COURT OF APPEALS
DECISION
DATED AND FILED

July 8, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP13-CR **Cir. Ct. No. 2007CF30**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGG B. KANDUTSCH,

DEFENDANT-PETITIONER.

APPEAL from an order of the circuit court for Marathon County: PATRICK M. BRADY, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Gregg Kandutsch appeals an order denying a motion to dismiss on the basis of double jeopardy.[1] Because we conclude the circuit court appropriately determined there was a manifest necessity for granting a mistrial in Kandutsch's first trial, we affirm the order.

Background

¶2 Kandutsch was charged with operating while intoxicated as a fifth or subsequent offense, criminal damage to property, and criminal trespassing with a domestic abuse enhancer. He allegedly went to the home of his estranged wife, Jennifer Heilman, and broke through the locked door's glass in order to gain entry. A divorce was pending at the time, and the family court had entered a temporary order stating, as relevant here, that the parties do not rent a residence together and Heilman was responsible for her own rent. Further, with regard to the couple's daughter, Heilman was granted sole legal custody and primary placement. Kandutsch was granted visitation every other Saturday or Sunday for two hours at a supervised site. The order also states that the parties "are restrained from interfering with the personal liberty of the other" and "are prohibited from interfering in the parental rights of the other." Prior to the trial in this case, Kandutsch and the State stipulated they would avoid discussing the details of Kandutsch's relationship with, and estrangement from, Heilman.

[1] Kandutsch petitioned this court for leave to appeal the non-final order. By order dated January 4, 2008, we ordered briefing on the double jeopardy issue and the propriety of granting leave. Having considered the petition and the briefs, IT IS ORDERED that leave to appeal is granted. Because we also determine that the merits have been appropriately briefed, we will decide the issue. *See* WIS. STAT. § 808.03(2)(a). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶3 During opening statements, Kandutsch's attorney told the jury that

> there were no documents or no orders or nothing that [Kandutsch] could not occupy that residence at any point.
>
> There were no documents or restraining orders or temporary orders or anything that said [Kandutsch] could not come upon the premises at any point.
>
> There was nothing that precluded [Kandutsch] from seeing his daughter.

The State objected. It argued counsel was violating the pretrial stipulation because such assertions would force discussion of the family court order and circumstances of the divorce. Further, the State asserted, counsel was misrepresenting the order. The State pointed out that although there were no restraining orders issued, the family court order nevertheless effectively separated the residences—Kandutsch was residing with his mother, not with Heilman. Further, while counsel claimed nothing prevented Kandutsch from seeing his daughter, the family court had specifically set supervised visitation for two hours every other weekend.

¶4 Defense counsel responded that the question was whether Kandutsch was "illegally at the location or was in fact he there under legal and proper circumstances" and, thus, he was merely getting to the defense that Heilman had invited Kandutsch to the home. The State countered that counsel "went beyond talking about whether he had been asked to come to the property that night and went into there was nothing stopping him from seeing his daughter."

¶5 After lengthy discussion, the court concluded defense counsel had given information to the jury contrary to the pretrial agreement and, further, the information was misleading. The court ultimately concluded it had no choice but to declare a mistrial and did so on its own motion. Kandutsch objected.

¶6 Before the second trial began, Kandutsch moved to dismiss on the basis of double jeopardy. He argued that the family court order merely created a factual dispute over whether Kandutsch was lawfully on the premises and counsel indicated he would make an identical statement to a new jury. The court reiterated that counsel had "clearly misrepresented to the jury the state of the court order with respect to [Kandutsch] and totally misrepresented the situation to them…." The court subsequently entered a written order denying the motion on the basis of defense counsel's misrepresentation of the order and violation of the pretrial stipulation. Kandutsch sought an interlocutory appeal, and we ordered briefing on the merits of the double jeopardy argument.

