COURT OF APPEALS
DECISION
DATED AND FILED

April 7, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3542-CR

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

SHANNON BUETTNER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: PATRICIA D. MCMAHON, Judge. *Reversed and cause remanded.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

SCHUDSON, J. The State of Wisconsin appeals from the trial court order granting Shannon Buettner's motion to dismiss with prejudice the information charging her with first-degree reckless homicide. The State argues that the trial court's order was based on clearly erroneous factual findings leading to the incorrect conclusion that, under ***State v. Copening***, 100 Wis.2d 700, 303

N.W.2d 821 (1981), the State's conduct resulting in a mistrial constituted "overreaching." The State is correct and, therefore, we reverse.

I. BACKGROUND

Buettner was charged with the May 7, 1996 reckless homicide of her ex-boyfriend, Maurice Patterson. Buettner's statement to police, together with additional undisputed evidence, established that during an argument with Patterson in her apartment, Buettner stabbed Patterson once, in the left upper chest area just below the clavicle, with a kitchen knife. Additional details, developed at pre-trial motion hearings and at trial during the presentation of the State's case, further indicated that the issue the jury ultimately would have had to resolve was whether the stabbing was justified. The jury would have evaluated: the testimony of several "ear-witnesses" from neighboring apartments who heard Buettner and Patterson arguing; the substantial circumstantial evidence offered by the State; and, in all likelihood, the defense's ***McMorris*** evidence of Buettner's fear of Patterson based on her knowledge of his threats and violence against other women. *See* ***McMorris v. State***, 58 Wis.2d 144, 205 N.W.2d 559 (1973).

At the jury trial, West Allis Police Detective Devan Gracyalny was the State's final witness in its case-in-chief. Detective Gracyalny's testimony was interrupted when he made reference to having a copy of questions asked of Buettner, contained in a West Allis Police Department Medical Intake Report (medical intake report) that was filled out at the time of her booking. The medical intake report recorded: (1) the arresting officer's observations of her mood, behavior, and signs of any self-inflicted injuries; (2) the booking officer's "visual opinion" of her physical and mental condition; and (3) Buettner's answers to the booking officer's "prisoner questionnaire" about her physical and mental

condition. The medical intake report had been in the police department's possession, but had not been provided to the defense and had only been provided to the State a few hours before Detective Gracyalny had taken the witness stand.

During the recess that immediately followed, Detective Gracyalny produced other documents from the West Allis Police Department that had not been provided to either the prosecutor, Douglas Simpson, or the defense attorney, Robin Shellow: (1) a West Allis Police Department Municipal Jail Record (jail record), on which the police had made entries noting their periodic observations of Buettner in her cell during the hours following her booking and, below the chart, stating that Buettner was on a "suicide watch"; (2) a computer print-out, with a "print date" of May 7, 1996, documenting Buettner's May 2, 1996 911 call to the police (1996 911 record); and (3) a computer print-out, also with a "print date" of May 7, 1996, documenting Buettner's February 24, 1994 telephone call to the West Allis Police Department (1994 phone record).

The trial court granted Buettner's motion for mistrial based on the nondisclosure of the four documents and what it viewed as their possibly significant relationship to Buettner's ***Miranda/Goodchild***[1] motion, her theory of defense, and to defense counsel's trial preparation and opening statement to the jury. Following the submission of briefs and a subsequent hearing at which Mr. Simpson testified, the trial court granted Buettner's motion for dismissal with prejudice.

[1] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis.2d 244, 133 N.W.2d 753 (1965).

While maintaining that the trial court's decision to grant a mistrial was wrong, the State does not challenge the mistrial on appeal, acknowledging that "[t]here is no way to void the discharge of the jury and the passage of time." *See* ***Copening***, 100 Wis.2d at 716, 303 N.W.2d at 829-30 (ordinarily, where defendant moves for or consents to mistrial, "any barrier to reprosecution is removed" and "the propriety of the ordering of the mistrial is not a subject for appellate review"). Challenging the subsequent order dismissing the case with prejudice, however, the State "requests that the Court of Appeals examine these [nondisclosed documents], in light of the facts, events, proceedings and explanations, and determine if further relief (dismissal [with prejudice]) constitutes an erroneous exercise of discretion."

