

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 13, 2004

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. 03-1303-CR
STATE OF WISCONSIN**

Cir. Ct. No. 02CF000015

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MARVIN JOST,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Barron County:
EDWARD R. BRUNNER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Marvin Jost appeals orders¹ denying his motion to dismiss based on double jeopardy and a motion to inspect psychological records.

¹ Leave to appeal the nonfinal orders was granted May 16, 2003.

Jost argues that (1) double jeopardy bars retrial; and (2) the trial court erred by denying his request for access to psychological records because those records are relevant to the alleged victim's veracity. We reject these arguments and affirm the orders.

BACKGROUND

¶2 In January 2002, the State charged Jost with two counts of sexual assault of a child, arising from allegations that he had sexual contact with eleven-year-old Nichole H. while babysitting her. At the jury trial, Nichole's mother testified on cross-examination that Nichole's interview with a Barron County social worker had been videotaped. Based on the State's failure to disclose the videotape, Jost consequently moved for dismissal with prejudice, or alternatively, a mistrial. Because the tape's existence had been disclosed in reports provided to the defense, the parties discussed whether counsel was ineffective for failing to request the tape or whether the State was otherwise obligated to provide the tape in the absence of a specific request. Ultimately, the court granted the alternative motion for mistrial and ordered that a second trial be held.

¶3 Jost subsequently moved the court to dismiss the case on double jeopardy grounds and to otherwise allow Jost access to Nichole's psychological records. The court denied the motion to dismiss. The court further denied Jost's request for access to the psychological records following an in camera inspection of the records. We granted Jost's petition for leave to appeal the orders denying his motions.

DISCUSSION

¶4 Jost argues that double jeopardy bars retrial of his case. We are not persuaded. The Fifth Amendment to the United States 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. *State v. Seefeldt*, 2003 WI 47, ¶4, 261 Wis. 2d 383, 661 N.W.2d 822. The clause also protects a defendant's right to have his or her trial completed by a particular tribunal. *See State v. Lettice*, 221 Wis. 2d 69, 79, 585 N.W.2d 171 (Ct. App. 1998).

¶5 As a general rule, however, the double jeopardy clause does not bar retrial when a defendant successfully requests a mistrial. *See State v. Hill*, 2000 WI App 259, ¶11, 240 Wis. 2d 1, 622 N.W.2d 34. The exception to this general rule is that retrial is barred when a defendant moves for and obtains a mistrial due to prosecutorial overreaching. *See id.* To constitute overreaching, the prosecutor must have acted with the intent to subvert the defendant's double jeopardy protection. *See Lettice*, 221 Wis. 2d at 82.

¶6 Jost argues that because there was no manifest necessity for a mistrial, double jeopardy bars retrial. The manifest necessity standard applies, however, when the trial is terminated over the defendant's objection and without his or her consent, either on the State's motion for mistrial or the court's *sua sponte* decision. *See id.* at 80. Here, the trial was not terminated over Jost's objection, but rather at his invitation. Although Jost argues that he did not consent to a mistrial, asking for an alternative remedy, without more, is not the same as

objecting to that remedy. Thus, Jost's arguments regarding manifest necessity are misplaced.²

¶7 To the extent Jost alleges prosecutorial overreaching, his argument is undeveloped and based wholly on conjecture. Any claim that the prosecutor failed to disclose the videotape with the intent to provoke a mistrial is not supported by the record. At the post-mistrial motion hearing, the prosecutor explained and the trial court evidently accepted, that he was unaware that the videotape contained Nichole's admission that she had falsely accused another man of sexual assault on an earlier occasion. If the prosecutor was unaware of this admission, his failure to disclose the statement or otherwise provide the videotape could not have been designed to subvert the defendant's double jeopardy protection. See *id.* at 82. Because Jost requested the mistrial in the absence of prosecutorial overreaching, the double jeopardy clause does not bar retrial. See *Hill*, 240 Wis. 2d 1, ¶11.

¶8 Jost argues in the alternative that on retrial he is entitled to Nichole's psychological records. Where, as here, the trial court determines the defendant has made a preliminary showing for an in camera review, the court must determine whether the records contain information that is material to the defense of the accused. *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). Before we can review the trial court's determination of materiality, we must also conduct an independent review of the mental health records. See *State v. Darcy N. K.*, 218 Wis. 2d 640, 655, 581 N.W.2d 567 (Ct. App. 1998). Our review is not possible in this case

² Jost nevertheless claims the trial court erred by failing to consider a "less drastic" alternative to mistrial. Jost is judicially estopped from arguing that the trial court erred by granting him the relief he requested. See *State v. McCready*, 2000 WI App 68, ¶8, 234 Wis. 2d 110, 608 N.W.2d 762.

because the sought-after records are not in the appellate record.³ It is Jost's responsibility to ensure that the record is sufficient to address the issues raised on appeal. *See State v. Turner*, 200 Wis. 2d 168, 178, 546 N.W.2d 880 (Ct. App. 1996). Moreover, when the appellate record is incomplete in connection with an issue, we assume that the missing material supports the trial court's ruling. *See Duhamel v. Duhamel*, 154 Wis. 2d 258, 269, 453 N.W.2d 149 (Ct. App. 1989).

By the Court.—Orders affirmed.

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

³ Even if the records contain the information Jost alleges—namely, that Nichole's mother says she lies—that information is cumulative to the mother's pretrial hearing testimony. There, Nichole's mother testified that she told a social worker Nichole has a tendency to lie at times.

