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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2024AP71-CRLV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAMARION SANDERS,

Defendant-Petitioner.

ON LEAVE TO APPEAL A NON-FNAL PRETRIAL ORDER DENYING A MOTION TO DISMISS ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DANIELLE L. SHELTON, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Did the trial court err when it denied Defendant-Petitioner Damarion Sanders's motion to dismiss with prejudice based on an alleged double jeopardy violation?

In the midst of his trial for burglary as a party to the crime, the trial court granted Sanders's motion for a mistrial because the State failed to disclose the results of a forensic examination of his cell phone. The court scheduled the case for retrial. Sanders moved to dismiss with prejudice on the ground that retrial would violate his right to be free from double jeopardy. The trial court denied the motion after finding that Sanders failed to prove the State intentionally withheld evidence to provoke a mistrial. On February 29, 2024, this Court entered an order that the parties file briefs "addressing the merits of the double jeopardy issue." (R. 40.)

This Court should affirm. Sanders did not discuss the controlling double jeopardy principles at all below and does not, as ordered by this Court, address them in his brief here. Instead, he appears to advocate for a new rule that requires dismissal with prejudice as a matter of double jeopardy law for a willful failure to disclose exculpatory evidence. Sanders did not argue for that new rule below and has thereby forfeited his right to have this Court review it for the first time on appeal. There is no reason to adopt such a rule and Sanders cites no authority that extends the principles of *Brady v. Maryland*, 373 U.S. 83 (1963), into the realm of double jeopardy.

Sanders does not develop any argument explaining why he should prevail under existing double jeopardy principles. When the controlling double jeopardy principles are applied, it is plain that Sanders loses. There is no evidence that the State acted in bad faith with the specific intent to provoke Sanders to move for a mistrial. The State opposed a mistrial. The late disclosure of the cell phone forensic evidence that

caused the mistrial was, as the trial court later found, due to miscommunication and neglect, not bad intent. That finding of fact is not clearly erroneous.

The cell phone forensic evidence also was not exculpatory. It confirmed that Sanders played an active role in the home invasion burglary by exchanging text messages with his cousin and accomplice, Areon Davis, while Sanders was inside the house as a guest shortly before the burglary, and he deleted those text messages afterwards. Nonetheless, the trial court declared a mistrial. Dismissal with prejudice is too drastic a sanction for a discovery violation such as this. Sanders now has all of the pertinent information regarding the examination of his cell phone at his disposal for the retrial.

The trial court also denied dismissal with prejudice based on the State's failure to disclose before trial evidence that police had interviewed Sanders's cousin, Areon Davis, about Davis's suspected involvement in the home invasion. The court treated this only as a discovery violation because the evidence was not exculpatory and Sanders was fully aware of Davis's involvement in the burglary from the outset.

This Court should affirm. Davis's statements to police exculpated only Davis, not Sanders. Dismissal with prejudice is too drastic a sanction for a discovery violation such as this. Sanders now has all of the pertinent information regarding Areon Davis at his disposal for the retrial.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This appeal involves the application of established double jeopardy principles to the facts.

STATEMENT OF THE CASE

Sanders stands charged with burglary as a party to the crime. The State alleged that, on July 7, 2020, Sanders helped three others execute an armed home invasion burglary to steal drugs and money from a house where he was staying ostensibly as an overnight guest of the intended target. (R. 2.) Things did not go according to plan when one of the residents resisted and was shot. The intruders fled with nothing. (R. 2.) Sanders gave a statement to police admitting that he and his cousin, Areon Davis, were involved. As alleged in the complaint:

> The defendant [Sanders] stated that, a couple of days before the July 4th, his cousin "Areon" got into an argument with DCO over a marijuana purchase. The defendant stated that Areon contacted him, telling him to go to DCO's house so that Areon could come over and rob DCO.
>
> The defendant stated he went to DCO's house on July 6, 2020. The defendant stated that Areon kept texting him to unlock the door so that he could rob DCO. The defendant stated he unlocked the main door of the residence and then went to sleep. The defendant stated he was woken up by DCO saying there were guys at the front door. The defendant stated he felt bad because he knew it was Areon at the door to rob DCO.
>
> The defendant stated he texted Areon that he was leaving and as he walked out of the front door, three male subjects with their faces covered ran up the front porch. The defendant stated one male pointed a gun at him and ran inside the house. The defendant stated he ran away and deleted the messages between he and Areon. The defendant stated he only helped Areon because he was threatened.

