STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal number 24-AP-1668

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CESAR FERNANDEZ-REYES,

Defendant-Petitioner.

APPEAL OF THE AUGUST 8, 2024, NON-FINAL ORDER ENTERED IN LANGLADE COUNTY CASE NUMBER 22-CF-22, THE HON. JOHN RHODE PRESIDING

BRIEF OF DEFENDANT-PETITIONER ADDRESSING THE MERITS OF THE DOUBLE JEOPARDY ISSUE

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STATEMENT OF THE ISSUE PRESENTED

I. Does the double jeopardy issue in the present case merit permissive review?

STATEMENT ON ORAL ARGUMENT

Fernandez-Reyes does not request oral argument or publication at this stage. Oral argument and publication may be appropriate after permissive review is granted.

STATEMENT OF CASE

On February 18, 2022, the State charged Cesar Fernandez-Reyes with two counts of First-Degree Sexual Assault of a Child. (R.2). The Information alleges that Fernandez-Reyes assaulted Child Victim, dob 01/07/2010 (hereinafter "child") in Antigo, Wisconsin, between August 2015 and November 2016. (R.18). The factual basis for the charge comes from a 2021 interview with the child, who claimed that she was raped vaginally and anally every day when her mom went to work. (2:2).

Fernandez-Reyes spent almost two years in custody waiting for the trial. The jury was selected and sworn on December 11, 2023. The prosecutor clearly had an upper respiratory illness during the jury selection and opening statements. During *voir dire* she told the jury panel,

> If you probably have noticed, I have a cold. So I apologize in advance if I start coughing in the middle of this.

(97:84-85). The parties made opening statements on the same day. (*see id*. at 124 and 127).

The state gave a short opening statement, about two pages of transcript, where it merely outlined basic information about the case that was revealed in the discovery. (*id*. at 124). The defendant's opening statement, however, set forth his complete trial strategy and revealed deep flaws in the State's case and its investigation of the case. (*id*. at 127-141).

In the opening Fernandez-Reyes explained that in 2016 there was an allegation that Fernandez-Reyes spanked the child's sister. (*id*. at 130). In a June 20, 2016, video-recorded interview, the then six-year-old child categorically denied any sexual mistreatment by Fernandez-Reyes. (*id*. at 130-33). For example, the interviewer asked the child, "Sometimes I talk to kids about if people hurt their bodies. Who hurts your body?" The child responded, "No one do." (*id*. at 131). The interviewer asked the child, "I also talk to kids if somebody touches their body, and that's not okay. Who touches your body?" In 2016 the child answered, "No one." (*id*.). The interviewer asked, "Has somebody ever wanted you to see or touch their body? Is this yes, or no, or something else?" The child answered, "No." (*id*.). The interviewer asked the child, "does [Fernandez-Reyes] ever do things that hurt your body?" The child paused and answered, "Sometimes he spanks me." (*id*. at 132). In other words, the 2016 interview amounts to a denial by the child of any sexual touching by Fernandez-Reyes from August 2015 (the start of the charging period) through at least June 20, 2016. The prosecutor knew about this interview by the time of the trial (because Fernandez-Reyes told her about it), but she did not know about it when she filed the charges.

During the opening statement Fernandez-Reyes revealed that from August of 2015, until June 20, 2016, the child's mother worked at Walmart, mostly

from 4:00 a.m. to 1:00 p.m. (*id*. at 136). She took the child and her siblings to the babysitter's house before work and picked them up after. (*id*.). During this same time period, Fernandez-Reyes worked at the Mattoon Mill from 5:30 a.m. until about 2:30 p.m. (*id*.). His friend picked him up for work between 5 and 5:15 a.m. (*id*.). The information about the babysitter and work schedule was revealed to the prosecutor for the first time in the opening statement. It was not something that the State investigated. Thus, during the opening statement the prosecutor learned for the first time that the evidence will show Fernandez-Reyes was not home alone with the child from August 2015 through June 20, 2016, when her mother was at work.