Supporting its request that this court independently examine the documents, the State cites ***Delap v. Institute of America, Inc.***, 31 Wis.2d 507, 143 N.W.2d 476 (1966), for the proposition that "in certain cases where the evidence is documentary, the appellate court is not bound by inferences drawn therefrom by the trial court." ***Id.*** at 510, 143 N.W.2d at 477; *see also* ***McCauley v. Tropic of Cancer***, 20 Wis.2d 134, 148, 121 N.W.2d 545, 552-53 (1963). This is such a case. Indeed, as we will explain, an understanding of the trial court's misunderstanding depends on this court's detailed examination of not only the four nondisclosed documents, but also of two disclosed documents. Moreover, the analysis of this appeal requires careful review of not only the trial court's dismissal decision, but also of the trial court's mistrial decision because, in its dismissal decision, the trial court explicitly incorporated its mistrial findings regarding the documents.[2]

[2] Ordering dismissal with prejudice, the trial court stated, *inter alia*:

(continued)

In addition to the four nondisclosed documents revealed during Detective Gracyalny's testimony, the two disclosed documents of great importance in this appeal are: (1) a West Allis Police Department Incident/Offense Narrative also documenting Buettner's 911 telephone call to the West Allis police on May 2, 1996 (1996 offense narrative); and (2) a stick-on "Post-it® Note" (post-it note), written by Mr. Simpson.

Although considerable confusion has accompanied the accounts of the content and status of several of these documents, and although some of that confusion, as we will explain, permeated the trial court's findings and decisions, and although some of that same confusion was carried into this appeal by defense counsel's brief and oral argument, and although this court's analysis initially was inhibited by the absence of the offense narrative,[3] the content and status of each document now is clear:

> Throughout the proceedings, the defendant raised concerns that all exculpatory information be provided and that there be compliance with all appropriate discovery requests. This history is set forth with more specificity in this Court's decision on the defendant's motion for mistrial that was issued on July 18, 1996, *and this Court incorporates that decision and the findings made therein into this decision on the motion to dismiss*.

(Emphasis added.)

[3] Although, as we will explain, the *content* of the offense narrative was important in the trial court proceedings, we note that the trial court never explicitly referred to the actual document in either its mistrial or dismissal decision. At oral argument before this court, defense counsel stated, "I don't believe it was discussed at any hearing before the trial court," and the State's appellate counsel stated that it had not been marked as an exhibit or introduced in the trial court proceedings. At oral argument, however, the parties also confirmed that the offense narrative was attached to the post-it note and was provided to defense counsel at the preliminary hearing.

As a result of the many, substantial oral argument references to the offense narrative by both parties, and given that the content of the offense narrative and the undisputed fact of its disclosure emerge as key clues to the trial court's confusion, and because of the obviously critical role played by that document in the resolution of the issues before the trial court and on appeal, this court, following oral argument, was provided with a copy of the offense narrative.

A. **the medical intake report** (content summarized above): not disclosed to the prosecution until several hours before Detective Gracyalny testified at the jury trial; not disclosed to the defense until Detective Gracyalny referred to it during his testimony;

B. **the jail record** (content summarized above): not disclosed to the prosecution or defense until the interruption of Detective Gracyalny's testimony;

C. **the 1994 phone record**: not disclosed to the prosecution or defense until the interruption of Detective Gracyalny's testimony; it states:

> COMPL REPORTS SHE IS GETTING PHONE CALLS FROM HER X BOYFRIEND MORESSE PATTERSON 24-28YRS WHO LIVES AT 6082 N 41 ST COMPL BROKE UP WITH HIM 6 MTHS AGO AND HE HAS NOW STARTED CALLING HER. SHANNON WAS ADVISED TO HAVE HER MOTHER GET A TRACE ON THE PHONE AND TRY AND GET A RESTRAINING ORDER AGAINST HIM

D. **the 1996 911 record**: not disclosed to the prosecution or the defense until the interruption of Detective Gracyalny's testimony; it states:

> SHANNON BUETTNER REPORTS THAT HER EX-BOYFRIEND, MAURICE R. PATTERSON, M/B, 06-10-69, HAD TELEPHONED HER AND THREATENED TO BOTH KILL HER AND BLOW UP HER VEHICLE. OFFICER SPOKE WITH MAURICE ON PHONE AND HE'LL BE[]MAILED A CITATION (M-44817) FOR DISORDERLY CONDUCT.

