COURT OF APPEALS
DECISION
DATED AND RELEASED

September 18, 1996

No. 96-1343

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

In the Interest of Joseph J.J.,
A Person Under the Age of 18:

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH J.J.,

Defendant-Appellant.

APPEAL from an order of the circuit court for Kenosha County: MARY KAY WAGNER-MALLOY, Judge. *Affirmed and cause remanded*.

NETTESHEIM, J. Joseph J.J. appeals from a nonfinal juvenile court order in a delinquency proceeding denying his motion for dismissal based on double jeopardy grounds. Joseph claims that a retrial following the court's grant of the State's mistrial motion will violate his double jeopardy rights. We grant Joseph's petition for leave to appeal the nonfinal

order. However, we reject Joseph's argument because he consented to the State's mistrial request. We affirm the order.

FACTS

The facts are undisputed. Joseph was arrested and charged with one count of possession of cocaine contrary to §§ 161.16(2)(b)1 and 161.41(3m), STATS., 1993-94. During the jury trial, under direct examination by the State, Officer Michael Wilkinson testified that the area of Joseph's arrest was a high crime area, that he knew Joseph by name and that he had prior contact with Joseph.

Fearing that this line of questioning suggested to the jury that Joseph had been previously arrested, Joseph's counsel asked Wilkinson on cross-examination if he had ever arrested Joseph for a different offense. Wilkinson testified that he had not. The State objected to this exchange, claiming that the questions were "improper" and "unethical." Joseph's counsel responded that the question was necessary to establish how Wilkinson knew Joseph. The juvenile court sustained the objection and struck Wilkinson's answer.

On these same grounds, the State also moved for a mistrial.[1] The court held the motion in abeyance over the noon recess.

[1] The State argued that Joseph's questions and Wilkinson's answers suggested to the jury that

During the recess, the State learned that Wilkinson's answer on cross-examination was incorrect and that he had, in fact, previously arrested Joseph. Based upon this added information, the State pursued its mistrial request. Joseph's counsel responded that although she did not believe that grounds for a mistrial existed, she nonetheless would not oppose the State's motion. The juvenile court granted the State's mistrial request and ordered a new trial. Joseph challenged the retrial, arguing that it violated his protection against double jeopardy. The juvenile court denied the challenge. Joseph appeals.

DISCUSSION

The double jeopardy provisions of the United States and Wisconsin Constitutions protect a defendant from being twice put in jeopardy for the same offense. *See* U.S. CONST. AMEND. V; WIS. CONST. ART. I, § 8. When the State moves for a mistrial over the objection of the defense, a trial court may not grant the motion unless "there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." ***State v. Copening***, 100 Wis.2d 700, 709, 303 N.W.2d 821, 826 (1981) (quoting ***United States v. Perez***, 22 U.S. (9 Wheat.) 579, 580 (1824)).

(..continued)
Joseph was "Mr. Perfect and this is the one little mistake he made and they're going to give him a break regardless of evidence."

However, a "manifest necessity" analysis is not required when a defendant requests a mistrial or consents to one, ***United States v. Dinitz***, 424 U.S. 600, 608 (1976), unless the government or court intentionally provokes the defendant to move for a mistrial. ***Oregon v. Kennedy***, 456 U.S. 667, 678-79 (1982). A defendant may expressly or impliedly consent to the declaration of a mistrial, and thereby be retried without violating the double jeopardy clause of the United States Constitution. *See* ***Wheeler v. State***, 87 Wis.2d 626, 629-30, 275 N.W.2d 651, 653 (1979). With this law in place, we now turn to the facts of this case.