(R. 2:2.)

Sanders went to trial on July 18–19, 2023, for burglary as a party to the crime. (R. 29; 30; 31.) The State introduced

Sanders's statement to Milwaukee Police Detective Rolando Gonzalez on July 7, 2020, (R. 29:86), implicating both himself and Areon Davis in the burglary (R. 30:9–17). On cross-examination, Detective Gonzalez revealed for the first time that Areon Davis had been interviewed by police about this case twice in October 2021. (R. 30:24–25, 28; *see* 31:6–7.) The reports and recordings of those interviews were not disclosed to the defense before trial. (R. 30:27–28.)

Sanders moved for a mistrial. (R. 30:30.) The State opposed the motion, pointing out that everyone—including Sanders—was fully aware of Areon Davis's alleged involvement in the burglary from the outset. (R. 30:31.) Also, Davis's statements were not exculpatory of Sanders. According to the prosecutor, Davis initially denied knowing Sanders at all. He then recanted and admitted knowing both Sanders and the intended target of the burglary inside the house, but he denied communicating with Sanders or having any involvement in the burglary. (R. 30:31; 31:6–7.) The trial court adjourned to the next day to decide whether to grant a mistrial.

While addressing the mistrial motion relative to the Davis interviews the next day, the State revealed that evidence of a forensic examination of Sanders's cell phone also had not been disclosed. Officer Gonzalez explained out of the presence of the jury that Sanders had given consent to turn over his cell phone when interviewed by police on July 7, 2020. (R. 31:13–14.) The forensic examination of Sanders's phone took place just over two months later on September 16, 2020. (R. 31:14.)

The prosecutor explained that, while obtaining the discovery materials regarding Davis, he also learned for the first time at 5 p.m. the day before that the contents of Sanders's cell phone had been examined by police, a "phone dump," and the results of that examination were revealed in a report that no one had seen before then. (R. 31:13.). "I have

never seen this," and "I have no idea what we have," he stated. (R. 31:7.) The prosecutor explained that he asked Detective Gonzalez at the end of the first day of trial to find out what the police had regarding the cell phone. He said that Gonzalez "worked very diligently and got a copy of all of this." (R. 31:7.) The materials apparently consisted of written reports, an expert's analysis of the results, and two disks. (R. 27:8.) The prosecutor stated that he had not yet reviewed the materials to see what they contained. (R. 31:7–8.) He asked the court: "Do I need to review it first, do we just hand it over? I'm happy to do whatever is appropriate under the circumstances, but we have it regardless. I don't think that there's anything on that disk or on that phone that could possibly be exculpatory." (R. 31:8.) The prosecutor explained further that, "To [his] knowledge, it's been in police custody this entire time." (R. 31:8–9.) Defense counsel added that, although Sanders signed a consent form during his police interview to have the contents of his phone examined, there was nothing in the discovery to indicate that the phone's contents were examined "until we got a new fresh set of reports with that information yesterday." (R. 31:14.) The forensic examination of the phone took place on September 16, 2020, "[m]onths after they talk[ed] to Mr. Sanders." (R. 31:14.) The forensic examination took place, according to defense counsel, "right after discovery was turned over." (R. 31:14.)

The court examined Detective Gonzalez about the non-disclosure of the "phone dump" evidence. Gonzalez explained that there was a delay in obtaining the forensic examination because "sometimes it takes time just based on priority of other cases." (R. 31:15.) He had no explanation other than that for why it took from July 7, when police obtained the phone from Sanders, until September 16 for it to be examined. (R. 31:15.) The examination results were "placed on inventory once it was completed," but they were not reviewed by anyone or disclosed to the prosecutor. (R. 31:15.) Gonzalez believed

that "no one has viewed this disk" as of the second day of trial. (R. 31:15.)

