COURT OF APPEALS
DECISION
DATED AND FILED

November 19, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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.

Nos. 98-1416-CR
98-1417-CR

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

98-1416-CR
STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS BRIESKE,

DEFENDANT-PETITIONER.

98-1417-CR
STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID J. PIZZINI,

DEFENDANT-PETITIONER.

APPEALS from an order of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

PER CURIAM. Thomas Brieske and David J. Pizzini petition for leave to appeal from an order denying their motion to dismiss charges against them on double jeopardy grounds. We grant the petition and affirm the order of the circuit court.

The defendants were each charged with a controlled substance violation and were being tried together. After the first day of trial, the prosecutor told defense counsel that he had learned an additional page existed on a document that had been provided to the defense in discovery, and that the additional page was potentially exculpatory. Based on that new document, the trial court ordered the defendants' trials severed and declared a mistrial in the trial then underway. The defendants later moved to dismiss the charges against them on double jeopardy grounds. The motion was denied, and the defendants have petitioned for leave to appeal from that nonfinal order under RULE 809.50, STATS. We ordered that the record be forwarded to this court and that the parties brief the merits.

The parties agree as to the applicable law. When a defendant moves for mistrial on the ground of prosecutorial overreaching, double jeopardy may bar a second trial if the prosecutor's action was (1) intentional and (2) designed either to create another chance to convict because, for example, the first trial is going badly, or to prejudice the defendant's rights to successfully complete the criminal confrontation at the first trial, that is, to harass him by successive prosecutions. *See* ***State v. Quinn***, 169 Wis.2d 620, 624, 486 N.W.2d 542, 543-44 (Ct. App.

1992). Determination of the prosecutor's intent involves a factual finding that will not be overturned unless it is clearly erroneous. *See* ***id.*** at 626, 486 N.W.2d at 544.

The defendants argue that the prosecutor's conduct in this case was intentional. However, the circuit court found that the failure to provide the additional page was inadvertent. The prosecutor had explained that the additional page was kept in a separate police file that he was not given. The defendants argue several reasons why it would be reasonable to infer that the failure to provide the page was intentional. However, the existence of other reasonable inferences does not by itself make the finding erroneous. The defendants argue that the prosecutor's explanation is unreasonable, but the argument is based primarily on alleged facts that are not of record, such as the standard procedure of that office and the prosecutor's participation in the creation of the additional page. Based on the record before us, the court's finding was not clearly erroneous.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.