COURT OF APPEALS
DECISION
DATED AND FILED

April 29, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2189-CR **Cir. Ct. No. 2006CF159**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONESSA T. DAVIS, SR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Fond du Lac County: DALE L. ENGLISH, Judge. *Reversed and cause remanded with directions.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 SNYDER, J. Donessa T. Davis, Sr. appeals from a nonfinal order granting a mistrial on a finding of manifest necessity and denying Davis' motion to dismiss with prejudice. He argues that the circuit court erroneously granted the

mistrial. Davis contends that, because the jury was selected and sworn, a new trial would expose him to double jeopardy. We agree with Davis and reverse the order of the circuit court. We direct that, because a new trial would subject Davis to jeopardy a second time for the same offense, the complaint must be dismissed with prejudice.

BACKGROUND

¶2 Davis was charged with one count of repeated sexual assault of a child, for conduct that allegedly occurred in the fall of 2004. A jury trial was set for July 15, 2008, and the parties appeared that morning in circuit court. The court first took up a preliminary issue regarding the admission of audiotape evidence, procedures for voir dire, preliminary jury instructions, and other pending motions. The court then suggested that, because additional research was needed on the audiotape issue, it would make sense to send the jurors home for the day. The court took a break so that Davis could consider the suggestion.

¶3 After the break, the circuit court explained that it might be more efficient to select the jury right away, in order to avoid having the entire jury pool reconvene the next day for voir dire. The State responded as follows:

> [Prosecutor]: Your Honor, I have no objection to that. In full candor to the Court, our witnesses are not here. Neither are the Defense witnesses. So I think it's an issue for both of us to secure their presence here. So it naturally does not at all bother me or I think [defense counsel] to secure their whereabouts and get them here so if we need an adjourned date we can give it to them and make sure they're here. That's not a problem. I think it best that we appropriately address the issues that we have regarding the recording.

¶4 The court decided it would be prudent to look a bit further into the evidentiary issue and indicated that the matter "may reconvene later this afternoon

for an offer of proof as to the recording." The jury was then selected and sworn and then released for the day so that the court and the parties could further address evidentiary matters. Jeopardy attached when the jury was selected and sworn. *See* WIS. STAT. § 972.07(2) (2007-08).

¶5 Court reconvened that afternoon to address admissibility of the audiotape. After arguments, the court decided to grant Davis' motion to suppress the audiotape evidence. The court ended the day's proceedings by stating, "[W]e'll start at 8:30 [tomorrow morning]. I will read the preliminary instructions to the jury. We'll have the openings and we'll go from there. It will be an interesting trial…. Be ready to go by 8:30."

¶6 The next day, July 16, when the court called the case, the prosecutor stated that, with the exception of a police officer, no witnesses for the State were present. She explained that the State had "made a lot of attempts to get in touch" with the witnesses, that the victim/witness coordinator had spoken to the witnesses, and that all but one witness had been confirmed to appear. Also, when the witnesses failed to appear the morning of July 15, which had been the original trial date, officers went to the residences of three witnesses but were unable to make contact. Follow up phone calls were also unsuccessful. Sheriff's deputies were expected to attempt contact early in the morning on July 16, but by the time the court proceeding started, there was no word that the deputies had made any contact with the witnesses.

¶7 During the ensuing on-the-record dialogue, the circuit court considered issuing bench warrants directing the witnesses to appear "without unreasonable delay." Donna Flechta, an assistant in the victim/witness department, testified that witnesses are first served with a mailed subpoena that

includes a return postcard to acknowledge service. In this case, the subpoenas were mailed on June 3, but no postcards were ever returned. Flechta stated that she had personally spoken to the mother of two of the witnesses on July 9 and was assured the two girls would be present at the trial on July 15. Flechta stated that she also called an adult witness and left a message the morning of July 9. Her call was returned by the witness just a couple of hours later and the witness confirmed she would appear. A fourth witness could not be found, despite an attempt at personal service by the sheriff's department, and therefore that witness was never notified of the trial.[1] Based upon this testimony, the court issued warrants for the witnesses.

¶8 The court took a recess to allow law enforcement officers to find the witnesses, and then reconvened later that morning with an update that the witnesses had not been located. After consultation with the parties and with law enforcement on the prospects for locating the witnesses, the court decided to reconvene after lunch to assess the situation.