Sanders moved for a mistrial based on the State's failure to disclose the police interviews of Davis, but also on the State's failure to disclose evidence of the forensic examination of Sanders's cell phone. (R. 20.) The court denied a mistrial regarding the late disclosure of the Davis police interviews because the defense knew about Davis all along. (R. 31:15–16.) It found, however, that the late disclosure of the forensic cell phone examination (the "phone dump") was "very concerning." (R. 31:15−16.) The court held that the failure to disclose the cell phone information was "potentially material evidence [that] hasn't been turned over," resulting in "a bit of [a] Brady violation." (R. 31:16.) The court declared a mistrial. (R. 31:16−17.) It granted the mistrial to give the defense time to go over the cell phone records. "And your attorney is completely correct. If there's a phone dump, or there was something that was turned over, that they need to look at in order to properly advise you as far as how to proceed. And so that's why I'm declaring a mistrial in this case, and we will reschedule a final pre-trial and jury trial." (R. 31:17.)

At the final pretrial conference on September 19, 2023, the parties assured the court that all discovery including the phone dump information had been disclosed to the defense. (R. 28:2−3.) Sanders renewed his motion to dismiss with prejudice because "the State failed to disclose exculpatory and potentially exculpatory evidence until the middle of trial." (R. 27:1; 28:3−4.) The State filed a response in opposition. (R. 34.)

The trial court denied the motion to dismiss with prejudice in an oral decision issued on January 2, 2024. (R. 37.) The court reaffirmed its decision not to declare a mistrial with respect to the late disclosure of the Davis police interviews because Sanders was aware of his cousin, Davis,

and his alleged involvement all along. (R. 37:5.) With respect to both the Davis evidence and the "phone dump" evidence, the court denied the motion for dismissal with prejudice because Sanders failed to prove prosecutorial overreaching intended to provoke a mistrial or prejudice. (R. 37:6–9.) The court found that the State's failure to disclose this evidence before trial was not intentional. It was due to the prosecutor's miscommunication with police and the lack of communication between the parties to make sure that all of the evidence was disclosed to the defense. (R. 37:4, 6; *see* 31:16–17.) The court scheduled the retrial for January 8, 2024. (R. 37:10.)

The court issued a written order denying the motion to dismiss on January 9, 2024. (R. 36.) Sanders filed a petition for leave to appeal the non-final order denying his motion to dismiss. (R. 38.) The State opposed leave to appeal. Later that same day, February 29, 2024, this Court ordered the parties to file briefs "addressing the merits of the double jeopardy issue." (R. 40.) It also ordered Sanders to identify portions of the record and to make arrangements for the preparation of transcripts "pertinent to the double jeopardy issue." (R. 40.)

STANDARD FOR REVIEW

This Court reviews de novo the legal issue whether Sanders's right to be free from double jeopardy has been violated. *State v. Steinhardt*, 2017 WI 62, ¶ 11, 375 Wis. 2d 712, 896 N.W.2d 700.

Whether the prosecutor intentionally provoked Sanders's mistrial motion is an issue of fact to be upheld on appeal unless the trial court's finding is clearly erroneous. *State v. Hill*, 2000 WI App 259, ¶ 12, 240 Wis. 2d 1, 622 N.W.2d 34; *State v. Quinn*, 169 Wis. 2d 620, 626, 486 N.W.2d 542 (Ct. App. 1992).

ARGUMENT

Based on the trial court's not clearly erroneous findings of fact, Sanders failed to prove a double jeopardy violation because he failed to prove prosecutorial overreaching.

Sanders argues that this Court should adopt a rule that dismissal with prejudice is the remedy for a willful and prejudicial *Brady* violation. (Sanders's Br. 12–13.) He cites no controlling precedent for this new rule. Sanders also does not argue that he should prevail under controlling double jeopardy principles.

Sanders argues that the prosecutor willfully failed to disclose exculpatory evidence regarding the forensic examination of his cell phone and the police interviews of Areon Davis, and this entitles him to dismissal under his proposed new rule. There is no evidence to support that claim. He proved only that Officer Gonzalez negligently failed to turn this information over to the prosecutor before trial. The evidence firmly supports the trial court's finding of fact that the prosecution was guilty of miscommunication with its officer and neglect, but not of willful misconduct.

Sanders has not shown that the trial court's finding of fact is clearly erroneous. Having failed to prove intentional misconduct, Sanders has failed to prove prosecutorial overreaching. He has, therefore, failed to prove a double jeopardy violation.

