STATE OF WISCONSIN

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

DISTRICT III

Case No. 2024AP1668-CRLV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CESAR O. FERNANDEZ-REYES,

Defendant-Petitioner.

ON LEAVE TO APPEAL AN ORDER DENYING A MOTION TO DISMISS ON DOUBLE JEOPARDY GROUNDS, ENTERED IN LANGLADE COUNTY CIRCUIT COURT, THE HONORABLE JOHN B. RHODE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Did the trial court erroneously exercise its discretion when it declared a mistrial over the objection of Defendant-Petitioner Cesar Fernandez-Reyes, rendering a retrial to be in violation of his right to be free from double jeopardy?

The prosecutor showed symptoms of an illness during the first day of trial. That evening, the prosecutor went to urgent care for treatment and tested positive for Covid-19. The next morning, the court explored with the parties possible alternatives short of a mistrial to address the situation. The court declared a mistrial because it found there were no feasible alternatives. Fernandez-Reyes objected. The court denied Fernandez-Reyes's subsequent motion to bar the retrial on double jeopardy grounds because the prosecutor's positive Covid test, the possible exposure of the jurors to Covid, and the lack of feasible alternatives created a manifest necessity for a mistrial.

The trial court properly exercised its discretion. It explored all alternatives, took into account the double jeopardy implications of declaring a mistrial, and properly applied the governing legal principles to the unique facts. This Court should affirm the order denying Fernandez-Reyes's motion to bar the retrial because it will not violate Fernandez-Reyes's right to be free from double jeopardy.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case involves the application of established principles of law to the unique facts.

STATEMENT OF THE CASE

In December 2023, Fernandez-Reyes went to trial on two counts of first-degree sexual assault of a child under age

12. (R. 18.) On the first day of trial, December 11, voir dire was completed, the jury (with one alternate) was selected, and the court gave preliminary instructions. The parties then presented their opening statements (R. 97:124–26 (State), 127–41 (Defense)), before court adjourned for the evening. Later that evening, the prosecutor, Langlade County District Attorney Kelly L. Hays, went to urgent care because she felt increasingly ill. She tested positive for Covid-19 and was told to quarantine for five days. Hays immediately notified the court and defense counsel.

The court addressed the issue with the parties on the record before trial the next morning, December 12, 2023. District Attorney Hays moved for a mistrial. (R. 95:5.) Counsel for Fernandez-Reyes opposed a mistrial and demanded an evidentiary hearing and production of the prosecutor's medical records. (R. 95:6–7.) Hays explained what happened the day before:

> I was not feeling well yesterday. It got bad enough that last night at about 7:30 p.m. I went into urgent care to see if there was anything they could do or what was going on. They originally told me that I had pneumonia and sent me home, and about 9 p.m. I got a phone call from the hospital saying that I had tested positive for Covid-19 and that I would need to stay home and isolate for the next five days. I immediately called Judge Rhode and informed him of that. He told me to contact Attorney Ruth right away, and he correctly noted that was an ex parte communication.

(R. 95:4.)

Hays stated that she felt worse that morning than the day before, and her lone assistant knew nothing about the case. (R. 95:19.) Hays's assistant was not able to take over the case because he was fresh out of law school, began working in her office in late September, and had no trial experience. (R. 95:5.) Hays also noted that she had built up a rapport with the thirteen-year-old victim whereas her new assistant had no contact with the victim. (R. 95:5.) Hays argued that having

her appear for the rest of the trial via Zoom also was not feasible given technical difficulties with the court's equipment, as evidenced by difficulties the parties had with Zoom at that hearing, requiring Hays to appear by telephone instead, which created its own technical difficulties. (R. 95:5, 11–12, 19.)

In response, Fernandez-Reyes complained that the State obtained a tactical advantage because it heard defense counsel's opening statement pointing out weaknesses in the State's case. (R. 95:6–7.) (Fernandez-Reyes also heard the State's opening statement). He insisted there were viable options short of a mistrial such as masking and appearing via Zoom. (R. 95:7–8.)

The prosecutor agreed to provide the medical records with her positive Covid test results (R. 95:9–10), and she did so in an e-mail she sent at 8:55 a.m. during a break in the proceedings (R. 90; 92; 95:19).