Discussion

¶7 The Fifth Amendment to the United States Constitution and Article I, Section 8 of the Wisconsin Constitution provide that a defendant may not be put in jeopardy twice for the same offense. ***State v. Moeck***, 2005 WI 57, ¶33, 280 Wis. 2d 277, 695 N.W.2d 783. "'Jeopardy' means exposure to the risk of determination of guilt." ***Id.***, ¶34. It attaches after a jury has been sworn. ***Id.*** The protection against double jeopardy includes the defendant's right to have his or her trial completed by a particular tribunal. ***Id.***

¶8 The protection also limits the ability of the State to request that a trial be ended and restarted. ***State v. Seefeldt***, 2003 WI 47, ¶17, 261 Wis. 2d 383, 661 N.W.2d 822. Otherwise, the unrestricted ability of the State to stop and restart a trial would increase the financial and emotional burden on the defendant, extend the period of stigmatization incurred by an unresolved accusation of wrongdoing, and may increase the risk an innocent defendant will be convicted. ***Id.***

¶9 However, a defendant's right to have his or her trial concluded by a particular tribunal may, under certain circumstances, be "subordinated to the public interest in affording the State one full and fair opportunity to present its evidence to an impartial jury." ***Id.***, ¶19. Thus, "the prohibition against retrial is not a mechanical rule to be applied to prevent any second trial after the first trial is terminated prior to judgment." ***Id.***, ¶18. One of these circumstances is when defense counsel engages in "gamesmanship" in the opening statement. *See* ***Moeck***, 280 Wis. 2d 277, ¶¶62, 68.

¶10 Nevertheless, the State must demonstrate a "manifest necessity" for any mistrial granted over the defendant's objection. ***Seefeldt***, 261 Wis. 2d 383, ¶19. Otherwise, the double jeopardy protection prevents retrial. *See* ***id.*** Manifest necessity means a "high degree" of necessity. ***Id.***; *see also* ***Arizona v. Washington***, 434 U.S. 497, 506 (1978). The court need not explicitly find manifest necessity provided the record sufficiently justifies such a finding. ***Washington***, 434 U.S. at 516-17. Whether manifest necessity exists is a fact-intensive question. ***Moeck***, 280 Wis. 2dd 277, ¶37. The level of deference afforded the trial court depends on the facts of each case. ***Id.***, ¶41. When, as here, the mistrial is based on defense counsel's opening statement, the court's determination "is entitled to special respect," although we must still be satisfied the court exercised its "sound discretion" in declaring the mistrial. ***Id.***, ¶¶41-42 (citation omitted).

¶11 Sound discretion requires the court to act deliberately and in a "rational and responsible manner." ***Id.***, ¶43. The court must give both parties a full opportunity to explain their positions, and should consider alternatives such as a curative instruction or sanctioning counsel. ***Id.*** The court should also ensure that the record reflects that there is an adequate basis for a finding of manifest

necessity. ***Id.*** Sound discretion is not exercised if the circuit court fails to consider the facts of record under the relevant law, bases its conclusion on an error of law or does not reason its way to a rational conclusion. ***Id.***

¶12 The State complained about counsel's opening statement. An opening statement is limited in purpose and scope. "It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument." ***United States v. Dinitz***, 424 U.S. 600, 612 (1976) (Burger, C.J., concurring). Counsel asserts that he was merely stating what the available evidence would show. The State counters, however, that counsel made "an opening statement that not only promised evidence that could not be produced but was patently false and made with intent to mislead."

¶13 "To make statements which will not or cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct." ***Id.*** Defense counsel "should not allude to any evidence unless there is good faith and [a] reasonable basis for believing such evidence will be tendered and admitted…." ***Moeck***, 280 Wis. 2d 277, ¶63 (citation omitted). Nor should counsel "allude to any matter that … will not be supported by admissible evidence." ***Id.*** (quoting SCR 20:3.4(e)). It is "fundamentally unfair to an opposing party to allow an attorney, with the standing and prestige inherent in being an officer of the court, to present to the jury statements not susceptible of proof but intended to influence the jury in reaching a verdict." ***Dinitz***, 424 U.S. at 612. "An improper opening statement unquestionably tends to frustrate the public interest in having a just judgment reached by a particular tribunal." ***Washington***, 434 U.S. at 512. Thus, the trial court "is under a duty, in order to protect the integrity of the trial, to take

prompt and affirmative action to stop such professional misconduct." ***Dinitz***, 424 U.S. at 612.

¶14 Indeed, misconduct of a defendant's attorney can often be the catalyst for manifest necessity required to declare a mistrial. *See* ***Quinones v. Florida***, 766 So.2d 1165, 1170 (Fla. Dist. Ct. App. 2000) (collecting cases); ***Moeck***, 280 Wis. 2d 277, ¶68. When the offending party is defense counsel, we are presented with a particular difficulty, because while there are institutional safeguards against the State's misconduct, there is no concomitant solution for defense counsel's misconduct. *See* ***Quinones***, 766 So.2d at 1170-71.

