COURT OF APPEALS
DECISION
DATED AND FILED

June 24, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2975-CR **Cir. Ct. No. 99 CT 3956**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL JON JURKOVIC,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN SIEFERT, Judge. *Affirmed.*

¶1 FINE, J. Daniel Jon Jurkovic appeals from a judgment entered on a jury verdict convicting him of operating an automobile while intoxicated, as a fourth offense. *See* WIS. STAT. § 346.63(1)(a). That was his second trial for the same crime. The first trial ended because of a hung jury. After deliberating approximately one hour and twenty minutes, the jury in the first trial sent a note to

the trial court saying that it was deadlocked. The transcript reveals the following colloquy after the trial court's receipt of that note:

> THE COURT: The note that we have signed which I assume is by the foreman is we have a hung jury.
>
> How do the parties wish to proceed?
>
> [PROSECUTOR]: I think it's a little early for that, Judge.
>
> THE COURT: From the defense?
>
> [DEFENSE]: It's not a little early for --
>
> THE COURT: What --
>
> [DEFENSE]: I would say that if there is a hung jury, then it's a mistrial.
>
> They have declared a hung jury.
>
> They have not said they are having a problem getting a verdict. They say they are hung. Then I will move for dismissal or in the alternative, a mistrial.

¶2 The trial court then asked whether it should instruct the jury to continue their deliberations and try to reach a verdict. The State said, "that probably is a good idea." The defense lawyer objected, arguing that the trial court should not "brow-beat a jury into the evening."

> THE COURT: So the defense would be asking for a mistrial. If the motion to dismiss has not been granted – it's not been granted.
>
> [DEFENSE]: That's right.

The trial court granted Jurkovic's motion, over the State's objection.

> THE COURT: I have reached my decision. The defense has requested a mistrial.
>
> I will grant the defense's motion for a mistrial.
>
> [DEFENSE]: Thank you.

¶3 Although Jurkovic eagerly accepted the mistrial he requested, and although he never contended at the time that a retrial might be barred by double-jeopardy considerations, he now claims that his second trial was so barred. Thus, the question on this appeal is whether, under the circumstances here, a defendant may complain that a retrial violated his double-jeopardy rights when he has asked for and received a mistrial. We answer this question "no," and affirm.

¶4 The Wisconsin Supreme Court recently restated the principles that govern 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.
>
> "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). As in ***Seefeldt***, the general situation where double jeopardy bars a retrial is where the State asked for the mistrial. *See* ***id.***, 2003 WI 47 at ¶9. Thus, on the surface at least, the fact that

Jurkovic not only asked for the mistrial, but embraced it over the State's objection, would end the matter. But Jurkovic claims that the State *really* wanted the mistrial because the technician who analyzed Jurkovic's blood draw for its alcohol content could not appear for the first trial as the result of complications with her pregnancy. Accordingly, Jurkovic argues that the State improperly persuaded the trial court to make what in Jurkovic's view were evidentiary errors in order to subject Jurkovic to another trial.

¶5 Although Jurkovic uses much ink and many pages to spin his syllogism, it is but an uncooked meringue that sags under scrutiny because there is *no* evidence in the record that the State did what he claims it did, or that the trial court ruled as it did, to cause the mistrial. This is a prerequisite to application of the double-jeopardy bar.[1]

> In cases where the defendant affirmatively moves for a mistrial ... and the proceedings are terminated at defendant's request and with his consent, the general rule is that the double jeopardy protection is not a bar to reprosecution. The defendant, by seeking a mistrial has surrendered his "valued right" to secure a verdict from the first tribunal. However, if defendant's motion for mistrial is prompted by prosecutorial or judicial misconduct which was intended "to provoke" defendant's motion or was otherwise "motivated by bad faith or undertaken to harass or prejudice" the defendant or "to afford the prosecution a more favorable opportunity to convict" the defendant, double jeopardy does bar further prosecution. If the defendant's motion for a mistrial is prompted by prosecutorial error made in the exercise of good faith and professional judgment, there generally is no bar to retrial.

[1] Accordingly, we do not discuss the trial court's evidentiary rulings. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

State v. Jenich, 94 Wis. 2d 74, 92, 288 N.W.2d 114, 122 (1980) (quoted sources and citations omitted). One year after ***Jenich***, ***State v. Copening***, 100 Wis. 2d 700, 303 N.W.2d 821 (1981), further explained what a defendant must show to bar a retrial following a mistrial he or she requested:

> (1) The prosecutor's action must be intentional in the sense of a culpable state of mind in the nature of an awareness that his activity would be prejudicial to the defendant; *and* (2) the prosecutor's action was designed either to create another chance to convict, that is, to provoke a mistrial in order to get another "kick at the cat" because the first trial is going badly, or to prejudice the defendant's rights to successfully complete the criminal confrontation at the first trial, *i.e.*, to harass him by successive prosecutions.

Id., 100 Wis. 2d at 714–715, 303 N.W.2d at 829 (emphasis in ***Copening***).

¶6 Jurkovic's stated reason for his mistrial motion was not because of anything that the State or the judge did, but because the jury indicated that it was deadlocked. Not once during the colloquy between court and counsel following receipt of the jury's note indicating the deadlock did Jurkovic even hint his motion for a mistrial was based on anything other than the jury's deadlock.[2] Indeed, Jurkovic practically begged for the mistrial over the State's opposition. Accordingly, Jurkovic may not now complain that the trial court gave to him what he so desperately sought. *See* ***State v. Petty***, 201 Wis. 2d 337, 347, 548 N.W.2d 817, 820 (1996) ("[J]udicial estoppel ... is intended to protect against a litigant

[2] Although Jurkovic did move for a mistrial at least several times during the first trial because of what he contended were the trial court's evidentiary errors, he does not argue on appeal that any of those motions should have been granted.

playing fast and loose with the courts by asserting inconsistent positions.") (internal quotation marks and quoted source omitted).[3]

By the Court.—Judgment affirmed.

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

[3] Jurkovic's reply brief complains that the trial court's "willingness to so quickly declare a mistrial" was evidence of "judicial overreaching," although he has the modicum of grace to concede that he "is hardly in a position to complain that the trial court allowed the precise relief he requested." Similarly, Jurkovic complains that the trial court was biased against him in the second trial, and, inexplicably, points to three things; in two, he concedes that the trial court's rulings were proper, and he also concedes that he suffered no prejudice in connection with the third.