Fernandez-Reyes complained that District Attorney Hays waited until after opening statements to get tested. (R. 95:21.) Hays adamantly denied Fernandez-Reyes's insinuation that she purposely waited to take a Covid test until after opening statements to gain a tactical advantage:

> I had a 13-year-old victim that was ready to come in at 7:30 this morning. It -- this is a tremendous disadvantage to the State as well. I went to the doctor last night because yesterday was such a long day, and I felt so terrible when I got home. I was in a tremendous amount of pain. That's why I waited. They suggested a Covid test, I did not request a Covid test. In fact, I did a[n] at-home Covid test before I even went to the doctor, and that was negative.
>
> I thought that I had bronchitis or something along those lines, where they could give me something to help manage the symptoms through the jury trial. I apologize to the Court, I apologize to the defense, and most of all I apologize to the victim. I certainly did not want this to happen.

(R. 95:10–11.)

The court considered adjourning the trial to the following week, December 18 and 19, rather than declare a mistrial. (R. 95:11.) In response, Hays explained why an adjournment was not practical:

> The first concern that I would have, Judge, is that I was within a few feet of all of those jurors for a large amount of the day yesterday. There is the chance that I got some of them sick as well, and then we would be in the same position. I will also note for the Court that after court yesterday I was reviewing CPS documents that I got yesterday at the defense request, and observed that Shawn Behrens, one of our jurors, was the GAL for the child victim. So we would have to remove him from the jury at this point, and would be down to 12 with no alternates at all.

(R. 95:12.) Fernandez-Reyes agreed that juror Behrens, the victim's former guardian ad litem, should be removed from the jury. (R. 95:16–17.) Hays also pointed out that jurors might become biased against the State because of the Covid revelation and exposure. (R. 95:20.)

In response, Fernandez-Reyes suggested only a one- or two-day adjournment in hopes that Hays might get better overnight, obtain a negative test result, and the case could proceed. (R. 95:13–14.) If that did not work, then the court could adjourn it to the following week. (R. 95:14.) He acknowledged that "there are a lot of balls in the air in this type of thing." (R. 95:14.)

The court noted that this case required two Spanish language interpreters, and "it takes weeks to line up interpreters on these matters." (R. 95:15.) The unlikely availability of the interpreters on December 18 and 19, and the difficulty in getting expert witnesses for both parties to appear on short notice, made an adjournment for one or two days, or into the following week, not practical. (R. 95:15–16.)

The court said it would weigh all options—a one-day adjournment, an adjournment to the following week, the District Attorney appearing via Zoom, and the use of the assistant district attorney as co-counsel—before ruling on the State's mistrial motion. (R. 95:18.) The court also told the parties that it would consult four trusted, more experienced judicial colleagues for advice. (R. 95:17–18.) It did so and received two responses: one judge said a mistrial would have to be declared while the other said a mistrial would have to be declared if the prosecutor did not have an assistant ready to take over the case. (R. 95:18–19.) The court clarified that its judicial colleagues did not know "anywhere close to the whole scenario; I just gave them a few sentences." (R. 95:18–19.) The court took a brief recess before issuing its decision.

After the recess, the trial court observed, "There's a lot of moving parts in a trial" and jeopardy has attached. (R. 95:23–24.) It then explained why a mistrial was necessary. An adjournment to the following week was not feasible. (R. 95:23–24.) The exposure of the jurors to Covid and the need to release one juror for cause complicated matters. (R. 95:24.) The court also believed that District Attorney Hays was truly ill and was not seeking a mistrial to gain a tactical advantage. "I'm not going to make Ms. Hays do anything else today. I am convinced by what I hear in her voice, and I know her, that she is suffering. She is sick. And I -- I am not going to make her do anything else today." (R. 95:24–25.) The court later told the jurors before releasing them:

> Ms. Hays is not present in the courtroom. She is listening to us, she is on speakerphone. I was informed by her last night that, as I think all of us saw, she was suffering from some symptoms that I thought looked like a very bad cold. I am not a doctor. But she clearly was suffering from some symptoms.
>
> She did not feel well at all last night, apparently, and did seek medical treatment, and has

> been diagnosed with Covid-19. All of you were somewhat close to her, you all walked right past her yesterday.

(R. 95:26–27.)

The court declared a mistrial (R. 95:24–25), and excused the jury (R. 95:26–27). The court and the prosecutor both apologized to the jurors for having exposed them to Covid. (R. 95:27–28.)

The next day, December 13, District Attorney Hays appeared via Zoom and was still sick. The court said it believed that her illness "is legitimate." (R. 96:3.) The court also rejected Fernandez-Reyes's letter complaining that the court had considered matters outside the record, namely Hays's positive Covid test results (the same results he demanded the day before), and asking that District Attorney Hays be sworn and subjected to cross-examination. (R. 88.)