E. **the 1996 offense narrative**: disclosed by the prosecution to the defense together with discovery materials provided at the preliminary hearing; it provides a detailed, eleven paragraph account of Buettner's May 2, 1996 complaint about Patterson's threatening call, the police investigation and contact with Patterson,

and the issuance of a disorderly conduct citation to him; preceding the eleven-paragraph account, the offense narrative also includes date, location, victim, offender, and synopsis entries; the synopsis entry states:

> SHANNON R. BUETTNER RELATES HER EX-BOYFRIEND, MAURICE R. PATTERSON HAD CALLED HER AND THREATENED TO KILL HER AND BLOW UP HER VEHICLE. OFFICER SPOKE WITH MAURICE ON PHONE. MAURICE WILL BE MAILED A CITATION FOR DISORDERLY CONDUCT.

F. **the post-it note**: attached to the 1996 offense narrative and disclosed by the prosecution to the defense together with the offense narrative and the other discovery materials provided at the preliminary hearing; it states:

> Hold these reports. If D tries to claim V pursued her or she is NGI … copy and supply to defense. Also phone records of V's relatives will show D sought V b/4 homicide.

Before discussing the significance of these documents, we need to straighten out two areas of obvious and understandable confusion involving the 1994 phone record and the 1996 911 record, and point out one particularly important factor that becomes clear from a comparison of the 1996 911 record and the 1996 offense narrative.

First, the 1994 and 1996 computer phone records can easily be confused with each other because of their similar and somewhat obscure computer-coded entries, because they both were generated from the same computerized phone logging system and were printed together as perforated parts of a lengthy print-out, and because each bears a "Print Date" of "05/07/96," reflecting not the dates of Buettner's calls, but rather, the date of Buettner's custody on which the police accessed the information from the computer. Second,

although defense counsel and the trial court referred to both reports as ones documenting "911" calls, only Buettner's 1996 call was a 911 call.[4]

Next, by comparing the content of the nondisclosed 1996 911 record (*see* D, above) to the synopsis contained in the disclosed offense narrative (*see* E, above), it is clear that, contrary to the repeated, emphatic arguments of defense counsel to the trial court and to this court at oral argument, the disclosed 1996 offense narrative provided all the information (and considerably more) contained in the nondisclosed 1996 911 report (*see* footnote 6, below).

II. DISCUSSION

In ***Copening***, the supreme court explained:

> [A] defendant's own motion for mistrial is assumed to remove any barrier to reprosecution, even when necessitated by prosecutorial or judicial error, so long as that error does not rise to the level of "overreaching." This is because, when the defendant moves for, or consents to, a mistrial, the defendant, and not the court, exercises primary control over the course to be followed in the event of prejudicial judicial or prosecutorial error.

Id. at 712, 303 N.W.2d at 827-28 (citations and footnote omitted). The supreme court went on to articulate the two required elements:

> to bar retrial of a defendant who moved for and obtained mistrial due to alleged prosecutorial overreaching: (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

[4] At the hearing on the mistrial motion, Mr. Simpson explained the code entries on the "Source" line of each of the two print-outs contained on the lengthy, phone-log print-out: the 1994 call source was "P" for "an ordinary [phone] call to the police department on an ordinary line," and the 1996 call source was "9" for "a 911 call."

> 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. at 714-15, 303 N.W.2d at 829.

We must accept a trial court's factual findings regarding a prosecutor's intent and design to provoke a mistrial unless the findings are clearly erroneous. *See* ***State v. Quinn***, 169 Wis.2d 620, 626, 486 N.W.2d 542, 544 (Ct. App. 1992). Whether factual findings are accurate, and whether accurate factual findings form the basis for concluding that a prosecutor's conduct constitutes "overreaching," however, present issues subject to our *de novo* review. *Cf.* ***id.*** at 626-27, 486 N.W.2d 544-45. The trial court concluded that Mr. Simpson's conduct constituted "overreaching." We conclude, however, that the trial court's conclusion was based on clearly erroneous findings and considerable misunderstanding, and that Mr. Simpson's conduct did not even come close to "overreaching."

Reviewing the evidence, arguments, and trial court decisions, we have located the apparent and, at times, quite understandable bases for the trial court's erroneous findings and its misunderstanding. We have already identified some of these in describing the documents. Without attempting to touch every area, we now further detail those that are most significant and, critically, appear to have been most determinative of the trial court's conclusion that the prosecutor's conduct constituted "overreaching."