Sanders was granted the mistrial that he demanded and the State opposed for the non-disclosure of the cell phone information. He will now receive another trial with all of the pertinent discovery in hand. That is what the law requires. Sanders is not entitled to outright dismissal of the burglary charge with prejudice for what was a violation of the discovery statute, Wis. Stat. § 971.23. He is not entitled to outright dismissal even assuming any of the non-disclosed evidence

was exculpatory. At best, he would be entitled to a new trial; the new trial that the trial court ordered when it granted his mistrial motion.

A. To obtain outright dismissal with prejudice, rather than another trial, Sanders must prove that the State overreached by intentionally provoking a mistrial.

Sanders is protected by the Fifth Amendment to the United States Constitution, and by Wis. Const. art. I, § 8, from being twice placed in jeopardy for the same offense. *State v. Williams*, 2004 WI App 56, ¶ 23, 270 Wis. 2d 761, 677 N.W.2d 691. Sanders's right to be free from double jeopardy includes his "valued right to have his trial completed by a particular tribunal." *Id.* (citation omitted).

When a defendant moves for a mistrial and it is granted, retrial normally is not barred because he has exercised control over the decision whether to proceed with the trial to completion or to be tried by another fact-finder. *United States v. Dinitz*, 424 U.S. 600, 607 (1976); *State v. Jaimes*, 2006 WI App 93, ¶ 7, 292 Wis. 2d 656, 715 N.W.2d 669; *State v. Copening*, 100 Wis. 2d 700, 709, 303 N.W.2d 821 (1981).

To obtain outright dismissal of the charge, rather than a retrial, Sanders must prove that the prosecutor intended to subvert the protection against double jeopardy. *Oregon v. Kennedy*, 456 U.S. 667, 675–76, 679 (1982). "Only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." *Id.* at 676. The double jeopardy bar to a retrial is "limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." *Id.* at 679.

Dismissal with prejudice is required only if Sanders proves that his mistrial motion was provoked by prosecutorial overreaching. *Copening*, 100 Wis. 2d at 714. Sanders must prove that the prosecutor acted with the intent to cause a mistrial and gain another chance to convict or harass him with multiple prosecutions. *Quinn*, 169 Wis. 2d at 625.

> In circumstances where the defendant moves for, or consents to, a mistrial, reprosecution is barred only if prosecutorial and judicial actions provoke that mistrial by conduct that falls within the definition of "overreaching"—the culpable intent to deprive the defendant of a complete trial in the first tribunal for the purpose of avoiding an acquittal and to gain the opportunity to have a second and better opportunity to convict or for the malicious purpose of harassment in or by the second trial.

Copening, 100 Wis. 2d at 724.

Sanders must prove that the prosecutor's actions were "designed either to create another chance to convict, that is, to provoke a mistrial in order to get another 'kick at the cat' because the first trial is going badly, or to prejudice the defendant's rights to successfully complete the criminal confrontation at the first trial, i.e., to harass him by successive prosecutions." *Id.* at 714–15; *Hill*, 240 Wis. 2d 1, ¶ 11.

The prosecutor's opposition to the defendant's mistrial motion is evidence that there was no intent to provoke a mistrial. *Hill*, 240 Wis. 2d 1, ¶ 18; *Quinn*, 169 Wis. 2d at 626.

B. This Court should summarily affirm because Sanders fails to develop any argument explaining why he should prevail under controlling double jeopardy principles.

This Court ordered the parties to file briefs "addressing the merits of the double jeopardy issue." (R. 40.) Sanders has not done so. Sanders did not in his motion to dismiss below,

(R. 27), did not in his petition for leave to appeal, (R. 38), and does not in his brief on appeal, address the controlling double jeopardy principles cited by the State below and here, (R. 34), and relied on by the trial court to deny his motion to dismiss. Sanders argues at length that there was a *Brady* violation, but nowhere in his brief does he argue that the prosecutor intended to provoke a mistrial. What's more, nowhere in his brief does Sanders complain that he was denied his "valued right to have his trial completed by a particular tribunal." *Williams*, 270 Wis. 2d 761, ¶ 23. He does not explain why the trial court erred in how it applied those controlling double jeopardy principles.