The court explained why it did not order an evidentiary hearing into District Attorney Hays's reasons for waiting to get tested; it believed Hays's representations about when and why she got tested, and the test results, without having to put her under oath. (R. 96:6–7.) The court also revisited the alternative of adjourning the trial to the following week but found that the logistics of doing so would be "extremely challenging." (R. 96:10.) The court ordered Fernandez-Reyes's bond reduced so he could be released from custody. (R. 96:14.) He posted bond and was released six days later. (R. 109:31.)

Seven months later, on July 30, 2024, Fernandez-Reyes moved to bar the retrial on double jeopardy grounds. (R. 99.) The State opposed the motion. (R. 100.) The court considered the parties' briefs and heard oral arguments on August 6, 2024, before denying the motion at the close of the hearing. (R. 109:20–32.)

In his remarks, Fernandez-Reyes again complained that the court failed to consider alternatives to a mistrial,

should not have consulted its "friends" (other judges), should not have taken District Attorney Hays at her word without putting her under oath, and failed to acknowledge that the prosecutor gained a tactical advantage by waiting to get tested until after she heard defense counsel's opening statements. (R. 109:4–12, 17–19.)

In her remarks, District Attorney Hays said that she did not know she had Covid on the first day of trial and learned she had it only after urgent care ordered a Covid test that night. "[Y]ou don't know what you don't know." (R. 109:14.) She pointed out that the defense heard the State's opening statement, so it also learned the State's trial strategy. (R. 109:14.)

In denying the motion to bar the retrial, the court first explained how it arrived at the decision to declare a mistrial. It addressed the double jeopardy implications (R. 109:15), and considered all other alternatives before declaring a mistrial. (R. 109:22–23, 24.) It gave the State and the defense a full opportunity to present their positions. (R. 109:24.) It applied the strictest scrutiny to the State's mistrial request even though it found that the prosecutor did not engage in any wrongdoing or act with the intent to gain a tactical advantage. (R. 109:25.) Specifically, it found that the prosecutor did not intentionally delay obtaining a Covid test until after opening statements to gain a tactical advantage. (R. 109:30–31.) Both sides gained a tactical advantage by hearing each other's opening statements. (R. 109:30.) The trial court took District Attorney Hays at her word about the Covid test and its results, and it saw no need to place her under oath. Hays's word was confirmed by the hospital report with the test results that she submitted via e-mail during the recess on the morning of the second day of trial. (R. 109:28.) The court said it solicited the advice of four judicial colleagues, two of whom responded to its inquiries. The court found nothing wrong with that, and Fernandez-Reyes cited no authority that

prohibits a judge from consulting the opinions of other judges when a problem suddenly arises during a trial. (R. 109:28–29.)

The court considered Fernandez-Reyes's interest in having his trial in one proceeding before the same jury (R. 109:29), but it held that an adjournment was not feasible because the prosecutor had Covid, the jurors were exposed to it on the first day, and the 13th juror would have to be excused for reasons unrelated to Covid (R. 109:26–27). It also would have been logistically difficult to get the two Spanish language interpreters and the parties' experts to appear for a trial adjourned to the following week. (R. 109:27.) The court summarized its findings as follows:

> Both parties were given a full opportunity to explain their positions and consider alternatives to mistrial. The [c]ourt accorded careful consideration to the defendant's interest in having the trial concluded in a single proceeding.
>
> The [c]ourt ensured that the record reflects that there is an adequate basis for a finding of manifest necessity specifically amongst other factors that the prosecutor had been diagnosed with Covid and could not continue, and there was no other prosecutor available to take over a case of this magnitude, either immediately or with a short delay. Furthermore, we don't know if the trial could have resumed with the short delay based on the unknown availability of the expert witnesses and interpreters.

(R. 109:29–30.) The court acknowledged that its declaration of a mistrial was an imposition on the defendant, on the victim, on the witnesses, and on the taxpayers, but it could not be avoided. (R. 109:31.)

The court denied the motion to bar the retrial. (R. 109:31–32.) It issued a written order on August 8, 2024. (R. 102.) Fernandez-Reyes filed an interlocutory appeal. (R. 103.) This Court granted leave to appeal and ordered briefs on the merits of the double jeopardy issue. (R. 110.)

