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

REPLY BRIEF OF DEFENDANT-PETITIONER

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I. How we label the people who influenced the trial judge does not alter the fact that the judge exercised his discretion based on information outside of the record.

The State criticizes Fernandez-Reyes for referring to the people who the judge contacted off the record as "friends," insisting that they should be referred to as "learned judicial colleagues." (State Brief at 25). That the friends were "learned" or that they were judges, however, makes no difference to the ultimate question in this case. Focusing on their label is nothing more than a distraction from what matters.

Before he contacted these "learned judicial colleagues" off the record, the trial court thought that there was a way to salvage the trial without a mistrial. *See* 95:18 (the judge said, "All plans I think are – are appropriate.). He also insisted on proof of a positive Covid test result. (*See id*. at 10). Once two of his colleagues weighed in, however, the judge abruptly abandoned the requirement that the prosecutor provide proof of the positive Covid test result, and he abandoned the proposals that he previously considered "appropriate." In other words, once the colleagues weighed in, the court based his discretion on the strong opinions of his colleagues rather than the record at the hearing. That was a misuse of discretion.

II. The trial judge did not seek legal advice from these "learned judicial colleagues," he apparently sought advice on how to exercise discretion.

The State notes that under SCR 60.04(1)(g)2 a judge may obtain advice from a "disinterested expert

on the law applicable to a proceeding." (State Brief at 25-26). For that to occur, however, the judge must "give notice to the parties of the person consulted." That did not occur in this case.

The State also notes that under SCR 60.04(1)(g)3, a judge "may consult with other judges…", but that he may not independently gather evidence. (*id*. at 26). From here, the State insists that the trial judge is in the clear because he merely solicited advice on the law. Unfortunately, that does not capture what occurred in this case.

The trial court did not enter into the record the emails that he sent to his "trusted judicial colleagues," so we cannot say for sure what he "solicited." The strong inference in the record, however, is that the judge sought advice on what he should do rather than advice on the law. At least that is how the colleagues understood the request, since neither colleague provided advice on the law and they both expressed strong opinions on how the judge must exercise his discretion. Based on a limited view of the facts, one of the colleagues said, "Absolutely. It has to be a mistrial" and the other colleague said, "Unless the DA has an assistant that can pick things up from here, it's a mistrial." (*id*. at 19). That is not advice on the law, that is strong push in favor of a mistrial. This strong push in favor of a mistrial caused the trial judge to ignore his order that the State provide proof of the positive Covid test result and ignore remedies short of a mistrial that he previously considered "appropriate."

III. **The fact that the positive Covid test result eventually made it to the record can never change the fact that the trial judge exercised his discretion without it**.

A trial court's exercise of discretion on a motion for a mistrial is limited to the record that was before the court at the time of the motion. *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. It is undisputed that the alleged positive Covid test result was not part of the record at that time. At the hearing on the motion to bar retrial, the trial court explained it like this:

> The record does not indicate if the Court reviewed that email or the attached portion of the letter before making a decision on the request for mistrial. It would be, I guess, pointless for me to speculate whether I did or I didn't because we are confined to the record.

(109:21). That is all that matters to this appeal.

IV. **The circuit court should have permitted a more robust investigation into the prosecutor's claims.**

The State accuses the defendant of changing positions on whether the prosecutor lied to the court. The state notes that at the time of the motion for a mistrial, Fernandez-Reyes told the trial court, "I don't come here this morning to accuse anybody of anything." (State Brief at 22 citing R. 95:6). The State claims, however, that "for the first time on appeal, Fernandez-Reyes accuses District Attorney Hays of

misconduct and lying to the court." (*id.*). Elsewhere, the State declares that the alleged accusation that the prosecutor lied is "both baseless and reckless." (*id.*). If there is anything that is "baseless and reckless" on this topic, it is the State's claim that Fernandez-Reyes accuses the prosecutor of lying. Fernandez-Reyes has never accused the prosecutor of lying. He merely points to the suspicious circumstances, the lack of meaningful discovery and the tremendous strategic benefit that the State achieved by the mistrial.

At the hearing on the motion for a mistrial, Fernandez-Reyes made two basic discovery requests. He asked for all of the prosecutor's medical records for the last week and an evidentiary hearing where he could question witnesses under oath. In the alternative, he asked 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.

Fernandez-Reyes explained the need for an inquiry into the facts claimed by the prosecutor like this:

> Judge, I -- I'm going to say -- I'm going to tell you what I tell many of my clients when I first meet them and they tell me their story. I say, "I believe everything, and then again I believe nothing." And I think that this is appropriate to the situation because I don't come here this morning and accuse anybody of anything. But … We revealed the enormous deficiencies in the state's case in our opening statements. Now they know our case, and that -- if -- if you postpone this trial, that

> shifts a tremendous tactical advantage to the State. And so when I see something like that happen where, wait a second, we now have factual allegations and we propose to -- to change the trial schedule in a way that shifts a tremendous tactical advantage to the State, I think we need to explore that every possible way.

(95:6-7)

Still not accusing the prosecutor of anything, Fernandez-Reyes makes the same point on appeal. The prosecutor claimed that her motives were pure and that she took the second Covid test at the suggestion of medical professionals. (*id*. at 10). She bristled at the request to provide the records that would back up this claim and she bristled at the suggestion that she should answer questions about her claims under oath. (*id*. at 9).

The bottom line is that the prosecutor handled this matter in a way that shifted a tactical advantage to the State. After hearing an outline of the defendant's evidence and strategy, the prosecutor took a Covid-19 test. 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, coupled with the fact that the prosecutor refused to provide records or testimony to prove otherwise, provides at least "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. That is all that the defendant needs to show to require strict scrutiny. See *Arizona v. Washington*, 434 U.S. 497, 508, 98 S.Ct. 824, 54 L.Ed. 2d 717 (1978)(The reviewing court

applies the strictest possible scrutiny whenever "there is reason to believe that the prosecutor is using the State's superior resources … to achieve a tactical advantage.").

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 7th day of January 2025.

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 about 1405 words.

Dated this 7th day of January 2025.

Signed:
Electronically signed by
Robert T. Ruth

CERTIFICATE OF EFILE/SERVICE

I certify compliance with Wis. Stat. § 801.18(6) in that I electronically filed this document with the Wisconsin Appellate Court E-filing System, which will accomplish electronic notice and service for all participants.

Dated this 7th day of January 2025.

Signed:
Electronically signed by
Robert T. Ruth