¶9 That afternoon, the State, having failed to produce any witnesses, moved for a mistrial without prejudice. Davis opposed the motion. The court, citing case law, observed that jeopardy had attached once the jury was sworn and that prosecution before a new jury would be barred absent a finding of manifest necessity. The court's subsequent analysis was extensive and included the following observations:

> The offer of proof this morning was that the … District Attorney's office spoke to [one witness who] said she

[1] The State indicated that it would be prepared to go forward with the three witnesses who had been contacted, even if the fourth witness could not be located.

would be here. They spoke to, I think, the mother of the two minor witnesses in the last couple of days. She said they would be here….

….

They weren't here yesterday. They're not here today…. I don't know whether or not Mr. Davis is involved in this at all. I don't know why all of a sudden none of the witnesses would show up. I think one could draw inferences. I mean, I think a valid inference is, and I'm not saying that that's what happened, a valid inference is … Mr. Davis is facing a felony and is facing potential prison time and all of a sudden none of the witnesses show up. I mean, one could draw an inference that there's something there. It may not be. But it's certainly very strange to have every witness not show up for a trial.

….

To my way of thinking … if anything would constitute manifest necessity for a mistrial, this bizarre circumstance does…. Mr. Davis has the right to have his trial in front of the original tribunal; but the witnesses haven't shown up. As far as alternatives, I've issued warrants. We've kept the jury for a whole morning. Warrants are still outstanding so we're trying to get the witnesses here.

We could theoretically send the jury home, have them come back at 8:30 tomorrow and we pick the witnesses up overnight. From what I've been briefed by [law enforcement], at least as of this morning, things haven't been real promising as far as locating anyone…. [The State] doesn't think that in all likelihood anything is going to happen from this point forward.

….

Actually the State has done everything it could to get the witnesses here; sent the subpoenas out, followed up with them, talked to them as of a few days ago. Less than a week before, everything was set to go. And all of a sudden, nobody shows. And then additional efforts to get them here today failed.

….

I think that this, if anything, reaches a high degree of necessity where none of the witnesses show up and

> everything is set to go as of seven days before…. [T]his situation does constitute manifest necessity.

The court addressed the jury and released them from any further service on the case.

¶10 The next day, July 17, the witnesses appeared voluntarily in court. One explained that she did not appear for trial because she had not signed or returned the post card acknowledgement and had not been personally served. She believed that she was not required to appear. The other two witnesses, who are minors, said that they were told they did not have to appear. The court set a new trial date and ordered all three witnesses to appear.

¶11 At the close of the hearing, Davis moved for reconsideration of the order for mistrial and moved to dismiss the complaint with prejudice. The court continued the matter to August 11 and ultimately denied Davis' motion. The court stayed the proceedings to allow Davis to petition for leave to appeal. Because Davis presents a significant double jeopardy issue, we granted his petition.

DISCUSSION

¶12 The Fifth Amendment to the U.S. Constitution and Article I, Section 8 of the Wisconsin Constitution protect the accused from being placed in jeopardy twice for the same offense. This protection against double jeopardy is "to prevent the government from using its resources and power to make repeated attempts to convict a person for the same offense." ***State v. Seefeldt***, 2003 WI 47, ¶15, 261 Wis. 2d 383, 661 N.W.2d 822. The single issue on appeal is whether the circuit court erred when it granted a mistrial on a finding of manifest necessity. If so, a new trial on the same charges would place Davis in double jeopardy.

¶13 The level of deference we afford a circuit court's declaration of a mistrial depends upon the circumstances of the case. ***State v. Harp***, 2005 WI App 250, ¶10, 288 Wis. 2d 441, 707 N.W.2d 304.

> "[O]n review the test is whether, under all the facts and circumstances, giving deference to the trial court's first-hand knowledge, it was reasonable to grant a mistrial under the 'manifest necessity' rule." Trial courts considering a mistrial declaration … on the motion of the prosecutor should consider other alternatives before depriving a defendant of the valued right to be tried by the original tribunal. The amount of deference to be accorded to a trial court's mistrial declaration varies with the reason necessitating the mistrial. Where the mistrial was based on the unavailability of prosecution evidence, strict scrutiny is appropriate.