STANDARD OF REVIEW

The decision whether to grant a mistrial rests within the sound discretion of the trial court reversible only for a clear showing of an erroneous exercise thereof. *State v. Green*, 2023 WI 57, ¶ 42, 408 Wis. 2d 248, 992 N.W.2d 56, *cert. denied*, 144 S. Ct. 578 (2024); *State v. Doss,* 2008 WI 93, ¶ 69, 312 Wis. 2d 570, 754 N.W.2d 150.

The trial court must exercise "sound discretion" when balancing the defendant's interest in seeing his trial to completion against the public's interest in the fair and even-handed administration of justice. *Green*, 408 Wis. 2d 248, ¶ 19; *State v. Seefeldt*, 2003 WI 47, ¶¶ 28, 35, 261 Wis. 2d 383, 661 N.W.2d 822. "The trial court must weigh the decision to declare a mistrial by also considering the defendant's interest in having the case concluded before the jury called to decide it." *Green*, 408 Wis. 2d 248, ¶ 22.

The level of scrutiny on appellate review "varies" and "exists on a spectrum." *Green*, 408 Wis. 2d 248, ¶ 20. The least amount of scrutiny—the greatest deference—is reserved for when a court declares a mistrial because the jury is hopelessly deadlocked. *Id.* at ¶ 21. The strictest scrutiny is reserved for when a court declares a mistrial because the prosecution does not have important evidence, or "there is reason to believe that the prosecutor is using the State's superior resources to harass the defendant or to achieve a tactical advantage." *Id.* (citations omitted).

"Sound discretion means acting in a rational and responsible manner. ('[I]f a trial judge acts irrationally or irresponsibly, his action cannot be condoned.' (citations omitted))." *Green*, 408 Wis. 2d 248, ¶ 22 (alteration in original) (citations omitted).

The reviewing court "should 'look for reasons to sustain [the] trial court's discretionary decision.'" *State v. Gutierrez*, 2020 WI 52, ¶ 27, 391 Wis. 2d 799, 943 N.W.2d 870; *see*

generally McCleary v. State, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971). Accordingly, if the appellate court is to independently review the record at all, it should do so in an effort to *uphold* rather than undermine the trial court's discretionary decision to declare a mistrial. *Arizona v. Washington*, 434 U.S. 497, 516–17 (1978) (mistrial declaration upheld even though the trial judge failed to make an explicit "manifest necessity" finding because, "[t]he basis for the trial judge's mistrial order is adequately disclosed by the record" despite the judge's failure "to articulate on the record all the factors which informed the deliberate exercise of his discretion").

"Provided the trial court exercises sound discretion, retrial after declaring a mistrial based on manifest necessity will not violate the defendant's double jeopardy right." *Green*, 408 Wis. 2d 248, ¶ 26.

SUMMARY OF ARGUMENT

The trial court was presented with a most difficult situation on the eve of the second day of trial. The prosecutor, who had shown symptoms of an illness on the first day of trial, went to urgent care for treatment of her symptoms that night and tested positive for Covid. She was ordered to quarantine for five days. The State requested a mistrial the next morning and Fernandez-Reyes opposed it. The court thoroughly considered alternatives short of a mistrial before concluding that there was no feasible alternative. It then made the difficult decision to declare a mistrial despite the double jeopardy implications.

The court was correct. The prosecutor had inadvertently exposed the jurors and everyone else in the courtroom to Covid on the first day. The prosecutor only had one assistant who was on the job for less than three months, fresh out of law school, and unfamiliar with the case. An adjournment for one or two days, or into the following week,

was not feasible because it would be difficult to reschedule the two Spanish language interpreters or the parties' expert witnesses on such short notice. The parties learned that one juror would have to be excused for cause unrelated to the prosecutor's illness, leaving no alternate juror. Having been exposed by the prosecutor to Covid, any of the remaining 12 jurors might become ill or be biased against the State for putting them in this situation. The prosecutor did not intend to cause a mistrial to gain a tactical advantage. An adjournment of any length was not feasible because the jurors had all been exposed to Covid. The trial could not feasibly continue with that jury.

The prosecutor did nothing wrong. She got Covid and inadvertently exposed everyone in the courtroom. She did not delay the test to obtain a tactical advantage. Fernandez-Reyes's accusation that she manufactured this situation to gain a tactical advantage is utterly baseless. The judge did nothing wrong. He could take the prosecutor at her word as an officer of the court because she was bound by the Code of Ethics to be truthful and candid. In any event, the prosecutor produced the positive test results on the morning of the second day of trial to confirm her unsworn statements. The judge also could consult his experienced judicial colleagues (inappropriately categorized by Fernandez-Reyes as the judge's "friends") for their advice on how to handle the problem. He did so and put their advice on the record. The court then properly applied the law to the facts before declaring a mistrial.