Fernandez-Reyes explained in his opening statement that from June 21, 2016, until August 25, 2016, he was incarcerated in the Winnebago County Jail without any form of release. (*id*. at 138). Thus, from June 21, 2016, until August 25, 2016, it would have been impossible for Fernandez-Reyes to have any physical contact with the child.

Finally, Fernandez-Reyes revealed in his opening statement that on August 25, 2016, he moved to Malone, Wisconsin, over two hours away from Antigo. (*id*. at 138-140). Soon thereafter he found an apartment in Malone and started to work second shift at the Lake Breeze Dairy. (*id*.). He never moved back to Antigo or lived with the child and her mother again during the charged time period. (*id*.). The prosecution did not investigate Fernandez-Reyes's employment or residence after he was released from jail, so it learned for the first time during the opening statement that Fernandez-Reyes moved away from Antigo in August 2016.

The evidentiary portion of the trial was supposed to start on December 12, 2023. Instead, on

December 12, 2023, the State moved for a mistrial alleging that the prosecutor tested positive for Covid-19. (95:5). Fernandez-Reyes adamantly opposed a mistrial.

At the December 12, 2023, hearing on the State's motion for a mistrial, Fernandez-Reyes made a discovery demand for the prosecutor's medical records for the week leading up to the trial and requested the opportunity to call witnesses. Counsel asserted,

> I make a discovery demand for all of the medical records for Ms. Hays for, let's say, the last week. I think we need to look at those records. We need to study those records, and we need to -- to see what's in there.
>
> And then I also make a request for an evidentiary hearing where witnesses will be called, and put under oath, and testify, and we can find out exactly what the facts are here that the State proposes to -- you to rely upon to grant a mistrial in this case.

(*id*. at 7). Apart from this request, Fernandez-Reyes insisted that the prosecutor provide the details of her Covid symptoms, when the onset of symptoms occurred, and proof of the alleged positive Covid-19 test result. (*id.* at 8-9).

With one exception, the Court accepted everything that the prosecutor said about her Covid situation at face value and refused to entertain most of Fernandez-Reyes's discovery requests. The notable exception is that early in the discussion the Court ordered the prosecutor to provide "the record

confirming [her] diagnosis." (*id*. at 10). The Court eventually abandoned this order, however, and the alleged positive test result was not made part of the record before the Court declared a mistrial.[1]

Fernandez-Reyes proposed that instead of a mistrial, the Court should consider masking, social distancing, a short adjournment, the use of Zoom and the use of the prosecutor's assistant district attorney to help the State at trial. The defendant also proposed that rather than declare a mistrial in haste, the Court should delay the trial by one day and see where things stand. This request was based largely on the fact although she did not volunteer it when she made the motion, it came out during the arguments that the prosecutor allegedly took two Covid tests. (*id*. at 10). One test was allegedly negative the other allegedly positive. The defendant proposed to wait a day, in part, to see if the next test was negative. (*id*. at 13-14).

Early in the discussion the judge found that there is a possible plan to go forward without a mistrial. On this topic the Court said,

> All plans I think are – are appropriate. I'm considering them all, including the one-day delay, including trying to resume on the 18th or 19th, including mistrial, including the options of proceeding today with Zoom and – and co-counsel from the – or, from the state. I'm going to ponder all those.

[1] Near the end of the hearing the prosecutor claimed that during a break she emailed the judge "a copy of the letterhead and the first part of the letter confirming the positive Covid-19 test." (*id*. at 19). The alleged test result was not made part of the record before the Court declared the mistrial, nor did the Court review the alleged email before it declared the mistrial.

> They're – none of them are outlandish or way out of bounds. So let me think.

(*id*. at 18).

The Trial Judge, however, abruptly changed his mind about how to proceed after two of his friends weighed in. The Court emailed four friends with a "brief overview of the situation" and asked for their advice. (*id*. at 18). The judge informed the parties that before he makes a decision he wants to review "any emails from them with any other suggestions." (*id*. at 17-18). The Court took a brief recess and learned that two of his friends replied. One of the friends said, "Absolutely. It has to be a mistrial" and the other friend said, "Unless the DA has an assistant that can pick things up from here, it's a mistrial." (*id*. at 19).