Sanders argues that "the State acted with willful misconduct when it failed to turn over exculpatory evidence." (Sanders's Br. 13.) That argument is baseless. More important, it is not germane to the legal issue presented here: whether Sanders has proven a double jeopardy violation. It also is not germane to the underlying outcome-determinative factual issue: whether Sanders has proven that the prosecution withheld evidence with the specific intent to provoke a mistrial. *Oregon*, 456 U.S. at 675–76, 679.

Sanders confuses matters by arguing that, despite Wisconsin precedent directly to the contrary, this Court should order dismissal with prejudice if he proves a willful *Brady* violation. (Sanders's Br. 12–13.) Sanders's brief sounds in the due process principles of *Brady* and not in the germane double jeopardy principles of *Oregon v. Kennedy*, *Copening*, *Jaimes*, *et. al*.

Sanders appears to be arguing for a new rule that requires dismissal with prejudice whenever a *Brady* violation is found to be willful and prejudicial. (Sanders's Br. 12–13.) Sanders relied below exclusively on *Brady* due process principles and not on double jeopardy principles for his proposed new rule. (R. 27.) The lone authority on which Sanders relies for his novel rule, *Government of the Virgin*

Islands v. Fahie, 419 F.3d 249 (3rd Cir. 2005), was not a double jeopardy case. The issue there was only whether dismissal with prejudice can be a remedy for "egregious" *Brady* due process violations. *Id.* at 252. Neither the United States nor Wisconsin Supreme Court has recognized an exception to the established rule that, to win outright dismissal rather than retrial as a matter of double jeopardy law, a defendant who successfully moves for a mistrial must prove prosecutorial intent to provoke that mistrial.

Sanders argues for the first time on appeal that this alleged due process violation has somehow morphed into a double jeopardy violation. (Sanders's Br. 11−12.) He does not explain how. More important, Sanders has forfeited the right to have this novel double jeopardy claim reviewed for the first time on appeal. This Court generally will not review claims raised for the first time on appeal. *E.g. State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). This Court should summarily affirm for that reason alone.

This Court also should summarily affirm because Sanders failed to develop any argument below or here with regard to the controlling double jeopardy principles on which leave to appeal was granted. This Court cannot and should not develop the double jeopardy argument for him. *State v. Pettit*, 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992).

C. Sanders failed to prove a double jeopardy violation because he failed to prove that the prosecutor's late disclosure of the Davis and cell phone evidence was intended to provoke a mistrial.

The trial court properly found that Sanders failed to prove the prosecutor intentionally withheld discovery to provoke a mistrial or to prejudice him. The non-disclosure was due to miscommunication and neglect, not intent. (R. 37:4,

6–7.) The court also properly found that there was no evidence of collusion by the police and the prosecutor to provoke a mistrial. (R. 37:8.) All Sanders has proven is that Officer Gonzalez neglected to turn over the cell phone information and the Davis interviews to the prosecutor before trial. *See Jaimes*, 292 Wis. 2d 656, ¶ 12 ("[A]n officer's wrongful [actions] will not be imputed to the prosecutor in the absence of evidence of collusion by the prosecutor's office intended to provoke the defendant to move for a mistrial.").

Had the prosecutor intended to provoke a mistrial, he would not have opposed it. *Id.* ¶ 10 ("The trial court could reasonably infer that, had a mistrial been the goal of the prosecutor, he would not have opposed the motion."). Most important, Sanders has not proven that the trial court's findings of fact regarding the reasons for the late disclosure—neglect and miscommunication rather than malicious intent—are clearly erroneous. *Id.* Having failed to prove malicious intent or collusion, Sanders has failed to prove prosecutorial overreaching. Having failed to prove prosecutorial overreaching, Sanders has not proven a double jeopardy violation.

1. The trial court properly found that there was no intentional wrongdoing and no prejudice with regard to the late disclosure of the cell phone evidence.