This Court would be hard-pressed to find a more thorough exercise of discretion than that engaged in by the trial court before it declared a mistrial here. The inadvertent exposure of the jurors to Covid created a "manifest necessity" for a mistrial. There was no double jeopardy bar to a retrial.

ARGUMENT

The trial court properly exercised its discretion because the prosecutor's positive Covid test and inadvertent exposure of the jury to Covid-19 created a "manifest necessity" for declaration of a mistrial.

The court properly exercised its sound discretion in declaring a mistrial. It applied the applicable law to these unique facts. It weighed all possible alternatives. It considered the parties' oral and written presentations. It took into account Fernandez-Reyes's interest in having his case tried in one proceeding before the chosen jury, and it considered the interests of the State, the victim, and the witnesses. This all added up to a "manifest necessity." Having properly exercised its discretion to declare a mistrial, the court then properly denied Fernandez-Reyes's motion to bar the retrial.

A. The trial court may declare a mistrial if it finds there is a "manifest necessity" for doing so.

A defendant is protected by the Fifth Amendment to the U.S. Constitution and Wis. Const. art. I, § 8, from being placed in jeopardy twice for the same offense. *State v. Williams*, 2004 WI App 56, ¶ 23, 270 Wis. 2d 761, 677 N.W.2d 691. Jeopardy attaches when the jury is sworn. *Id.* (citing *State v. Comstock*, 168 Wis. 2d 915, 937, 485 N.W.2d 354 (1992)). The right to be free from double jeopardy protects a defendant's "valued right to have his trial completed by a particular tribunal." *Id.* (quoting *Seefeldt*, 261 Wis. 2d 383, ¶ 16).

The Double Jeopardy Clause does not prohibit a trial judge from declaring a mistrial over defense objection and ordering a retrial if the judge finds there is a "manifest necessity" for it or "the ends of public justice would otherwise be defeated" if the trial were to continue. *Illinois v.*

Somerville, 410 U.S. 458, 461 (1973) (quoting *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824)); *State v. Mattox,* 2006 WI App 110, ¶ 13, 293 Wis. 2d 840, 718 N.W.2d 281.

Competing with the defendant's right to have his case completed in one proceeding before the chosen jury is "the public interest in affording the State one full and fair opportunity to present its evidence to an impartial jury." *Williams,* 270 Wis. 2d 761, ¶ 24 (citing *Seefeldt*, 261 Wis. 2d 383, ¶ 19). "The 'manifest necessity' standard provides sufficient protection to the defendant's interests in having his case finally decided by the jury first selected while at the same time maintaining 'the public's interest in fair trials designed to end in just judgments.'" *Oregon v. Kennedy*, 456 U.S. 667, 672 (1982) (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)).

The term "manifest necessity" is not to be interpreted literally. It is not an *absolute* necessity, but a "high degree" of necessity. *Green*, 408 Wis. 2d 248, ¶ 23; *Washington,* 434 U.S. at 506. "The determination whether a manifest necessity exists is a fact-intensive question." *State v. Moeck*, 2005 WI 57, ¶ 37, 280 Wis. 2d 277, 695 N.W.2d 783. The "manifest necessity" standard is not to be applied mechanically but flexibly to the specific problem confronting the trial court. *Green*, 408 Wis. 2d 248, ¶ 23 (citations omitted).

The trial court should not act hastily and it must give both sides "a full opportunity to explain their positions" with due consideration to the defendant's interest in having his trial concluded in a single proceeding. *Seefeldt*, 261 Wis. 2d 383, ¶ 28. Sound discretion requires acting deliberately and taking sufficient time in response to the State's mistrial motion to give both sides the opportunity to explain their positions, and to explore viable alternatives short of mistrial such as curative instructions or sanctioning counsel. The trial judge must ensure that the record reflects an adequate basis for a "manifest necessity" finding. *Id.* ¶¶ 36–37.

The issue for reviewing courts is not whether the mistrial declaration was complete or even correct; it is only whether the mistrial declaration was reasonable. *See* George C. Thomas III, *Solving the Double Jeopardy Mistrial Riddle*, 69 S. Cal. L. Rev. 1551, 1566–67 (1996) (when Justice Story first coined the term "manifest necessity," he meant it to be a guide to trial judges in exercising their virtually unreviewable discretion to declare a mistrial). The strictest scrutiny is reserved for those mistrials declared due to "the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused." *Washington,* 434 U.S. at 508 (footnote omitted).