Immediately after receiving the influence of his friends (but without seeing evidence of a positive Covid-19 test result), the Court ruled as follows:

> Considering all of the options here, and the complications, and I am sensitive to the fact that this may actually harm the State and benefit Mr. Fernandez in the form of this could be a mistake, and jeopardy has attached, and the whole case is done now, or that it -- it could require me to feel compelled to accommodate Mr. Fernandez with granting him a significantly reduced or signature bond while we wait. But my heart, and my guts, and my head tell me that this requires an adjournment.

(*id*. at 24).

The next day the State filed what purports to be a letter setting forth that the prosecutor tested positive for Covid-19. (R. 90). The defendant objected in writing the same day. (R. 88). The Court overruled the objection and supplemented the record with the alleged Covid test result. The Court also reviewed the emails that passed between the prosecutor and the Court. The judge noted that the prosecutor emailed the judge a copy of the allegedly positive Covid test result during the motion hearing on December 12, 2023. (96:7). After the hearing, the judge emailed the prosecutor back stating, "Can you file that so it is in the record." (*id*.). The prosecutor emailed the judge back stating, "I can't today but can make sure I do once I'm better." (*id*.).

On July 30, 2024, Fernandez-Reyes filed a motion to bar retrial alleging that the Circuit Court erroneously exercised its discretion when it granted the mistrial. (R. 99). The Court applied the "strictest possible scrutiny," but denied the motion at a hearing on August 6, 2024. The Court signed the written order on August 8, 2024. (R. 102).

Fernandez-Reyes petitioned this Court for leave to appeal the non-final order entered on August 8, 2024. The Court ordered Fernandez-Reyes to file a brief addressing the merits of the double jeopardy issue. This brief followed.

ARGUMENT

I. This Court must apply the strictest possible scrutiny to the Circuit Court's decision to grant a mistrial.

Depending on the facts of the case, reviewing courts apply a "spectrum of deference to a circuit court's exercise of its discretion in granting a mistrial." *State v. Moeck*, 2005 WI 57, ¶41, 280 Wis. 2d 277, 695 N.W.2d 783. If the mistrial is based on a deadlocked jury or improper argument by defense counsel, the circuit court's decision to grant a mistrial is afforded "special respect." *State v. Seefeldt*, 2003 WI 47, ¶27, 261 Wis. 2d 383, 661 N.W.2d 822 (quoting *Arizona v. Washington*, 434 U.S. 497, 510, 98 S.Ct. 824, 54 L.Ed. 2d 717 (1978). A reviewing court applies the strictest possible scrutiny, however, whenever "there is reason to believe that the prosecutor is using the State's superior resources … to achieve a tactical advantage." *Id*. at ¶25, citing *Washington*, 434 U.S. at 508.

The Court permitted no discovery before it ordered the mistrial, so the record is underdeveloped on the prosecutor's motives for the motion. Still, the evidence suggests that the State sought the mistrial to achieve tactical advantage. The prosecutor was clearly ill at the start of the trial, yet she made the decision to go forward with jury selection and opening statements. After hearing an outline of the defendant's evidence and strategy, the prosecutor took a Covid-19 test. The fact that she took the first test, standing alone, does not prove that she had an improper motive. But when that test was negative, the fact that she took a second test suggests that she was fishing for a way to get a mistrial. The second test at least provides "a reason to believe" that the prosecutor did not like what

she heard in the opening statement and she wanted a second chance to put together the State's case.

There can be no question that the State gained a tactical advantage by the mistrial. Fernandez-Reyes revealed numerous defects in the state's case. For example, he revealed that the child was with a babysitter (and unavailable to Fernandez-Reyes) when her mother was at work for the first several months of the charged time period. (97:136), that for the next two months Fernandez-Reyes was in jail (*id*. at 138), and after that he moved two plus hours away and no longer lived with the child and her mother. (*id*. at 138-140). These details basically make the State's claim of sexual assault during the charged time frame impossible. The State learned about Fernandez-Reyes's jail stretch before the opening statements, but it did not know the details of the mother's work schedule, the babysitter schedule, or the fact that Fernandez-Reyes moved away when he got out of jail.

