and there was no "manifest necessity" for it. *See, e.g.*, *Copening*, 100 Wis. 2d at 711; *see also United States v. Dinitz*, 424 U.S. 600, 611 (1976) (double-jeopardy clause bars retrials in the event of bad-faith conduct by judge or prosecutor designed to create more favorable opportunity to convict). Reviewing courts thus scrutinize lower courts' declarations of mistrial where such facts might be at issue.

None of that has any bearing where a circuit court has *denied* a motion for a mistrial and the trial proceeded to verdict. In that situation, a defendant's double-jeopardy rights are not implicated by the court's ruling: no second trial flows from it. *Bunch*, *Barthels*, *Copening*, and *Seefeldt* are simply not on point.

Even if those cases could apply where there is no mistrial and the trial is completed, the record paints a different picture than Debrow does about the prosecution's "overreach" in this case. The prosecutor agreed that Debrow's criminal history would be off limits unless Debrow opened the

door to it. Even after Debrow's cross-examination of Isaac, the prosecutor was looking for a way to explain Isaac's mistrust of Debrow without getting into Debrow's criminal history, which is why he sought permission to ask leading questions. (R. 129:111.) Defense counsel, in contrast, made it very clear that he was looking for any excuse to request a mistrial even before Isaac's CCAP response. (R. 129:112.) When the prosecutor questioned Isaac, he immediately cut Isaac's response off when it appeared to be going into Debrow's criminal history. (R. 129:118.) Rather than suggesting some nefarious intent or overreach, all of this indicates a strong desire by the prosecution to limit the introduction of any previously excluded evidence.

In sum, Wisconsin's caselaw does not require "strict scrutiny" review of circuit court decisions *denying* motions for mistrials. Such scrutiny is reserved for situations where a motion for a mistrial was granted and the defendant's double-jeopardy protections are at issue. But even if strict scrutiny could apply to the denial of a motion for a mistrial where the defendant claimed that a mistrial was necessitated by prosecutorial overreach, that standard would not be met here. This Court should review the circuit court's decision to deny Debrow's request for a mistrial with great deference to the trial court, as Debrow previously conceded was appropriate.

B. The circuit court properly exercised its discretion when it concluded that any evidentiary error was amenable to correction and denied Debrow's motion for a mistrial.

Debrow argues that the circuit court erroneously exercised its discretion in denying his request for a mistrial because it "came to irrational conclusions about the incurable and 'extremely prejudicial' nature of the inadmissible character evidence elicited by the State." (Debrow's Br. 25.)

Debrow's argument thus seems to be that Isaac's testimony placed an "incurable" taint on the trial. It did not.

While the State has always agreed that the jury should not be told about Debrow's previous sexual assault conviction, the State does not agree that Isaac's testimony, in which he fleetingly mentioned CCAP, had the same prejudicial effect that telling the jury about Debrow's prior conviction would have had. As the circuit court noted, Isaac's testimony offered no indication of what he saw on CCAP, other than the possibility that it caused him to be on alert. Debrow's position that the reference to CCAP required a mistrial would effectively create a per se rule that a mistrial is always required upon any similar testimony referencing CCAP because a jury (assuming that jurors all know what CCAP refers to) would always assume the worst. While references to prior criminal conduct will often be out-of-bounds, they are not always going to result in incurable error.

Debrow cites *State v. Castillo*, No. 2020AP983-CR, 2021 WL 2659567 (Wis. Ct. App. June 29, 2021) (unpublished), as an example of a reference to other criminal acts creating an irreparable taint. *Castillo* is distinguishable; it involved a victim witness's direct testimony that the defendant "did it to three other little girls." *Castillo*, 2021 WL 2659567, ¶ 45 (Resp-App. 9.) Here, Isaac's comment about CCAP was far more obscure, and thus far more amenable to correction by a curative instruction.

Debrow offers a statement by the U.S. Court of Appeals for the Fifth Circuit: "[I]f you throw a skunk into the jury box, you can't instruct the jury not to smell it." *Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962). (Debrow's Br. 22) As colorful of an image as that paints, it is not particularly helpful for deciding what constitutes a "skunk." Here, the circuit court reasonably decided that given the obscure, fleeting reference to CCAP that was immediately cut off and

for which an alternative explanation was offered, any evidentiary taint could be cured with a jury instruction. That was a proper exercise of discretion, and it should stand.

C. Debrow misunderstands the mistrial analysis; whether a particular corrective instruction was correct is a separate issue from whether a mistrial was required.

Debrow argues that it was appropriate for the court of appeals to consider the sufficiency of the instruction the circuit court gave the jury because that instruction was part of the circuit court's reasoning for denying Debrow's request for a mistrial. But that is not the analysis. As the State discussed in its opening brief, the question is whether, "in light of the whole proceeding, . . . the claimed error was sufficiently prejudicial to warrant a new trial." *State v. Ross*, 2003 WI App 27, ¶ 47, 260 Wis. 2d 291, 659 N.W.2d 122. (State's Br. 17.) The court of appeals erred by relying on cases considering the sufficiency of jury instructions as a standalone issue rather than mistrial cases. (State's Br. 19–21.)