The reviewing court should not disturb a mistrial declaration unless it is "irrational[ ] or irresponsibl[e]." *Id.* at 514. The following are guidelines for a proper exercise of discretion in declaring a mistrial:

> A trial court exercises sound discretion in deciding manifest necessity justifies a mistrial provided the court:
>
> • gives "both parties a full opportunity to explain their positions and consider[s] alternatives such as a curative instruction or sanctioning counsel." *State v. Moeck*, 2005 WI 57, ¶43, 280 Wis. 2d 277, 695 N.W.2d 783;
>
> • "accord[s] careful consideration to [defendant]'s interest in having the trial concluded in a single proceeding." *Washington*, 434 U.S. at 516 [98 S.Ct. 824]; and
>
> • "ensure[s] that the record reflects that there is an adequate basis for a finding of manifest necessity." *Moeck*, 280 Wis. 2d 277, ¶43 [695 N.W.2d 783].
>
> A court does not exercise sound discretion if "the ... court fails to consider the facts of record under relevant law, bases its conclusion on an error of law

> or does not reason its way to a rational conclusion." *Id*. (quoting *Seefeldt*, 261 Wis. 2d 383, ¶36, 661 N.W.2d 822).

Green, 408 Wis. 2d 248, ¶ 24 (alterations in original).

B. The trial court properly exercised its discretion because there were no feasible alternatives to a mistrial once the jurors were all exposed to Covid-19.

"Flexible rules ensure reviewing courts do not impede circuit courts' duty to protect 'the integrity of the trial.' As the COVID-19 pandemic made clear, a mistrial may be manifestly necessary in 'varying and often unique situations arising during the course of a criminal trial.'" *Green*, 408 Wis. 2d 248, ¶ 41 (citations omitted).

> When confronted with the need to decide whether to declare a mistrial, the district court — like a quarterback in the red zone — must scan the field and mull all of the available options. Considering the myriad challenges posed at the relevant time by the virulence of the COVID-19 pandemic, we think that rejecting the alternatives discussed above was an appropriate exercise of the court's discretion.

United States v. Dennison, 73 F.4th 70, 79 (1st Cir. 2023).

Strict scrutiny is not warranted here because the prosecutor did nothing wrong. District Attorney Hays unknowingly contracted Covid and tested positive for it when she went to urgent care on the evening of the first day of trial. Hays did not seek a Covid test in hopes of gaining a tactical advantage after hearing defense counsel's opening statement. Fernandez-Reyes's accusation that she did and lied about it is both baseless and reckless. The court reasonably chose to take District Attorney Hays at her word. Regardless of the level of scrutiny on the "spectrum of deference to be accorded the trial court's conclusion," *Green*, 408 Wis. 2d 248, ¶ 27, the trial court thoroughly and properly exercised its sound discretion.

The court applied the relevant double jeopardy law cited by the parties in their briefs and oral arguments to the unique facts, it did not commit an error of law, and it "reason[ed] its way to a rational conclusion." *Green*, 408 Wis. 2d 248, ¶ 24 (citation omitted).

1. The trial court considered the parties' positions, alternatives to a mistrial, and the double jeopardy implications of its decision.

The court gave both parties every opportunity to lay out their positions both in briefs and in oral presentations to the court. It carefully considered their respective positions on how best to resolve this difficult, unanticipated situation. The court considered the double jeopardy implications of its decision. It recognized that jeopardy attached when the jury was sworn the day before and that an adjournment would in essence mean a mistrial. (R. 95:23–25; 96:6–10; 109:20–32.)

The court carefully weighed Fernandez-Reyes's valued interest in having his case tried in one proceeding before the jury selected for that trial. The court considered adjourning the trial for a day or two, or into the following week to serve that interest. The court considered every possible alternative to a mistrial. It reasonably found that an adjournment of any length was not feasible because the jurors had been exposed to Covid, there would be no alternate juror because one juror of the thirteen selected would have to be struck for cause when the trial resumed, and the two Spanish language interpreters and the parties' expert witnesses likely would be unable to rearrange their schedules to appear the following week.

> It is by no means clear that a seven-to-ten-day adjournment, as the defendant now proposes, would have either been feasible under the circumstances or resolved the problems with which the district court was confronted.