Without much explanation, the Circuit Court found that it should apply the "strictest possible scrutiny" to its decision to grant a mistrial. This Court should do the same.

II. The Circuit Court erroneously exercised its discretion when it granted the mistrial.

The review of a motion for a mistrial requires the court of appeals to satisfy itself that "the circuit court exercised sound discretion in ordering a mistrial." *Id*. at ¶13. In general, a court properly exercises its discretion when it makes a "reasoned and reasonable determination" that is "based upon the facts appearing in the record and in reliance on the appropriate and applicable law." *Hartung v. Hartung*,

102 Wis. 2d 58, 66, 306 N.W.2d 16, 20 (1981). On the issue of a mistrial, the sound exercise of discretion requires the court to do all three of the following:

> 1. give "both parties a full opportunity to explain their positions and consider alternatives…". *See State v. Green, 2023 WI 57, ¶24, 408 Wis. 2d 248, 262, 992 N.W.2d 56, 63-64, citing State v. Moeck, 2005 WI 57, ¶43, 280 Wis. 2d 277, 695 N.W.2d 783*;
>
> 2. "accord careful consideration to [defendant]'s interest in having the trial concluded in a single proceeding." *Id*., citing *Washington*, 434 U.S. at 516;
>
> 3. "ensure that the record reflects that there is an adequate basis for a finding of manifest necessity." *Id*., citing *Moeck*, 280 Wis. 2d 277, ¶43, 2005 WI 57, 695 N.W.2d 783.
>
> a. By refusing to permit discovery and evidence, the Court did not give Fernandez-Reyes a "full opportunity to explain his position."

Fernandez-Reyes requested discovery of the prosecutor's medical records for the week leading up to the jury selection. He also requested an evidentiary hearing where he could call witnesses. Finally, he requested more limited discovery, *i.e.*, the details of the prosecutor's Covid symptoms, when the onset of

symptoms occurred, and proof of the alleged positive Covid-19 test result. (95:8-9). The Court denied everything, except that it did order the prosecutor to provide "the record confirming your – your diagnosis." (*id*. at 10).

The timing of the Covid tests is suspicious. The prosecutor was ill with Covid type symptoms before the trial. Did she take Covid test before trial? We do not know because the judge refused to order her to turn over any records from the week before the trial. After the opening statements, she allegedly took a second Covid test after the first test came up negative. Whose idea was it to take the second Covid test? We do not know that either because the judge would not permit discovery. But if the prosecutor requested the second Covid test, it powerfully suggests that she is fishing for a mistrial. We do know that the defendant's opening statement revealed deep flaws in the State case. That gives the prosecutor an incentive to seek a second kick at the investigation.

Discovery of the Covid records and the opportunity to call witnesses is the only way to fully unravel the prosecutor's motives and determine whether she was legitimately too sick to proceed. Refusing discovery and evidence, and merely accepting the prosecutor's claims at face value, deprives Fernandez-Ryes a "full opportunity to explain his position."

> b. The circuit court did not "accord careful consideration to [defendant]'s interest in having the trial concluded in a single proceeding."

Because jeopardy attaches prior to judgment, double jeopardy protection reaches a criminal

defendant's "valued right to have his trial completed by a particular tribunal," and to be spared from the burdens of multiple trials, even if those trials do not finally resolve the merits of the charges. *Washington*, 434 U.S. at 503. The Supreme Court explains it like this:

> The reasons why this "valued right" merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed.

Id. at 503-05.

In the present case, jeopardy attached the moment that the jury was sworn. At that point, Fernandez-Reyes had the right under the federal and state Double Jeopardy Clauses to "have his trial completed by [that] particular tribunal," and to be spared from the burdens of multiple trials." *Id*. at 503. In granting the motion for a mistrial, the Court never addressed Fernandez-Reyes's right to "have his trial completed by [that] particular tribunal." This topic just never entered into the Court's reasoning. No matter what level of scrutiny the reviewing court applies, the failure to consider this essential element of the double

jeopardy protection amounts to a failure to exercise sound discretion.

