COURT OF APPEALS
DECISION
DATED AND RELEASED

May 16, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 96-0130

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

IN THE INTEREST OF DAVID A. L.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

DAVID A. L.,

Respondent-Petitioner.

APPEAL from an order of the circuit court for Dane County: ROBERT A. DE CHAMBEAU, Judge. *Reversed and cause remanded with directions*.

DYKMAN, J. This is a single-judge appeal decided pursuant to § 752.31(2)(e), STATS. We granted David A.'s petition for leave to appeal a trial court order denying his motion to dismiss a delinquency petition. Section 808.03(2), STATS. David filed this motion after the court declared a mistrial at the State's request during his first trial. David argues that his motion to dismiss should have been granted because a second trial would violate the Double

Jeopardy Clause of the Fifth Amendment to the United States Constitution.[1] We conclude that the trial court erroneously exercised its discretion in declaring the mistrial because there was no manifest necessity for the mistrial. Consequently, David's motion to dismiss should have been granted. Accordingly, we reverse.

BACKGROUND

Dane County filed a delinquency petition alleging that David A. had sexually assaulted his younger cousin. At the outset of the trial, the trial court ordered that all witnesses be sequestered and remain outside of the courtroom and not discuss their testimony with one another. Several times during the trial, David objected to the introduction of various State evidence and moved for a mistrial when his objections were overruled.

At the end of the first day of testimony, David sought to introduce testimony about a dispute between his and the victim's parents to show that the victim may have fabricated his assertions at his parents' request. The trial court ruled that this testimony was inadmissible and David moved for a mistrial. The court denied the motion.

David's father was permitted to remain in the courtroom during this hearing. As the bailiff was locking the courtroom, he overheard David's father in the hallway complaining to some family members or friends about the judge's ruling on this matter. The bailiff also overheard another witness complaining about having to return the next day to testify. At least one juror was present in the hallway when these comments were made. The bailiff reported the incident to the judge.

The following morning, the judge called the parties into his chambers and told them about the incident. The State, believing that the trial court's sequestration order had been violated, moved for a mistrial. The judge

[1] The Fifth Amendment to the United States Constitution provides in pertinent part, "No person shall be ... subject for the same offence to be twice put in jeopardy of life or limb."

stated that he would not grant the motion until he had heard testimony from the bailiff.

At a hearing on the matter, the bailiff testified that he saw David's father in the hallway with some family members or friends and that there was "quite a bit of shouting going on back and forth." Believing that the jury was gone, he permitted them to "blow off steam." The bailiff could not remember exactly what was spoken, but generally understood that the people were upset with the judge and the court, that they felt that the judge did not want to hear the truth but only what the police officers had to say, and that two people in the group who had been waiting to testify were upset because they were not going to be permitted to testify that day. He also sensed that David's father believed that the judge did not care about his son and that David was not getting a fair trial. The bailiff then saw one of the jurors in the hallway who told the bailiff that he did not hear anything they said except that "the Judge called off the trial for today."

Based upon this evidence, the State argued that David's father violated the sequestration order by discussing what testimony the trial court would and would not admit. David objected, arguing that he did not believe that his father violated the sequestration order because the order prohibited discussions about witness testimony and there was no evidence that David's father specifically talked about any testimony. The judge, however, believed that there was a discussion of testimony or an inability to testify and that there was a "general melee outside of the courtroom which compromised the business of the courts." The judge admitted that he had noticed some commotion outside of the courtroom at the end of the day but he did not pay attention to what was being said. The judge ruled that the sequestration order had been violated "based on the best evidence we have." He reasoned,

it doesn't seem to me to be too much of a presumptive leap when

> [David's father] is one of the last witnesses testifies and then goes out into the hall and talks to other witnesses about the Judge not wanting to hear the truth and not wanting to hear the testimony that he has given or that they have given. That's discussing testimony. Period. I don't know how you can possibly put any other spin on it. That is discussing

> his testimony with another witness. That's what's precluded.