The trial court properly found that Sanders failed to prove intentional misconduct by the prosecutor with regard to the cell phone evidence. (R. 37:4, 6.) The cell phone evidence also is likely not exculpatory of Sanders. It confirms that Sanders and Davis texted each other shortly before the home invasion while Sanders was a plant inside the house, and Sanders deleted those text messages shortly after. (R. 31:8–9.) So, as it turns out, the State failed to disclose

evidence that is likely inculpatory of Sanders to its own detriment.

The remedy for the State's failure to disclose even exculpatory evidence is not dismissal but a new trial. "Thus a *Brady* violation entails prejudice to the accused and necessarily entitles the defendant to a new trial." *State v. Harris*, 2008 WI 15, ¶ 62, 307 Wis. 2d 555, 745 N.W.2d 397. Sanders obtained that new trial when the court granted his motion for a mistrial.

The exculpatory evidence must be disclosed in time for the defense to be able to make effective use of it at trial. *Id.* ¶ 63; *see Socha v. Richardson*, 874 F.3d 983, 988 (7th Cir. 2017) (the evidence must be disclosed "before it was too late for the defendant to make use of the evidence") (citation omitted). The cell phone evidence has now been fully disclosed, giving Sanders ample time to assess its value to the defense and make effective use of it at the retrial. (R. 28:2–3.)

Sanders has not proven a *Brady* violation. He has proven only a discovery violation. The phone records apparently show that Sanders sent text messages to his accomplice, Davis, shortly before the burglary and then deleted them shortly after. As with a proven *Brady* violation, dismissal with prejudice is not the appropriate sanction for a proven violation of the discovery statute, Wis. Stat. § 971.23.

The decision whether to impose a sanction for a discovery violation is addressed to the trial court's sound discretion. *State v. Martinez*, 166 Wis. 2d 250, 259, 479 N.W.2d 224 (Ct. App. 1991). Granting a mistrial, as occurred here, is rarely appropriate. More appropriate sanctions would be to strike the testimony of a witness or the evidence that was not disclosed; or to grant a recess or continuance of the trial to give the defense time to review the evidence. Wis. Stat. § 971.23(7m)(a). "The granting of a continuance or recess is to be favored over striking the witness." *Kutchera v. State*, 69

Wis. 2d 534, 543, 230 N.W.2d 750 (1975). These more proportionate remedies are favored over granting a mistrial. It necessarily follows that retrial after a mistrial is favored over outright dismissal with prejudice. *See State v. Ruiz*, 118 Wis. 2d 177, 202, 347 N.W.2d 352 (1984) (ordering a new trial for prosecutorial misconduct is a "drastic step" that "should be approached with caution.").

Sanders has not proven that the trial court erroneously exercised its discretion when it denied his motion to dismiss the burglary charge with prejudice after it had earlier exercised its discretion in favor of granting his motion for a mistrial. In hindsight, the declaration of a mistrial was perhaps too drastic a sanction for what was nothing more than the State's neglect and miscommunication regarding pretrial discovery, resulting in a violation of Wis. Stat. § 971.23.

Even when a discovery violation is proven, prejudice must exist before a new trial is warranted. *Harris*, 307 Wis. 2d 555, ¶¶ 41–43. The trial court failed to determine when it declared a mistrial that Sanders would be prejudiced by the late disclosure of the cell phone evidence. It simply found without elaborating that "there's a bit of [a] Brady violation" with regard to the cell phone records. (R. 31:16.) But, when it denied Sanders's motion to dismiss with prejudice, the court this time properly found that Sanders failed to prove prejudice. (R. 37:8–9.) The court was correct. Sanders has not proven prejudice. He will now receive the retrial that his mistrial motion brought about, this time with all of the discovery in hand well in advance of trial.

The court imposed the drastic sanction of a mistrial that Sanders requested and the State opposed. The trial court properly exercised its discretion when it denied Sanders's follow up motion to dismiss with prejudice because the late disclosure of the evidence was not intentional; it was merely the product of miscommunication and neglect, and it was not

prejudicial. (R. 37:4, 6–9.) Sanders obviously disagrees, but he has not shown how the court erroneously exercised its discretion. He has failed to prove that the court's finding of no intentional misconduct by the prosecution is clearly erroneous. Sanders has, therefore, failed to prove prosecutorial overreaching designed to provoke the mistrial that he requested and received. He has failed to prove a double jeopardy violation.

