COURT OF APPEALS
DECISION
DATED AND FILED

April 5, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2659-CR **Cir. Ct. No. 2011CM161**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEVI ALEXANDER RODEBAUGH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Monroe County: TODD L. ZIEGLER, Judge. *Reversed and cause remanded with directions.*

¶1 LUNDSTEN, P.J. This is a permissive appeal from an order of the circuit court granting a mistrial, after a jury was sworn, in the face of an objection

by the defendant, Levi Rodebaugh.[1] Rodebaugh argues that the circuit court erroneously determined that a "manifest necessity" justified a mistrial and that a new trial would be permitted. I agree with Rodebaugh. Accordingly, I direct that the complaint must be dismissed with prejudice.

Background

¶2 Rodebaugh was charged with misdemeanor battery and disorderly conduct relating to a domestic incident involving the woman Rodebaugh lived with, E.S. The trial began the morning of September 1, 2011. Jury selection began at 9:00 a.m., and the jury was sworn in at 10:18 a.m. Following a break, and out of the presence of the jury, the prosecutor informed the court at 10:34 a.m. that the alleged victim, E.S., had not appeared.

¶3 The circuit court issued a body warrant for E.S., indicating that law enforcement should attempt to locate E.S. that morning. The prosecutor and Rodebaugh's counsel gave opening statements. Afterward, at 11:13 a.m., and again out of the presence of the jury, the court inquired as to the progress in locating E.S. The prosecutor stated that deputies were actively searching for her. The court ordered a recess, and the parties returned at 12:23 p.m. The prosecutor informed the court that deputies had checked several addresses and had been in contact with some people who might know E.S.'s whereabouts, but had not been able to find her.

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[1] Rodebaugh petitioned this court for leave to appeal the non-final order addressed in this appeal. Rather than issue a separate order granting that petition, I do so here. As will be readily apparent from the opinion, the criteria for granting a petition for an interlocutory appeal are met. This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶4 The prosecutor requested a continuance and there was a discussion as to whether to grant a continuance or a mistrial. The prosecutor informed the court that he or another person in his office would be able to try the case at any later date. Rodebaugh's counsel did not indicate any limitation except that, in a month's time, she would be "leav[ing]," an apparent reference to her leaving the local public defender's office. The only concern expressed on the record regarding the continuance option was Rodebaugh's counsel's concern that jurors might find out that Rodebaugh had more convictions than the court had ordered the jury should learn about.

¶5 The circuit court made inquiries that day and at a subsequent hearing regarding the events that led up to E.S. not appearing. The record reveals the following.

¶6 E.S. was personally served with a subpoena requiring her appearance at 9:00 a.m. on the day of trial. Two days before the start of trial, the prosecutor met with E.S. The prosecutor stated that E.S. was again living with Rodebaugh and was "a little hesitant," but that he told her it was "required" that she appear, and E.S. said she would.

¶7 On the morning of trial, the prosecutor was informed that E.S. had not arrived. He was uncertain whether he learned that information before or after the jury was sworn. Although the prosecutor could not recall, the circuit court made a finding on the topic based on its own observations. The court noted that it did not recall anyone approaching the prosecutor and there was no break in the proceedings prior to the time the jury was sworn. The court found that the prosecutor notified the court about E.S.'s absence "immediately" when the prosecutor found out.

¶8 The circuit court concluded that a manifest necessity justified ordering a mistrial and, therefore, ordered that Rodebaugh could be retried.

Discussion

¶9 After Rodebaugh's jury was sworn and jeopardy attached, the circuit court declared a mistrial. The issue here is whether the circuit court erred when it determined that the prosecutor met his burden of showing a "manifest necessity" supporting a mistrial without prejudice. *See* ***State v. Seefeldt***, 2003 WI 47, ¶¶16, 20, 261 Wis. 2d 383, 661 N.W.2d 822. For the reasons below, I conclude that the circuit court erred.

