COURT OF APPEALS DECISION DATED AND FILED

September 30, 2003

Cornelia G. Clark
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 03-1360-CR **Cir. Ct. No. 02CM9472**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL J. JORDAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Reversed and cause remanded with directions.*

¶1 SCHUDSON, J.[1] Michael J. Jordan appeals from a nonfinal order denying his motion to dismiss the criminal complaint on double jeopardy grounds

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f), (3) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

after the trial court granted the State's motion for a mistrial during his jury trial.[2] This court concludes that the trial court erred in ordering the mistrial and, therefore, reverses.

I. BACKGROUND

¶2 According to the criminal complaint, at approximately midnight on November 15, 2002, Milwaukee Police were dispatched to 6718 West Warnimont Street, apartment 2, on a battery complaint. They knocked on the apartment door of Maria Cardosa, the 911-caller and Jordan's live-in girlfriend, but received no response. After knocking a second time, they "heard what appeared to be a [woman] screaming for help and … being choked." Police then kicked-in the apartment door and observed Jordan "standing in the middle of the room with his hands up in the air" and "Cardosa on the couch crying." Cardosa told police that Jordan had hit her and choked her. Jordan was arrested and charged with two counts of battery.

¶3 At the jury trial, the State did not call Cardosa to testify. Instead, the prosecutor called Officers Justin Sebestyen and Michael Wawrzyniakowski to testify about the events that occurred on November 15. Through their testimony the State offered Cardosa's statements under the excited utterance hearsay exception.

¶4 On the second day of trial, defense counsel called Cardosa. Her testimony differed substantially from her statements to the arresting officers. At

[2] This appeal is from a nonfinal order. Petition for Leave to Appeal was granted on May 23, 2003.

trial, Cardosa denied having been battered by Jordan. She testified that she had received her injuries in a bar fight with the girlfriend of Robert Diaz, the man with whom she (Cardosa) was having an affair. Cardosa explained that on the evening of November 14, she went to a bar to meet Diaz. On arrival at the bar, Cardosa saw Diaz sitting with another woman who became enraged when she saw her (Cardosa) and immediately began fighting with her.

¶5 After the bar fight, Cardosa returned to her apartment and woke up Jordan to tell him about it. Cardosa testified that Jordan then told her she had to move out of the apartment and threw her clothes out of their bedroom. Cardosa explained that she called police that night because Jordan's rejection had angered her and because she had assumed that he would only have to spend a night in jail. Defense counsel then asked Cardosa:

> Q. Did you have any contact with the District Attorney's Office after [Michael Jordan] was arrested?
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> A. The next day, someone called me.
>
> Q. And at that point, were you able to tell them what happened?
>
> A. He didn't really want to hear it. He said to me it didn't really matter if I came in and testified, or not, because they had enough evidence against him to convict him of this crime.

The State objected, requested a sidebar and, ultimately, moved for a mistrial.

¶6 The State's mistrial motion was based on the prosecutor's contention that she could not put on a rebuttal case because, in order to provide a full response to Cardosa's comments, she would have to become a witness. The prosecutor explained that prior to the trial, she had had contact with the victim at a hearing where the victim sought to modify the no-contact order; at that hearing she

had heard Cardosa's hoarse voice, which she believed was consistent with that of one who has been strangled. Jordan objected to a mistrial, arguing that the State could attack Cardosa's testimony either in rebuttal or on cross-examination. He also contended that the court could strike the testimony and offer a curative instruction.

¶7 The court granted the State's motion, concluding: (1) the mistrial was necessary; (2) it was caused by the defense; and (3) justice would not be served if the trial were permitted to proceed. Consequently, on April 1, 2003, Jordan, facing a new trial, filed a motion to dismiss the complaint on double jeopardy grounds. The trial court denied his motion.

II. ANALYSIS

¶8 The Wisconsin Supreme Court recently restated the principles governing the propriety of retrials following a mistrial:

> The Fifth Amendment to the U.S. Constitution and Article I, Section 8 of the Wisconsin Constitution protect a criminal defendant from being placed in jeopardy twice for the same offense. The underlying purpose for this protection against double jeopardy is to prevent the State from using its resources and power to make repeated attempts to convict a person for the same offense.
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> "Jeopardy" means exposure to the risk of determination of guilt. It attaches in a jury trial when the selection of the jury has been completed and the jury is sworn. Accordingly, the protection against double jeopardy includes a defendant's "valued right to have his trial completed by a particular tribunal."
>
> The protection against double jeopardy limits the ability of the State to request that a trial be terminated and restarted. This protection is important because the unrestricted ability of the State to terminate and restart a trial increases the financial and emotional burden on the defendant, extends the period during which the defendant is stigmatized by an unresolved accusation of wrongdoing

> and may increase the risk that an innocent defendant may be convicted.

State v. Seefeldt, 2003 WI 47, ¶¶ 15-17, ___ Wis. 2d ___, 661 N.W.2d 822 (quoted sources, citations, and footnote omitted). Given the importance of the constitutional protections against double jeopardy, *the State bears the burden of demonstrating a manifest necessity for any mistrial ordered over the defendant's objection*. ***Id.***, ¶19 A "manifest necessity" means a "high degree" of necessity. ***Id.***

¶9 Generally, in reviewing a mistrial order, this court first determines "the level of deference that attends a circuit court's mistrial order." ***Id.***, ¶20. The level varies according to the facts of the case. ***Id.***, ¶¶25 & 30. At one end of the spectrum are situations in which a mistrial is granted because a jury cannot reach a verdict, *see* ***id.***, ¶26, and in those instances, great deference is accorded to the trial court's decision, ***id.*** At the other end of the spectrum are cases involving the unavailability of critical prosecution evidence or involving the State's use of superior resources to harass the defendant to achieve a tactical advantage. In such cases, an appellate court applies the strictest scrutiny to a trial judge's mistrial order. ***Id.***, ¶25. Finally, irrespective of the level of deference due a trial court's mistrial order, an appellate court must satisfy itself that the trial judge exercised sound discretion in declaring a mistrial. ***Arizona v. Washington***, 434 U.S. 497, 514 (1978).