State v. Duckett, 120 Wis. 2d 646, 650, 358 N.W.2d 300 (Ct. App. 1984) (citations omitted). It is well established that "manifest necessity" means that a "high degree" of necessity is required before a mistrial is appropriate. ***Arizona v. Washington***, 434 U.S. 497, 506 (1978). Accordingly, "the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar" and that burden is a "heavy one." ***Id.*** at 505.

¶14 In ***Seefeldt***, 261 Wis. 2d 383, ¶35, our supreme court directed that, "[c]onsidering the double jeopardy interests, the reviewing court must … satisfy itself that the trial judge exercised 'sound discretion' in concluding that the State satisfied its burden of showing a 'manifest necessity' for the mistrial." With these standards in mind, we look to the facts of this case to determine whether the State met its burden to show manifest necessity and the circuit court exercised sound discretion in granting the mistrial.

¶15 The State emphasizes that the circuit court made extensive findings of fact regarding the State's efforts to contact its witnesses and secure their

appearance in court. The State mailed subpoenas and had telephone conversations with the three key witnesses to assure they would be at court for the trial. There is no suggestion that the State intentionally caused a delay to harass Davis or otherwise manipulate the efficient pursuit of justice. The State distinguishes the situation from earlier cases where the prosecutor knew or should have known that a key witness would not appear. For example, the State contrasts the instant case with that of ***State v. Barthels***, 174 Wis. 2d 173, 495 N.W.2d 341 (1993), *abrogated in part by* ***Seefeldt***, 261 Wis. 2d 383, ¶33. There, our supreme court held that where the undisputed facts demonstrated that the prosecutor did not act reasonably to assure the presence of an indispensable witness, it was error to declare a mistrial. ***Id.*** at 188-89. Here, the State asserts, it had made reasonable efforts to bring its witnesses to court and had every reason to believe that its witnesses planned to appear as instructed.

¶16 The State also attempts to distinguish the current facts from those in ***Downum v. United States***, 372 U.S. 734 (1963). There, the prosecution did not successfully bring its key witness, Rutledge, to court. ***Id.*** at 735. In ***Downum***, the prosecutor had sent approximately one hundred subpoenas to the U.S. Marshal's office for service. ***Id.*** On the eve of trial, the prosecutor learned that Rutledge had never been served; rather, Rutledge's wife had told the marshal that she did not know where Rutledge was but would be in touch if she found out. ***Id.*** Nonetheless, the State acknowledges that in ***Downum*** "the prosecutor knew when the jury was sworn that his key witness was not present and there was no reason to believe the witness would appear."

¶17 Davis asserts that ***Downum*** is not so different from his case. He asserts that an important premise of ***Downum***, that the State cannot complain of a problem it created itself, is applicable here. When the ***Downum*** Court confronted

the double jeopardy issue, the Court characterized the situation as "simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict." ***Downum***, 372 U.S. at 737. Observing that "[e]ach case must turn on its facts," the Court held double jeopardy prohibited the retrial of the defendant, because a jury had been empanelled, sworn, and discharged without reaching a verdict and without the defendant's consent. ***Id.*** at 737-38. The Court stated that "[t]he discretion to discharge the jury before it has reached a verdict is to be exercised 'only in very extraordinary and striking circumstances.'" ***Id.*** at 736.

¶18 We agree with Davis that ***Downum*** controls. On the first morning of trial, July 15, the State acknowledged on the record that none of its witnesses were present. Preliminary evidentiary matters were addressed while the jury pool waited. At approximately 10:10 a.m., with the State's acquiescence, jury selection began even though no witnesses had arrived in court. The record indicates that jury selection ensued at the suggestion of the court clerk, for the convenience of the potential jurors. The State made no objection. Just before noon, which would have been approximately three hours past the time the witnesses were to arrive, the court asked the State, "[I]s this the jury that's been selected?" The jury panel was sworn in as the court was about to break for lunch. Even though half the day had passed, and no witnesses had arrived, the State made no objection to the swearing in of the jury.

¶19 The U.S. Supreme Court stated that the constitutional protection against double jeopardy protects an accused from successive prosecutions or the declaration of a mistrial which affords the prosecution a more favorable opportunity to convict. *See* ***id.***; *see also* ***Burks v. United States***, 437 U.S. 1, 11 (1978) ("The Double Jeopardy Clause forbids a second trial for the purpose of

affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."). Our review of the record convinces us that the State did not carry its burden to demonstrate a manifest necessity for a mistrial. Like the ***Downum*** court, our focus here is on the State's decision to allow the jury to be selected and sworn without knowing the whereabouts of its witnesses.