¶15 Here, the trial court properly exercised its discretion in granting a mistrial over Kandutsch's objection.[2] The court sent the jury from the courtroom so the court could address the State's objection to Kandutsch's opening, then gave both parties a full opportunity to argue their positions and make a full record. Kandutsch's attorney conceded there had been an agreement reached during a motion in limine hearing not to bring up details of the estranged spouses' relationship, but contends his comments were not misleading. We disagree.

¶16 The State claims counsel's representations—that there were no documents or orders stating that Kandutsch could not occupy or come upon the premises of Heilman's apartment and there was nothing precluding him from

[2] At the close of the hearing following the State's objection, the court clarified that it was granting the mistrial on its own motion, yet Kandutsch later argued it was disingenuous of the State to claim it had not requested a mistrial. For purposes of the appeal, it is irrelevant whether the State requested the mistrial or the court granted it on its own motion; the key point is that the mistrial was granted over Kandutsch's objection.

seeing his daughter—were patently false in light of the family court order.[3] Kandutsch asserts the jury is entitled to interpret the order and make a determination of fact. We agree with the State because, as far as the meaning of the family court order goes, there is no room for interpretation.

¶17 Interpretation of the written order is a question of law. *See* ***City of Wis. Dells v. Dells Fireworks***, 197 Wis. 2d 1, 23, 539 N.W.2d 916 (Ct. App. 1995); ***Levy v. Levy***, 130 Wis. 2d 523, 528-29, 388 N.W.2d 710 (1986). The family court order indicates the parties did not reside together and Heilman was solely responsible for the rent while Kandutsch went to live with his mother. There is only one interpretation here: the apartment was Heilman's home, not Kandutsch's. It should go without saying that individuals have an inherent right to be secure in their homes from trespass, against the rest of the world, whether there is a restraining order or not. This does not preclude Kandutsch from arguing Heilman invited him to her home. Rather, it prevents counsel from making an erroneous assertion to the jury that in the absence of a court order preventing him from doing so, Kandutsch was free to come and go as he pleased.[4]

¶18 Further, Kandutsch argues that the portion of the order saying neither parent shall interfere with the parental rights of the other means that he had a right to visit his daughter whenever she asked him to. Kandutsch is mistaken.

[3] That Kandutsch's attorney may earnestly believe the temporary order is subject to interpretation does not make it so, particularly with regard to any claim of free access to the child at Heilman's residence.

[4] The State also pointed out that Kandutsch had admitted violating restrictions of his electronic monitoring when he left his mother's home and went to Heilman's apartment. However, we are not convinced that this evidence would be admissible and we therefore give it no weight in our analysis.

His parental rights are not unfettered; the court order limited his visitation right to two hours every other weekend at a supervised location—specifically, the Family Resource Center, not Heilman's home. Under the court order, Heilman could not prevent that visitation, but Kandutsch is not entitled to visit his daughter whenever he wishes or whenever the minor child asks him to. Thus, his attorney's representation to the jury that nothing prevented Kandutsch from seeing his daughter was, in fact, false.

¶19 Kandutsch contends the court failed to consider alternatives to a mistrial. *See* ***Moeck***, 280 Wis. 2d 277, ¶43. However, Kandutsch admitted at the motion hearing that the State had only one real remedy—mistrial. Further, we are not convinced that, at the time the State objected, the alternative of sanctions against defense counsel would have been appropriate. More significantly, the court was in fact concerned with the difficulty of erasing counsel's comments from jurors' minds, even with a curative instruction. We give special deference to the trial court's consideration of jury taint, as it is in the best position to evaluate jurors and their demeanors and the likely impact of counsel's inappropriate comments.[5] The court permitted both parties to have their say and make a record, considered alternatives to a mistrial, and properly exercised its discretion in concluding a manifest necessity warranted a mistrial. Thus, a new trial is not barred by double jeopardy.

[5] Counsel argues that the court cannot grant a mistrial simply because he violated a court order. *See* ***State v. Seefeldt***, 2002 WI App 149, ¶1, 256 Wis. 2d 410, 647 N.W.2d 894. The mistrial here was not granted solely on the basis of violating a court order. The court also ruled that counsel had made misrepresentations to the jury.

By the Court.—Order affirmed.

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