In deciding whether to grant a mistrial, he stated,

> My obligation is not only to see that the defendant has a fair trial. My obligation is also to see that the State of Wisconsin has a fair trial. [The State] by [its] motion and by implication has ... found [itself] in a position where the State, that where the Court is unable to assure the State of a fair trial. I racked my brain to try to figure out and try to think of something in my 30 years of experience that I could do to correct what has been done here, and I don't know what that is other than impanel a new jury. I just, I am at a loss. I can't think of a corrective measure. I have tried, I have, I have done so many in the past where there have been some corrective things that either I could do as a judge or before that other judges did in cases that I have been involved in, I can't think of what it is. It's not a matter of advising the jury to disregard something. That would be, that would probably be the easier thing to do because it's my belief that juries listen to judge's instructions, contrary to what a lot of people believe, but I think they do and I think they are able to accept that and perform their job here in a fair manner. But this doesn't involve the jury. This involves the witnesses. And it involves proceedings that went on in this courtroom that they were not to know about and do now know about to the disadvantage of the State. The playing field now, counsel, has tilted. It no longer is even. And I am unable to, to figure out a way to bring it back even other than not allow the defense witnesses to testify. If I did that that offends my sense of fairness and the ability of the young [defendant] to present a defense. I think he is entitled to that.

The judge added that he was concerned about the victim having to retestify in a new trial but because he could not assure the State of a fair trial, there was no corrective measure that he could take. He then declared a mistrial and David objected, arguing that there was no evidence that potential testimony had been tainted.

Subsequently, David moved to dismiss the petition against him arguing that retrial was prohibited by the Double Jeopardy Clause. The trial court denied his motion, reasoning that instructing the jury to consider the credibility of the witness was not necessary to deal with the violation and that declaring a mistrial was a manifest necessity. We granted David's motion for leave to appeal that nonfinal order.

DISCUSSION

The Fifth Amendment to the United States Constitution provides that a state may not put a defendant in jeopardy twice for the same offense. ***Arizona v. Washington***, 434 U.S. 497, 503 (1978). Jeopardy attaches when a witness is sworn in a trial to the court without a jury or when the jury selection is completed and the jury is sworn. Section 972.07, STATS.; ***State v. Barthels***, 174 Wis.2d 173, 182, 495 N.W.2d 341, 345 (1993). Because jeopardy attaches before the judgment becomes final, the constitutional protection "embraces the defendant's `valued right to have his [or her] trial completed by a particular tribunal.'" ***Arizona***, 434 U.S. at 503. The purpose underlying the prohibition against double jeopardy is that:

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him [or her] to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he [or she] may be found guilty.

Barthels, 174 Wis.2d at 181-82, 495 N.W.2d at 345 (quoting ***Green v. United States***, 355 U.S. 184, 187-88 (1957)).

The State asserts that David has waived, consented, or is judicially estopped from raising this issue because he made several motions for a mistrial earlier in the proceedings. We treat differently those mistrials granted at the defendant's request or consent, and those declared by the court *sua sponte* or at the State's request. ***United States v. Dinitz***, 424 U.S. 600, 607-08 (1976). A mistrial declared at the defendant's request "is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error." ***Id.*** at 607 (quoted source omitted). The State, however, may retry a defendant when a mistrial had been declared over the defendant's objections if it can demonstrate a "manifest necessity for the mistrial." ***Arizona***, 434 U.S. at 505. The reasoning for this rule is as follows:

> [W]hen judicial or prosecutorial error seriously prejudices a defendant, he [or she] may have little interest in completing the trial and obtaining a verdict from the first jury. The defendant may reasonably conclude that a continuation of the tainted proceeding would result in a conviction followed by a lengthy appeal and, if a reversal is secured, by a second prosecution. In such circumstances, a defendant's mistrial request has objectives not unlike the interests served by the Double Jeopardy Clause—the avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions.

Dinitz, 424 U.S. at 608.