¶10 "Sound discretion means acting in a rational and responsible manner … and includes … acting in a deliberate manner taking sufficient time in responding to a prosecutor's request for a mistrial." ***Seefeldt***, ___ Wis. 2d ___, ¶36. A court fails to exercise sound discretion when it does not "consider the facts

of the record under the relevant law, bases its conclusion on an error of law or does not reason its way to a rational conclusion." ***Id.***

¶11 This court need not determine the exact level of deference due here because, regardless of the level, it is clear that the trial court did not exercise sound discretion in ordering the mistrial. *See* ***id.***, ¶34. The trial court granted the State's request for a mistrial because, it concluded, Cardosa's testimony regarding her conversation with a representative of the district attorney's office was prejudicial to the State. The court, however, failed to recognize that: (1) in all likelihood, Cardosa's statements were admissible, *see* WIS. STAT. § 908.01(4)(b)1 & 4; (2) even if not admissible, Cardosa's statements were *helpful to the prosecution* and, therefore, produced no prejudice requiring a mistrial; and (3) even if Cardosa's statements were considered prejudicial to the State, a mistrial was unnecessary because several other approaches could easily have addressed the problem.

¶12 Cardosa's statements were admissible as an admission of a party opponent. WISCONSIN STAT. § 908.01(4) provides:

> STATEMENTS WHICH ARE NOT HEARSAY. A statement is not hearsay if:
>
> . . . .
>
> (b) *Admission by party opponent.* The statement is offered against a party and is:
>
> 1. The party's own statement, in either the party's individual or a representative capacity, or
>
> . . . .
>
> 4. A statement by the party's own agent or servant concerning a matter within the scope of the agent's or servant's agency or employment, made during the existence of the relationship[.]

Clearly, the statement from the representative of the district attorney's office was his or her "own statement" in "[his or her] representative capacity" and, therefore, was not hearsay. *See* WIS. STAT. § 908.01(4)(b)1. *See also* ***State v. Benoit***, 83 Wis. 2d 389, 402, 265 N.W.2d 298 (1978) (under § 908.01(4)(b)1, any prior out-of-court statements by a party, whether or not they are "against interest" are not hearsay). As such, it was admissible if it was relevant, *see* WIS. STAT. § 904.01, and if its probative value was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or delay, *see* WIS. STAT. § 904.03.

¶13 Even if, in the trial court's estimation, Cardosa's statements were not admissible, a mistrial still was not warranted. *See* ***State v. Bunch***, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995) (Not all errors warrant a mistrial and the "law prefers less drastic alternatives, if available and practical."). After all, a recanting witness's declaration that a prosecutor considered the evidence sufficient for conviction even without the witness's testimony is, in every apparent way, *helpful to the prosecution*. Indeed, as *the State concedes on appeal*:

> There is an alternative interpretation of Ms. Cardosa's statement that would make it prejudicial to Mr. Jordan and not the State. Ms. Cardosa is communicating to the jury an assessment of the State's case as circumstantially very strong, and attributing that assessment to the District Attorney's Office. Defense counsel elicited testimony regarding this opinion that the evidence was strong enough to convict Mr. Jordan without Ms. Cardosa's cooperation. In fact, the trial strategy of the assistant district attorney, to avoid calling Ms. Cardosa and try the case by presenting the other evidence, (the "911" tape of Ms. Cardosa's call to the police, the "911" log of the her call, the photos of Ms. Cardosa's injuries, the officers' testimony about hearing an apparent muffled scream and [an] apparent female screaming for help, their discovery of Ms. Cardosa crying and Mr. Jordan standing with his hands in the air), supports this view.
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> . . . Although the comment came in through a witness called by the defense, it was being attributed to

> someone in the District Attorney's office. Such a statement would clearly be objectionable and prejudicial to the defense had it been made by a witness called by the prosecution.

¶14 Finally, even if, somehow, Cardosa's statements would be deemed prejudicial to the State, the available options included: (1) cross-examination—to emphasize why, even without Cardosa's testimony, the prosecutor deemed the evidence sufficient; (2) cross-examination—to impeach Cardosa's statement (if, in fact, the prosecutor did not agree with Cardosa's account); (3) a stipulation—to present what the trial prosecutor would have said about her conversation with Cardosa had she become a witness in the case; (4) substitution of another prosecutor—to allow the first trial prosecutor to become a witness; (5) no action—in recognition of the relative insignificance of Cardosa's comment; and (6) striking the comment and instructing the jury to disregard it.

¶15 Clearly, and as virtually conceded on appeal, the State failed to meet its burden of establishing a "manifest necessity" for the termination of the trial. *See* ***Seefeldt***, ___ Wis. 2d ___, ¶43. Consequently, the trial court, in not recognizing that the testimony was, in all likelihood, admissible, helpful to the State, and relatively insignificant, and in not utilizing any of several readily available options (any of which would have obviated any conceivable need for a mistrial), failed to exercise sound discretion in ordering the mistrial. Accordingly, this court reverses the circuit court's order and remands with directions to dismiss the complaint.

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

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