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**DISTRICT I**

September 17, 2024

To:

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Clerk of Circuit Court  
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You are hereby notified that the Court has entered the following opinion and order:

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2024AP71

State of Wisconsin v. Damarion Sanders (L.C. # 2021CF1825)

Before White, C.J., Donald, P.J., and Colón, J.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Damarion Sanders appeals a nonfinal order denying his motion to dismiss, with prejudice, on double jeopardy grounds.<sup>1</sup> Sanders is charged with burglary as a party to a crime. His first trial resulted in a mistrial after it came to light that material evidence had not been turned over by the State. Based upon our review of the briefs and record, we conclude at

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<sup>1</sup> This court grants leave to appeal. *See* WIS. STAT. RULE 809.50(3) (2021-22); *State v. Jenich*, 94 Wis. 2d 74, 97A-97B, 288 N.W.2d 114 (1980).

All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

The charge against Sanders stems from an armed home invasion that occurred in July 2020. One of the residents of the home was a friend of Sanders's, and Sanders sometimes stayed there. In an interview with police after the home invasion, Sanders stated that a few days earlier, his cousin, Areon Davis, had directed Sanders to go to the residence. Davis told Sanders that he had gotten into an argument with Sanders's friend over a marijuana purchase, and Davis wanted Sanders to help him enter the home so he could rob the occupants. Sanders said he agreed to cooperate because he felt threatened.

On the night of the incident, Sanders said Davis texted him to unlock the door at the residence. Sanders did so, and then went to sleep. Sanders told police he woke up when three armed men arrived at the home, and he "felt bad" because he knew it was Davis there to rob them. The other occupants of the home resisted; one person was shot, but survived. The armed men then fled. Sanders also ran away, and deleted the text messages between him and Davis.

Sanders was charged with burglary as a party to a crime. The matter proceeded to trial in July 2023. During the testimony of one of the officers who interviewed Sanders, it was revealed that Davis was interviewed twice by police regarding the home invasion. Counsel for Sanders asserted that the defense had no prior knowledge of these custodial interviews with Davis, and moved for a mistrial. The State argued that Davis's alleged involvement was known to the defense "from the beginning" of the case. The circuit court took Sanders's motion for a mistrial under advisement, allowing time for the parties to fully review the video of Davis's custodial interviews.

When the circuit court took up the motion the following day, it was informed of an additional discovery issue. The State explained that there had been a forensic extraction of information from Sanders’s cell phone, known as a “phone dump,” which had never been reviewed by the State nor turned over to the defense. The forensic exam of the phone was completed several months after the police interviewed Sanders, after discovery had been turned over, and the State asserted it was not previously aware of this evidence.

The circuit court concluded that the failure by the State to turn over the video of the police interviews with Davis did not warrant a mistrial. Instead, the court determined that the error was the result of faulty communication among the parties, who should have “compare[d] notes on discovery” prior to trial. The court reasoned that Sanders clearly knew about Davis from the beginning of the case, as Sanders had implicated Davis in the home invasion, and therefore could have further investigated Davis’s contacts with police. However, the court ultimately declared a mistrial based on the State’s failure to turn over the phone dump evidence.

Subsequently, Sanders sought dismissal of the charge with prejudice, alleging a double jeopardy violation due to deliberate misconduct by the State relating to the discovery violations. The circuit court denied the motion. Sanders now appeals that nonfinal order.

“The double jeopardy clause of both the federal and state Constitutions protects a defendant’s right to have his or her trial completed by a particular tribunal and protects a defendant from repeated attempts by the State to convict the defendant for an alleged offense.” *State v. Jaimes*, 2006 WI App 93, ¶7, 292 Wis. 2d 656, 715 N.W.2d 669. Jeopardy attaches in a jury trial “when the selection of the jury has been completed and the jury is sworn.” *State v. Mattox*, 2006 WI App 110, ¶12, 293 Wis. 2d 840, 718 N.W.2d 281. Retrial of the offense is

generally barred after that, except under certain circumstances. *Id.* An example where retrial is not barred is when a defendant successfully requests a mistrial. *Id.* Under those circumstances, “the general rule is that the double jeopardy clause does not bar a retrial because the defendant is exercising control over the mistrial decision or in effect choosing to be tried by another tribunal.” *Jaimes*, 292 Wis. 2d 656, ¶7.

However, an exception to the rule allowing retrial after the defendant requests a mistrial may be applied when the mistrial is granted on the grounds of prosecutorial overreaching. *Id.*, ¶8. To establish prosecutorial overreach, two elements must be shown: (1) the prosecutor’s action was “intentional,” demonstrating an awareness that the action “would be prejudicial to the defendant;” and (2) the prosecutor’s action was meant to “provoke a mistrial” or to “prejudice the defendant’s rights to successfully complete the criminal confrontation at the first trial[.]” *Id.* (citation omitted).<sup>2</sup>

The issue of whether double jeopardy protections have been violated is a question of law that we review *de novo*. See *State v. Steinhardt*, 2017 WI 62, ¶11, 375 Wis. 2d 712, 896 N.W.2d 700. However, “[d]etermining the existence or absence of the prosecutor’s intent involves a factual finding, which will not be reversed on appeal unless it is clearly erroneous.” *Jaimes*, 292 Wis. 2d 656, ¶10.

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<sup>2</sup> Sanders does not argue this standard in his brief, but rather advocates for a new, broader exception for dismissal due to an evidence violation, as suggested in *Government of Virgin Islands v. Fahie*, 419 F.3d 249 (3d Cir. 2005): that if the defendant can show both willful misconduct on the part of the State and prejudice to the defense, dismissal for an evidence violation “may be proper.” *Id.* at 255. We decline to expand the current exception in this manner, and instead review this matter based on established double jeopardy principles.

Here, the circuit court found that the State’s failure to turn over the phone dump evidence—the grounds for granting the mistrial—was the result of faulty communication between the prosecutor and the police, not prosecutorial overreach. The court stated that there was no indication that the prosecutor intended to cause prejudice to Sanders’s defense or provoke a mistrial. Rather, the record reflects that the timing of the phone dump, and the lack of communication afterwards, led to the State’s failure to turn over that evidence. In fact, it was noted that the prosecutor had recently taken over the case, and was not involved at the time discovery was turned over. Furthermore, the prosecutor argued against granting the mistrial, asserting that the phone dump evidence was neither exculpatory nor material to the outcome of the trial.

The record supports the findings of the circuit court and, as such, they are not clearly erroneous. *See id.; Royster-Clark, Inc. v. Olsen’s Mill, Inc.*, 2006 WI 46, ¶11, 290 Wis. 2d 264, 714 N.W.2d 530 (stating that factual findings are clearly erroneous if they are unsupported by the record). We therefore conclude that Sanders has not established the prosecutorial overreach exception to bar a retrial in this matter. *See Jaimes*, 292 Wis. 2d 656, ¶8. Accordingly, we affirm the circuit court’s order denying Sanders’s motion to dismiss with prejudice.

Upon the foregoing, therefore,

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Samuel A. Christensen*  
*Clerk of Court of Appeals*