The circuit court concluded that Isaac's statement was not so prejudicial as to warrant a new trial based on the "whole proceeding": the testimony itself, the instruction given to the jury, and the offer of further instruction given to Debrow. The court of appeals failed to take the whole proceeding into account, as it was required to do, and focused solely on the instruction the court gave. This approach was incorrect.

Debrow points to *Genova*, *Sigarroa*, and *Johnson*, but those cases do not support his premise. The question in each was whether the circuit court exercised its discretion in considering whether the prejudicial impact of a particular error, taking into account the nature of the error itself and the

available curative steps, was so great as to necessitate a mistrial. None of the cases was a review of whether the circuit court's particular choice of instruction was erroneous.

In *Genova,* the court considered a defendant's claim for mistrial based on an improper, but unanswered, question by the prosecutor; the court of appeals stated the general rule for such situations as when a "trial court gives the jury a curative instruction, as it did in this case, the appellate court may conclude that such instruction erased any possible prejudice, unless the record supports the conclusion that the jury disregarded the trial court's admonition." *Genova v. State*, 91 Wis. 2d 595, 622, 283 N.W.2d 483 (Ct. App. 1979). It concluded that the circuit court did not erroneously exercise its discretion in denying a mistrial given the nature of the error and the curative instruction. *Id.*

Sigarroa similarly concluded that a circuit court appropriately exercised its discretion in denying a mistrial where the complained-of error—a witness's implication that the defendant had a prior criminal record—was curable through the court's striking of the testimony and a jury instruction at the close of testimony. *See State v. Sigarroa*, 2004 WI App 16, ¶¶ 24–26, 269 Wis. 2d 234, 674 N.W.2d 894.

And in *Johnson*, this Court considered whether the circuit court had properly exercised its discretion in denying a mistrial based on the jury's viewing of unadmitted evidence. *Johnson v. State*, 75 Wis. 2d 344, 366, 249 N.W.2d 593 (1977). The circuit court conducted voir dire of the jurors on the effect of seeing the evidence and also instructed them not to consider it. This Court determined that the record supported the circuit court's decision: "Defendant's motion for a mistrial was addressed to the sound discretion of the trial court, and its denial of the motion will not be reversed unless that discretion was abused." *Johnson*, 75 Wis. 2d at 365. Notably, this Court also addressed a claim by the defendant about the

adequacy of a different jury instruction—but that was a separate analysis from the mistrial question. *Id.* at 367–68.

Debrow cites no caselaw supporting his premise—that an appellate court reviews a denial of a mistrial motion based on the premise that curative steps could have been adequate, but the wrong ones were undertaken. And the facts of his case are particularly inapt for advancing such a change in the law because the circuit court here offered further instruction, but Debrow declined it. His proposed rule would invite gamesmanship by defendants who reject curative steps, arguing that nothing would cure the potential prejudice, and later assert that curative steps could have worked but were not taken by the court.

If a defendant chooses to argue—as Debrow did (and still seems to[1]) here—that an error is not amenable to a curative instruction and can be rectified only by a mistrial, he can do so. But if he chooses to forgo an alternative argument that the jury instruction should have been more specific, he cannot then later argue that a mistrial was necessary due to a faulty jury instruction.

The question of whether a particular jury instruction was the correct one is a separate issue from whether a mistrial was necessary. Here, Debrow chose the mistrial path, and his arguments fail to show that, given the error at issue, the curative steps taken, and additional curative instruction offered to Debrow, the denial of a mistrial was not an appropriate exercise of discretion.

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[1] Although he discusses the substance of the court's initial instruction to the jury at length, Debrow also acknowledges that he "objected to the use of a jury instruction from the beginning," "objected to *any* alternative to a mistrial," and argued on appeal "that no jury instruction could cure the prejudice caused by this error." (Debrow's Br. 34.)

II. Debrow forfeited the argument that the jury instruction was flawed, but regardless, any shortcoming in the instruction was harmless.

Debrow's arguments about whether the particular instruction was the right one is a different objection from his mistrial request, and he forfeited the instruction argument by declining the opportunity to further instruct the jury. But if this Court disagrees that Debrow forfeited the issue, it should still reverse the court of appeals because any shortcoming in the instruction was harmless. The State presented this argument in its opening brief. (State's Br. 26–28.) Debrow does not refute this argument and has therefore conceded it. *See United Coop. v. Frontier FS Coop.*, 2007 WI App 197, ¶ 39, 304 Wis. 2d 750, 738 N.W.2d 578 (failure to refute a proposition asserted in a response brief may be taken as a concession).

CONCLUSION

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

Dated this 24th day of March 2023.

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 2,866 words.

Dated this 24th day of March 2023.

Electronically signed by:

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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 24th day of March 2023.

Electronically signed by:

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