2. Dismissal with prejudice is not the appropriate remedy for what was only a discovery violation with respect to the non-disclosure of Areon Davis's police interviews.

The same reasoning applies to what was only a discovery violation with respect to the late disclosure of Areon Davis's police statements.

When it ordered the mistrial, the trial court was quick to emphasize that its decision was not based on the late disclosure of evidence relating to Davis, but only on the late disclosure of the records relating to the forensic examination of Sanders's cell phone:

> And based on the Areon Davis avenue, I didn't think that a mistrial was appropriate. But it is very concerning that there was a phone dump, and this additional information was not turned over to the defense. . . . And let me just finish up about Areon Davis. It's not like you just found out about Areon Davis yesterday, or during the course of this trial. You knew about Areon Davis. There was nothing that stopped you from investigating Areon Davis. You got the reports. There was time -- I believe I gave you the time to review the reports in the QP. And then we would have continued on with the trial with that.

(R. 31:15–16.)

The State's duty to disclose the Davis interviews arose under Wis. Stat. § 971.23, not under *Brady*, because Sanders

has not shown that there was anything exculpatory of him in the Davis interviews. Davis and Sanders were alleged from the outset to have planned and executed the burglary. Sanders knew at least from when the complaint was filed on May 10, 2021, over two years before trial, that he was alleged to have plotted the burglary along with his cousin Davis. (R. 2.) According to the prosecutor, Davis initially denied in his statements to police knowing Sanders at all. He then recanted and admitted knowing both Sanders and the intended target of the burglary inside the house, but he denied communicating with Sanders or having any involvement in the burglary. (R. 30:31; 31:6–7.) Finally, Sanders gave his own inculpatory statement to police on the day of the home invasion, July 7, 2020, implicating both himself and Areon Davis in the burglary plot. He admitted playing a role but claimed that Davis coerced him. (R. 2:2; 30:9–17.)

Sanders's trial defense will presumably be that, although he was a party to the burglary, Davis coerced him into taking part. Sanders can use his own statement to police, Davis's statements, and any other evidence to try to prove that difficult defense. Wis. Stat. § 939.46(1). Sanders may not even be entitled to an instruction on the defense of coercion because it requires proof of, "[a] threat by a person *other than the actor's co-conspirator* which causes the actor reasonably to believe that his or her act is the *only means* of preventing imminent death or great bodily harm to the actor or another." *Id*. Assuming Sanders is allowed to put on a coercion defense, whether he was in fact coerced is an issue for the jury at the retrial.

If the late disclosure of evidence relating to Davis did not justify a mistrial, (R. 31:15), it certainly does not justify the ultra-drastic remedy of dismissal with prejudice. Sanders now has all of the pertinent information regarding Davis at his disposal in time to make effective use of it at the retrial.

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Sanders complains that "the defense did not have information that may have led to filing pretrial motions, subpoenaing witnesses, or preparing an adequate defense." (Sanders's Br. 15.) Sanders now has all of that information, enabling him to file pretrial motions, subpoena witnesses, and prepare an adequate defense for the retrial.

The trial court properly exercised its discretion when it denied Sanders's motion to dismiss with prejudice because the prosecutor did not withhold the cell phone evidence or Davis's statements to provoke a mistrial. Sanders has failed to show that the trial court's finding of no malicious intent on the part of the prosecution was clearly erroneous. Sanders also has failed to show that any of this evidence is exculpatory. But even if he had, the remedy for a *Brady* violation is not dismissal but a new trial—the trial that Sanders requested and will now receive with all of the discovery in hand.

CONCLUSION

This Court should affirm the order denying Sanders's motion to dismiss with prejudice.

Dated this 24th day of June 2024.

Respectfully submitted,

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Electronically signed by:

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CERTIFICATION

I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. § (Rule) 809.50(4) or Wis. Stat. § (Rule) 809.51(4) for a petition or response setting forth the word count or page count of the document as provided in sub (1) or (2). The length of this brief is 5,468 words.

Dated this 24th day of June 2024.

Electronically signed by:

Daniel J. O'Brien
DANIEL J. O'BRIEN

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

Dated this 24th day of June 2024.

Electronically signed by:

Daniel J. O'Brien
DANIEL J. O'BRIEN