> . . .
>
> Moreover, the trial could only resume at that later date if all essential persons (including counsel, witnesses, and jurors) were themselves COVID-free — a difficult thing for a trial court to predict amidst an ongoing pandemic.

Dennison, 73 F.4th at 80.

The trial proceedings depend on the health of the participants; their health is a factor to be considered in the double jeopardy analysis. *United States v. Jorn*, 400 U.S. 470, 479–80 (1971); *Hightower v. State*, 883 S.E.2d 335, 339 (Ga. 2023). Fernandez-Reyes does not explain why it would have made any sense to adjourn and proceed with a jury that had been exposed to and possibly infected with Covid, risking a trial with less than twelve jurors should one or more become sick. Masking up or appearing via Zoom would not solve anything if fewer than twelve jurors were available because one or more was home sick with Covid. Anger over Covid exposure might also have seriously interfered with the remaining jurors' ability to decide this case fairly and impartially based only on the facts and the law.

Fernandez-Reyes seems to believe that the existence of possible alternatives renders the court's decision an erroneous exercise of discretion. But the double jeopardy analysis does not turn on the mere existence of possible alternatives that a defendant might have preferred to a mistrial. Instead, it asks whether the court properly considered those alternatives and reasonably concluded that they were not workable. That is precisely what the court did here.

2. There was no need for discovery or a formal evidentiary hearing to delve into the prosecutor's actions and motives.

For the first time on appeal, Fernandez-Reyes accuses District Attorney Hays of misconduct and lying to the court.

> 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.

(Fernandez-Reyes's Br. 12.) "The timing of the Covid tests is suspicious." (Fernandez-Reyes's Br. 15.)

That is the opposite of the position Fernandez-Reyes took in the trial court when the issue arose. "I don't come here this morning and accuse anybody of anything." (R. 95:6.) "[A]gain, I don't accuse anyone of anything." (R. 95:8.) And, eight months later, "I'm not accusing anyone of anything." (R.109:18–19.) Now he is.

Fernandez-Reyes was right the first time. District Attorney Hays did nothing wrong. She got Covid. That's it! The court did not have to put Hays under oath before finding that she was truly sick with Covid and did not delay her test to gain a tactical advantage.

The court made sure that the record sufficiently supported its finding of a manifest necessity. The court heard what District Attorney Hays had to say about the timing, reasons for, and results of her Covid test. Hays then provided the medical records with the positive test results at 8:55 a.m.

during a break on the second day of trial while the issue of a mistrial was being discussed. (R. 90; 92; 95:19.)

Although Fernandez-Reyes complains that Hays should have been placed under oath and subjected to cross-examination, and there should have been some sort of "Discovery of the Covid records and the opportunity to call witnesses" (Fernandez-Reyes's Br. 15), he does not dispute that Hays went to urgent care the night after the first day of trial for her obvious illness, she tested positive for Covid, and she immediately notified counsel and the court. The "Covid records" were then provided by Hays during the hearing the next morning.

Fernandez-Reyes cites no authority for the proposition that the court could not take District Attorney Hays at her word and it had to place her under oath. He merely contends that because the court did not allow him to create a record in his preferred manner—by turning the prosecutor into a fact witness and placing her private medical records in the court record—the court did not adequately consider his position. Nonsense. The court was free in its discretion to take Hays at her word. *See United States v. Gilmore*, 454 F.3d 725, 730 (7th Cir. 2006) ("Here, the district judge was satisfied not only with the prosecutor's explanation, but also satisfied by what she witnessed in overseeing the trial. Since she was satisfied with the explanation, there was no need to hold an evidentiary hearing to probe the prosecutor's intent."). The court reasonably chose not to let the proceeding devolve into a mini-trial into whether District Attorney Hays had Covid, when she knew she had Covid, and whether she might have had nefarious intent in seeking a mistrial. This does not mean the court failed to consider Fernandez-Reyes's position. The record is clear that it did.

Hays explained on the record that the reason for and timing of her Covid test had nothing to do with what defense counsel said in his opening statement. Fernandez-Reyes also

gained the tactical advantage of hearing the State's opening statement. No witnesses had yet been called to testify. The defense theory presented in the opening also was not unexpected. As Hays aptly put it:

> They know my strategy as well, and I also wouldn't say that there's anything very surprising here. The defense strategy is pretty much the same as every child sex assault: The victim is lying, the investigation was poor. That's not groundbreaking news and is contained in the discovery that the State provided.