¶20 The circuit court, in its rationale for granting the mistrial and for denying Davis' motion for reconsideration, focused on the efforts of the prosecution to secure the presence of its witnesses both before trial and on what would have been the second day of trial. However, the proper focus is on the State's willingness to select a jury, stand silently as that jury is sworn, allow jeopardy to attach, and to do so unprepared to go forward with its case.

¶21 Furthermore, we observe that reasonable alternatives to the mistrial were not fully considered. At the hearing on July 16, the circuit court was informed that law enforcement was actively trying to locate the three missing witnesses. The court took two breaks during the morning, and reconvened for updates at 10:30 a.m. and again at 1:30 p.m. That afternoon, the following dialogue took place as the State moved for a mistrial:

> [Prosecutor]: …. To be honest with the court, I don't like the idea of wasting the Court's time or resources for witnesses when I [have] a gut feeling they're not going to be here today or tomorrow…. However, I don't like the idea of a mistrial and kind of giving into the behavior of not showing up for court.
>
> The Court: Well, that would only be true if there wasn't further prosecution.
>
> [Prosecutor]: That is correct…. I'm kind of seeing some competing case law. The case that concerns me the most is the State vs. Barthel case. Barthel … indicates that generally jeopardy attaches when the jury is sworn in. And that because it was my burden to have our witnesses here,

> that we are precluded from having another trial on this nature.
>
> The other case law that I've … reviewed, and I know from experience, is that I believe the Court can delay a determination of whether or not it needs to attach prejudice now or let us investigate whether or not this was somehow caused by any particular person or party…. I would ask the Court to do [that] if there was going to be a mistrial at this time. I don't think we're doing anything efficient by having the jury sitting around anymore.
>
> The Court: All right. You wouldn't have [the jury] come back tomorrow either?
>
> [Prosecutor]: At this point, Your Honor, I don't think it would be in the interest of efficiency. I don't think they would be here. That's my gut feeling.
>
> The Court: All right. So you're moving for a mistrial at this point?
>
> [Prosecutor]: And I would ask that mistrial be with the caveat that we are allowed to retry the case.

The court then heard from Davis, who objected to the mistrial. There was no further discussion of alternatives, such as a continuance to the next day. Although the court's recital of the State's efforts to bring its witnesses to court is extensive, its on-the-record reference to possible alternatives is brief. Because significant double jeopardy concerns exist, the law requires serious consideration of alternatives to a mistrial. *See* ***Seefeldt***, 261 Wis. 2d 383, ¶38. The court, just that morning, issued warrants ordering the witnesses to court. Law enforcement officers were actively investigating the whereabouts of the witnesses. Nonetheless, the court gave little consideration to a continuance based on the "gut feeling" of the prosecutor that the witnesses would not appear. A court fails to exercise appropriate discretion without fully considering alternatives. *See* ***Barthels***, 174 Wis. 2d at 189 ("both the state and defendant are ill served when the possibility of a continuance is not weighed as an alternative").

¶22 The State's own critique of the ***Downum*** prosecutor fits neatly here: In ***Downum***, "the prosecutor knew when the jury was sworn that his key witness was not present and there was no reason to believe the witness would appear." Similarly, the State knew when the jury was sworn that its three key witnesses were not present and that there was no reason, after waiting three hours on the opening day of trial, to believe the witnesses would appear. The State knew that its subpoenas had never been acknowledged and should have been concerned enough to seek a continuance rather than to agree to empanel the jury. Jeopardy is not a casual concept and the State must not approach it without due consideration. Here, in the words of our supreme court, "The prosecutor [took] a chance and had to live with the consequences of [that] decision." *See* ***Barthels***, 174 Wis. 2d at 186.

CONCLUSION

¶23 The manifest necessity threshold is a high one. Based upon our review of the record and the totality of the circumstances, we hold that there was no manifest necessity justifying the mistrial. We therefore conclude that the circuit court erroneously exercised its discretion in granting the mistrial, and that a new trial would violate Davis' constitutional protection against double jeopardy. Accordingly, we reverse the order of the circuit court and direct that the complaint be dismissed with prejudice.

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

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