¶10 It was the prosecutor's burden to demonstrate that there was a manifest necessity for ordering a mistrial over Rodebaugh's objection. *See* ***id.***, ¶19. If Rodebaugh's trial was terminated without a manifest necessity, a second trial is not permitted. *See* ***id.***

¶11 The circuit court's decision on this issue is discretionary, but there is a question regarding what level of deference I should accord this decision. As the court in ***Seefeldt*** explained, there is a spectrum of deference, depending on the circumstances. *See* ***id.***, ¶¶20-34. Because the mistrial here was prompted by the failure of the State's key witness to appear, it may be that "strict scrutiny" of the circuit court's decision is required. *See* ***State v. Barthels***, 174 Wis. 2d 173, 184, 495 N.W.2d 341 (1993) ("The most stringent scrutiny is afforded 'when the basis for the mistrial is the unavailability of critical prosecution evidence.'" (quoting ***Arizona v. Washington***, 434 U.S. 497, 508 (1978)), *abrogated in part by* ***Seefeldt***, 261 Wis. 2d 383. On the other hand, I glean from ***Seefeldt*** that, under the particular facts here, something less than strict scrutiny might be appropriate. *See* ***Seefeldt***, 261 Wis. 2d 383, ¶¶20-34. However, I need not resolve this legal issue

because the State agrees with Rodebaugh that strict scrutiny is the appropriate standard, and I will abide by the agreement of the parties. Accordingly, I turn my attention to whether the State met its burden of showing a manifest necessity, and do so strictly scrutinizing the circuit court's decision. At the same time, I note that I would reach the same result unless required to grant a high level of deference to the circuit court's decision.

¶12 "'Manifest necessity' means a 'high degree' of necessity." ***Id.***, ¶19 (citation omitted). Whatever the precise meaning of a "high degree of necessity," it is not present here.

¶13 First, it is undisputed that either (1) the prosecutor knew before the jury was sworn that his key witness, E.S., had failed to appear at 9:00 a.m., as required by her subpoena, and remained a no-show at 10:18 a.m. when the jury was sworn, or (2) the prosecutor failed to check on E.S.'s status before acquiescing in the jury being sworn. Either scenario was not reasonable under the circumstances.

¶14 The charges arose from a domestic dispute. Prior to trial, the alleged victim, E.S., had resumed living with Rodebaugh. The prosecutor acknowledged that victims in these circumstances often "don't want to be there." And, although E.S. had told the prosecutor that she would appear, the prosecutor acknowledged that, two days before trial when he met with her, E.S. had resumed living with Rodebaugh and was "a little hesitant." Under these circumstances, a reasonable prosecutor would have been concerned that E.S. might not appear. It would have been a simple matter for the prosecutor to ask the circuit court for a short recess before the jury was sworn to check on E.S.'s status. This simple step would likely

have avoided putting the circuit court in the position of needing to make a mistrial decision.

¶15 Second, the record does not disclose in any detail why a short continuance was not attempted. The prosecutor requested a continuance, indicating that he or another prosecutor would be made available to try the case. Rodebaugh's counsel indicated that she was available for the next three weeks. The circuit court, in effect, estimated that it would take less than a half day to finish the trial. So far as the record discloses, on the day the mistrial was ordered, the availability of the continuance option meant that a mistrial was not yet necessary.[2]

¶16 The State argues that a manifest necessity existed because the prosecutor took all appropriate steps to ensure E.S.'s appearance and had even met with E.S. two days prior to trial, at which time E.S. said she would appear. This argument fails to address two simple facts. Regardless of the steps the prosecutor took to ensure E.S.'s appearance, there was good reason to suspect that E.S. might not appear and nothing prevented the prosecutor from checking on E.S.'s status prior to the time the jury was sworn. If the prosecutor had done so, and learned that E.S. was more than an hour late, he could have asked the court to delay

[2] I realize that the circuit court later learned that law enforcement had an ongoing problem locating E.S. But the question here is whether the facts, as they existed at the time the mistrial was ordered, created a manifest necessity.

swearing in the jury to give deputies some time to locate E.S. or, in the alternative, requested that the jurors be dismissed before jeopardy attached.[3]

¶17 I stress that this is not a circumstance in which the prosecutor sought to gain advantage or in any way intentionally disregarded Rodebaugh's double jeopardy rights. Rather, it appears to be a situation in which the prosecutor was insufficiently mindful of those rights. However, regardless of the prosecutor's thoughts or intentions, I cannot ignore the lack of a high degree of necessity for the mistrial. So far as I can tell, this situation could easily have been avoided.

¶18 Accordingly, I reverse the circuit court's order denying Rodebaugh's motion to dismiss, and remand to the circuit court with directions that the complaint be dismissed with prejudice.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.

[3] The State asserts that the circuit court "made a specific finding of fact that the prosecutor *could* not have known prior to the jury being sworn that the witness was not going to appear" (emphasis added). The circuit court, however, used the words "would not have known." In context, it is readily apparent that the circuit court was merely stating that the prosecutor did not in fact learn that E.S. had not appeared until after the jury was sworn. The court was not suggesting that the prosecutor could not have taken steps to learn about E.S.'s status prior to the time the jury was sworn.