After reviewing the relevant case law on this subject, we are persuaded that David did not consent to the mistrial. In ***United States ex rel. Russo v. Superior Court***, 483 F.2d 7, 11 (3d Cir.), *cert. denied*, 414 U.S. 1023 (1973), the defendant moved for a mistrial after learning that the jury was deadlocked. The trial court did not specifically rule on the motion but sent the jury to a motel for the evening. ***Id.*** The following day, without consulting either the defense or prosecution, the trial court granted a mistrial because the jury was exhausted. ***Id.*** The defendant objected to the mistrial after the jury had been dismissed. ***Id.***

In concluding that the defendant did not consent to the mistrial even though the trial court stated that it was granting the defendant's motion from the previous day, the court reasoned that the defendant's motion was made for reasons different than that upon which the court ruled, the defendant could have concluded that there was a strong possibility for a verdict and therefore his assessment of his chances for an acquittal changed, and the defendant had no opportunity to object when the court declared a mistrial. ***Id.*** at 16. The court wrote, "We see no reason to lock him into a motion once it is made." ***Id.***

Similarly, in ***United States v. Evers***, 569 F.2d 876, 878 (5th Cir. 1978), the defendant moved for a mistrial after the prosecutor elicited improper testimony. The defendant, however, withdrew his motion after deciding that he did not want to sit through another trial. ***Id.*** Nevertheless, the trial court granted the motion.

In concluding that the defendant had not consented to the mistrial, the court noted that there is "[a] clear distinction ... between mistrials granted at the request of the defendant, or with his consent, and those declared by the court *sua sponte*, with respect to whether the double jeopardy clause bars reprosecution." ***Id.*** The court reasoned that while the defendant initially moved for a mistrial, he unequivocally withdrew his motion prior to the time the trial court ruled. ***Id.***

In ***Jones v. Commonwealth***, 387 N.E.2d 1187, 1191 (Mass. App. Ct. 1979), *rev'd on other grounds*, 400 N.E.2d 242 (Mass. 1980), the trial court initially denied the defendant's motion for a mistrial but later granted it over the defendant's objections. In concluding that double jeopardy barred retrial, the court wrote:

> We think that in the circumstances of this case the mistrial should be treated as one declared *sua sponte* by the judge, despite his pronouncement that he was acting upon the defendant's written motion filed at the inception of trial. We see no reason to bind the defendant to that motion. The motion had been based on specific events occurring at an earlier stage in the proceedings. Our examination of the record

> indicates that the mistrial declared by the judge appears to have been based in large part upon events transpiring at trial after the Commonwealth and the defendant had rested, events primarily involving the judge and codefendant's counsel. *Furthermore, the defendant's counsel made his changed position clear to the judge immediately upon being apprised of the judge's intended action, and he unequivocally expressed a desire to continue with that particular jury, stating his belief that any prejudice against the defendant which might have existed in the jurors' minds had since abated.*

Id. at 1192 (citations omitted; emphasis added). The court concluded that the judge's revival of the defendant's mistrial motion "did not operate as consent by the defendant to the judge's declaration of a mistrial in substantially different circumstances." ***Id.*** at 1193.

Likewise, in ***United States v. Mastrangelo***, 662 F.2d 946, 948-50 (2d Cir. 1981), *cert. denied*, 456 U.S. 973 (1982), the trial court granted the defendant's mistrial motion even though it had earlier denied it. The court found no consent, concluding that the defendant had effectively withdrawn the motion. ***Id.*** at 950. *See also* ***United States v. Huang***, 960 F.2d 1128, 1134 (2d Cir. 1992) (no consent where defendants moved for a mistrial with an order barring retrial, the trial court stated that it would grant a mistrial without the order, the defendants objected and the trial court granted the mistrial anyway); ***United States v. Crotwell***, 896 F.2d 437, 438-39 (10th Cir. 1990) (no consent to a mistrial found when the defendant moved for a mistrial, changed his mind at a hearing on the matter but the trial court granted one anyway); and ***United States v. Kwang Fu Peng***, 766 F.2d 82, 84-85 (2d Cir. 1985) (no consent to a mistrial when the defendant expressly withdrew a motion for a mistrial that had been denied but the trial court declared one *sua sponte*).

In ***Lovinger v. Circuit Court***, 845 F.2d 739, 741-42 (7th Cir.), *cert. denied*, 488 U.S. 851 (1988), the defendant's motion for a mistrial was denied, but the trial court later declared a mistrial without giving the parties an opportunity to object. The court held that the defendant did not consent to mistrial despite his earlier motion because his motion was perfunctory, the court's mistrial was based on another ground, the court did not mention the earlier decision, and

that because of the State's "foibles," the defendant's assessment of his chances of acquittal may well have changed. ***Id.*** at 743-44.