> c. The circuit court failed to "ensure that the record reflects that there is an adequate basis for a finding of manifest necessity."

The trial court agreed that it should require proof of the positive Covid test result and ordered the prosecutor to provide it. After all, the alleged positive Covid test result was the basis for the mistrial. Considering what was at stake, requiring proof of the positive test result is a minimum level of protection for the defendant. In a rush to judgement, apparently persuaded more by his friends than the facts in the record, the Court granted the mistrial without any proof of the positive result in the record.

A court properly exercises its discretion only when its decision is "based upon the facts appearing in the record and in reliance on the appropriate and applicable law." *Hartung*, 102 Wis. 2d 58 at 66. Early in the hearing on the motion for a mistrial the Court made the decision that basic fairness requires that the State must submit proof of the positive test result. This is consistent with the basic double jeopardy principle that requires the court to "ensure that the record reflects that there is an adequate basis for a finding of manifest necessity." The Court then disregarded its own order and granted the motion for a mistrial without proof of a positive Covid test. This is an erroneous exercise of discretion because it amounts to a failure by the court to "ensure that the record reflects that there is an adequate basis for a finding of manifest necessity."

d. The Court's heavy reliance on advice from friends on how to exercise discretion amounts to a misuse of discretion.

The proper exercise of discretion requires the court to limit itself to the "facts appearing in the record" and "appropriate and applicable law." The trial judge, however, sought advice from friends about what they think that he should do. Without considering the need for discovery and without evidence of a positive Covid test result, one friend said, "Absolutely. It has to be a mistrial" and the other said, "Unless the DA has an assistant that can pick things up from here, it's a mistrial." Apart from the lack of a factual basis to make the decision, what stands out most about this advice is that it was not advice on the law; it was advice that went directly to how the Court should exercise its discretion.

It is appropriate for a court to go to an outside source to help discern the applicable law. Asking a friend his view on the state of the law is arguably no different than asking a law clerk to look up the law or referring to a law review article or some other secondary source that describes the law. So, for example, if the circuit judge sent his friends emails asking about the state of the law and one of the friends emailed back a description of the three elements of the proper exercise of discretion on a motion for a mistrial set forth in *Green*, there would be no problem. The problem in this case lies in the fact that the advice did not go to the law, it went directly to how the Court should exercise its discretion.

To make matters worse, neither friend knew the complete facts or arguments and neither friend inquired

at all about discovery or evidence on the prosecutor's motives or incentives. The Court explained that he did not give them the "whole scenario;" he "just gave them a few sentences." (*id.* at 18-19). Thus, these friends were permitted to weigh in with their strong opinions in favor of a mistrial based on a stunted view of the actual situation. It is not only unfair to the defendant to allow non-parties to put their thumb on the scale in off the record communications with the judge, it is a misuse of the Court's discretion to make a discretionary decision based on anything other than the "facts appearing in the record" and the "appropriate and applicable law."

It is clear that the push from his friends tainted the trial judge's discretion on the mistrial issue. Before the trial judge was influenced by the outside opinions of his friends, he insisted that the prosecutor provide proof of the positive Covid test result on the record. Without comment, however, the trial judge abandoned this requirement once the outsiders weighed in on the case. Our case law limits the court to the facts in the record and the relevant law when it exercises discretion. The Court misuses its discretion when it is goes outside the "facts in the record" and instead relies on the advice of friends.

CONCLUSION

Because Fernandez-Reyes is likely to succeed on the merits of his appeal, and granting an interlocutory appeal will: 1) protect Fernandez-Reyes from substantial and irreparable harm, 2) terminate this litigation and 3) clarify an issue of statewide importance – Fernandez-Reyes respectfully requests this Court to grant his petition for an interlocutory appeal.

Dated this 25th day of November 2024.

Respectfully submitted,

Electronically signed by
Robert T. Ruth
Wisconsin Bar #1021445
Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 3857 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 25th day of November 2024.

Signed:
Electronically signed by
Robert T. Ruth