We begin with a collateral observation. As part of its response to Joseph's appellate challenge, the State renews its argument made in the juvenile court that Joseph's cross-examination of Wilkinson was improper and unethical. We disagree. The State's direct examination of Wilkinson established that Joseph's arrest in this case occurred in a high crime area, that Wilkinson had previously made arrests in this area and that he had previous contact with Joseph. From this, a jury could reasonably infer that Wilkinson may have previously arrested Joseph. With this seed of suspicion in place, Joseph was entitled to pursue and clarify this matter on cross-examination. Therefore, we do not agree with the State that Joseph's cross-examination was either improper or unethical.[2] Thus, there was no manifest necessity for a retrial. Were the question that simple, we would reverse the juvenile court's order allowing a retrial.

[2] In the later proceeding on Joseph's motion to dismiss, the juvenile court appeared to agree with this assessment.

However, in response to the State's mistrial motion, Joseph's counsel stated:

> [DEFENSE COUNSEL]: My belief at the time I asked those questions was that the door had been opened to how this officer got—how he knows my client. If that was improper, it was not meant to be unethical, but *I would not oppose any mistrial motion at this point*.
>
> ….
>
> THE COURT: Okay. Much against my own wishes, the Court will grant the mistrial.
>
> ….
>
> [DEFENSE COUNSEL]: Your Honor, to make the record again, I'm not conceding that these are grounds for mistrial. *I am not opposing the motion for a mistrial*. … No, I don't think that that's grounds for a mistrial, but *I am not opposing* [the motion for mistrial]. [Emphasis added.]

Although these remarks demonstrate that Joseph's counsel did not believe that grounds for a mistrial existed, it is clear that she did not oppose the State's request on the ultimate issue before the court—whether a mistrial should be granted. That concession authorized (perhaps even invited) the juvenile court to order a retrial. Now, on appeal, Joseph argues against the retrial order. A party will not be heard to argue one way in the trial court and the opposite way on appeal. *See* ***Coconate v. Schwanz***, 165 Wis.2d 226, 231, 477 N.W.2d 74, 75 (Ct. App. 1991). To the contrary, a party is judicially estopped from employing such appellate strategy. *See* ***id***.

In further support of his argument, Joseph points to cases in which mistrial rulings have been upheld when the defendant remained silent on the mistrial request.[3] Because he voiced his doubt that there were grounds for the mistrial, Joseph argues that these cases suggest a different result here. We agree with Joseph that we have much more than silence in this case. However, the statement which we deem controlling is not Joseph's belief that grounds for a mistrial were not present, but rather his express representation that he did not object to the State's request for a mistrial.

Joseph also argues that the State engaged in prosecutorial overreaching when it requested a mistrial after the juvenile court had already remedied the situation by striking the testimony. However, prosecutorial overreaching applies when the behavior of the prosecutor was designed to goad the defendant into moving for mistrial. *See* ***State v. Quinn***, 169 Wis.2d 620, 624, 486 N.W.2d 542, 543-44 (Ct. App. 1992). Here, the State, not Joseph, moved for a mistrial.

In his reply brief, Joseph's counsel, who was also his trial counsel, asks that we declare her representation of Joseph to be ineffective assistance of counsel. However, this issue is waived because it was not raised in the juvenile court. *See* ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App.

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[3] *See, e.g.*, ***United States v. Puleo***, 817 F.2d 702, 705 (11th Cir.) (consent implied where trial judge expressed intent to declare a mistrial and the defendant was given the opportunity to object but failed to do so), *cert. denied*, 484 U.S. 978 (1987); ***Camden v. Circuit Court of Second Judicial Circuit***, 892 F.2d 610, 614-15 (7th Cir. 1989) (where defendant had the opportunity to object to a mistrial but fails to do so, the right to object to a second trial is deemed waived), *cert. denied*, 495 U.S. 921 (1990).

1979). Nonetheless, we are not prepared to say that counsel's failure to oppose a mistrial request, even where counsel harbors doubts as to the grounds, necessarily constitutes ineffective assistance of counsel. Gaining a mistrial may sometimes inure to the benefit of a defendant.

By the Court.—Order affirmed and cause remanded.

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