(R. 109:14.) *See Dennison*, 73 F.4th at 81–82 ("When the defendant's attorney was asked to address the matter, he offered no substantive objection other than to complain that his defense strategy had been exposed. . . . In our judgment, this is not the stuff from which a defendant may weave a colorable claim of abuse of discretion.").

Simply put, District Attorney Hays did not get a Covid test to gain a tactical advantage or cause a mistrial just because she heard counsel argue to the jury that the victim is lying and the State's investigation was poor.

3. The trial judge properly consulted trusted judicial colleagues for advice.

Fernandez-Reyes accuses the trial judge of abdicating his decision to declare a mistrial to his "friends." No less than 21 times in his brief, Fernandez-Reyes bellows that the judge improperly consulted his "friend" or "friends" for advice without once mentioning that those "friends" were actually four trusted judicial colleagues from whom the trial judge sought advice on how to resolve this difficult situation.

The trial judge explained why he sought the advice of his judicial colleagues:

> The [c]ourt did make a record, as we've all discussed at length, that it sought the advice of I believe it was four other judges in our district that I

> know and have known for years, as long as I've been a judge. They're all more experienced than me, the ones I consulted with. And we have a small group of us that occasionally check in with each other on issues like this, and I did. There's probably more than just four, but those were the four I could think of at the time, and I emailed them and, yes, two of them did respond.
>
> Not that this matters but Langlade County is a one-judge county. I have no colleagues in the building to consult with and that really probably isn't any different if I did consult with colleagues in the building or colleagues outside of the county by email. Maybe that's totally wrong, but I think that's something that judges commonly do.

(R. 109:22–23.)

Fernandez-Reyes's strategic approach on appeal in categorizing these confidants as "friends" rather than learned judicial colleagues is, to put it charitably, troubling. It both insults the trial judge and misleads this Court. Reading only Fernandez-Reyes's brief, the reader is led to believe that the trial judge asked random "friends"—maybe a teacher, an auto mechanic, a bartender, his barber, or a neighbor—to tell him how to decide the State's mistrial motion regardless of the law and facts. That, of course, is not what occurred.

Fernandez-Reyes is advocating for a rule that prohibits judges from consulting their colleagues when a problem arises during a trial. He cites no authority for that specious proposition because there is none. Judges are allowed to consult with each other (and other legal experts) for advice in a pending case.

> 2. A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice and affords the parties reasonable opportunity to respond.

> 3. A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities.

SCR 60.04(1)(g)2., 3.

"Judges are generally prohibited from independently gathering evidence by the rules of judicial ethics." *State v. Vanmanivong*, 2003 WI 41, ¶ 34, 261 Wis. 2d 202, 661 N.W.2d 76. The trial judge did not solicit evidence from his trusted colleagues; he solicited *their advice on the law*. That was proper, as SCR 60.04 clearly states.

When a court exercises its discretion, more information is better than less. What matters is that the trial court applied the applicable law to the facts and considered all possible alternatives when exercising its discretion. The court did not abdicate its decision to the other judges; it merely sought their advice. The court did not act irrationally or irresponsibly. *Washington*, 434 U.S. at 514; *Green*, 408 Wis. 2d 248, ¶ 22. The court properly exercised its sound discretion based on the law and facts presented.

***

Covid-19 ruined countless lives and disrupted the entire world. Its deleterious effects are felt worldwide to this day. Covid-19 disrupted Fernandez-Reyes's trial through no one's fault before any witness testified. The mere presence of Covid in the courtroom arguably created a "manifest necessity" for declaration of a mistrial. *See Hightower*, 883 S.E.2d at 341; *State v. Smith*, 244 A.3d 296, 300–01 (N.J. Super. A. D. 2020); *see also Dennison*, 73 F.4th at 73–74 (manifest necessity existed where the government's main witness tested positive for Covid-19). The presence of Covid in the courtroom created a manifest necessity here because the court, the parties, and most importantly the jurors were all inadvertently exposed to Covid. That gave the court no feasible alternative but to declare a mistrial. It properly denied Fernandez-Reyes's

motion to bar the retrial because there was no double jeopardy violation.

CONCLUSION

This Court should affirm the order denying Fernandez-Reyes's motion to bar the retrial and remand for trial.

Dated this 23rd day of December 2024.

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 6,602 words.

Dated this 23rd day of December 2024.

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

Dated this 23rd day of December 2024.

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