Most recently, in ***Weston v. Kernan***, 50 F.3d 633, 635-36 (9th Cir.), *cert. denied*, 116 S. Ct. 351 (1995), the defendant moved for a mistrial and the trial court took it under advisement. The defendant also submitted a written motion for a mistrial. When the trial court granted the mistrial without prejudice, defense counsel interrupted the court, asking if he could confer with his client about the effects of a mistrial without prejudice. The trial court said it was too late and granted a mistrial. ***Id.*** at 636.

In concluding that there was no consent, the court stated: "A defendant's consent to mistrial may be inferred `only where the circumstances positively indicate a defendant's willingness to acquiesce in the mistrial order.'" ***Id.*** at 637 (quoted source omitted). Because the defendant wanted a dismissal with prejudice and objected when the mistrial without prejudice was announced, the circumstances clearly indicated that the defendant did not acquiesce to the mistrial. ***Id.***

In this case, while David did make several mistrial motions which were denied, his objection to the mistrial motion made by the State because of the violation of the sequestration order was unequivocal. Those earlier motions were based upon different events which occurred earlier in the proceedings and do not mean he waived his right to object to this particular motion. Furthermore, there is no evidence that David's father violated the sequestration in order to give David some advantage over the State. Under the circumstances, we cannot say that the mistrial was declared with David's consent. Accordingly, the court's decision must be evaluated using the manifest necessity test.

The manifest necessity test provides that "[c]ourts of justice [may] discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." ***Barthels***, 174 Wis.2d at 183, 495 N.W.2d at 346 (quoted source omitted). The test, however, is not literal, and a "high degree" of necessity must be found before a mistrial is appropriate. ***Id.***

Whether a "high degree" of necessity exists rests within the trial court's discretion because that court is in the best position to determine whether the state seeks a mistrial to gain unfair advantages over the defendant. ***Id.*** The standard by which we review the discretion exercised in granting a mistrial varies according to the facts of the particular case. ***Id.*** at 184, 495 N.W.2d at 346. If the state requests the mistrial, we give stricter and more searching scrutiny to the judge's decision than had the defendant requested or consented to it. ***Id.*** In exercising its discretion, the trial court must examine the circumstances leading to the state's motion and should consider the alternatives before depriving the defendant of the right to have the original tribunal render a final verdict. ***Id.*** at 185, 495 N.W.2d at 347. If we are presented with a close case, the Supreme Court advises us to resolve doubts about the propriety of a mistrial in favor of the liberty of a citizen. ***Russo***, 483 F.2d at 17.

In this case, the trial court concluded that the sequestration order had been violated based only on the bailiff's testimony as to the "gist" of the hallway discussions. It did not individually question the jurors to determine if any discussions about testimony had been overheard or the witnesses to determine exactly what they said to one another in the hallway. Then the court focused on its obligation to give the State a fair trial but did not consider David's right to have his case decided by the first jury which is empaneled. It considered giving a curative instruction but rejected that option because the problem involved witnesses and not the jury. The court was concerned about the jury hearing the fact that certain testimony would not be admitted but because it could not devise a measure to correct this matter, it granted a mistrial.

We conclude that the trial court erroneously exercised its discretion in this case. When granting a mistrial, the trial court is obligated to consider less drastic alternatives to remedy the problem. As David suggested, the trial court could have entered contempt orders for the violating witnesses; if specific testimony was discussed, the court could have instructed the jury to consider that fact in weighing credibility; and the court could have excluded tainted testimony if doing so would not have unduly prejudiced David's ability to present a defense. Had the court questioned the jurors or witnesses, it might have found that only one juror overheard any discussions and could have excused or admonished that juror and continued with the trial. The only thing the juror heard was that "the Judge called off the trial for today," something that all the jurors already knew. The court could have admonished the witnesses or limited their testimony. This would have been consistent with David's right to have the first jury empaneled decide this case.

The manifest necessity test is a high one. Examining the totality of the circumstances, we conclude that there was no manifest necessity for the mistrial. The fact that the sequestration order was violated does not, alone, warrant a mistrial absent a showing of prejudice. The record does not reveal facts from which we can conclude that the State was prejudiced by the witnesses' actions. We conclude that the trial court erroneously exercised it discretion in granting a mistrial. Accordingly, we reverse the order denying David's motion to dismiss.

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

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.