A. The Post-it Note

The parties probably would agree that the post-it note was the document that most dramatically colored the trial court's view of Mr. Simpson's

conduct. Indeed, in her reply to the State's response to Buettner's motion to dismiss, defense counsel wrote, "**The note sets the context for the future failures to disclose**.… This note provides the looking glass in which to judge all conduct that occurred in this case …." In her oral argument to this court, Ms. Shellow reiterated that the post-it note was "the looking glass" through which we needed to view the appeal. Granting the motion for dismissal with prejudice, the trial court commented that the post-it note "impl[ies] some intent to withhold and not provide disclosure…. I recognize that the documents to which the note was attached were disclosed, but the language of the note is relevant in interpreting intent with respect to nondisclosure of other documents." For several reasons, however, we conclude that the post-it note implied no "intent to withhold and not provide disclosure" and, therefore, that the trial court's finding to the contrary was clearly erroneous.

At the evidentiary hearing on Buettner's motion for dismissal with prejudice, Mr. Simpson testified that one or two days after he had charged Buettner, and after his case file had gone to intake court, a West Allis police liaison officer brought him two reports, identified by the officer as ones related to other incidents involving Buettner, that had not been included in the materials the police originally had provided. One was the 1996 offense narrative, and the other was a report, otherwise immaterial to this appeal, relating to Buettner's alleged aggressive conduct toward her mother in 1993. Simpson testified that he never intended *not* to disclose these reports but, because he did not have his file and because these reports had not been copied with the others in preparing the extra set to be provided to defense counsel at the preliminary hearing, he "put a note on them reminding [himself] of a couple things." He implied that "copy and supply

to defense" was not connected to the "if" clause or his other entries on the post-it note. He testified:

> [I]t wasn't any desire to withhold anything; it was just to hold onto the reports until the file becomes available.
>
> ….
>
> I don't think there was any circumstance under which the defense wouldn't have received them, but when I got them without a file I had no idea what they were related to. But there was a possibility based on reading them that [Buettner] might claim some type of self-defense, and I just made a note to myself to that effect.

How, despite our inability to view Mr. Simpson's demeanor, can we conclude that his testimony was true? Why, despite Mr. Simpson's apparently hyperbolic comment that he "had *no idea* what [the two reports] were related to" (emphasis added), and despite the fact that the words on the post-it note, "copy and supply to defense," appear after an ellipsis following the "if" clause, can we conclude that the note does not connote his intent to withhold disclosure? Simply stated, we reach these conclusions because they are overwhelmingly supported by the undisputed record of Mr. Simpson's conduct in this case; it is Mr. Simpson's conduct that belies the plausibility of the trial court's finding of his intent.

Most critically, Mr. Simpson disclosed the two tardy reports promptly, together with all others he provided at the preliminary hearing *and*, as defense counsel acknowledged, he disclosed the post-it note itself "with the original packet of discovery." Thus, if "copy and supply" stands alone, it confirms Mr. Simpson's testimony—that when he received the two tardy reports, he wrote the note to remind himself to copy and disclose them. Even if, however, "copy and supply" connects to the "if" clause, Mr. Simpson's prompt disclosure of the reports at the preliminary hearing confirms that he understood the possible

relevance of at least one of the documents to Buettner's likely theory of defense. Either way, Mr. Simpson did exactly what the law required; he promptly disclosed the documents to the defense.

Thus, like the trial court, we conclude that the post-it note is relevant to the assessment of Mr. Simpson's intent. We also conclude, however, that the language of that note, in combination with his prompt disclosure of the two tardy documents, establishes his lack of intent to conceal anything. Finally, were there any lingering doubt, Mr. Simpson's disclosure of the post-it note itself strongly militates against any suggestion that the note could possibly indicate any intent to conceal or withhold disclosure of anything.[5]

B. The Telephone Records

[5] In both her trial court brief supporting her motion to dismiss and her oral argument in this court, Ms. Shellow offered an additional, intriguing theory. As phrased in her trial court brief, "Common sense would indicate that the prosecutor never intended to disclose those reports be[c]ause the **original** Post-it note was affixed to it. The prosecutor certainly appeared surprised when counsel presented the original note to the court." More harshly, at oral argument here, Ms. Shellow asserted that Mr. Simpson "was willing to lie and cheat," and that Mr. Simpson's conduct—both in attempting to prevent disclosure of documents and then inadvertently revealing them—showed himself to be, among other things, "a deceitful dishonest prosecutor, and a dumb prosecutor who didn't prepare his case."

Even assuming that Mr. Simpson's disclosure of the post-it note was inadvertent, that hardly means that his disclosure of the reports to which it was attached was unintended. To conclude otherwise would be to accept the proposition that not only was Mr. Simpson blatantly unethical, but also that he was both incredibly crafty and incredibly careless. To have been motivated as Ms. Shellow suggests, Mr. Simpson would have had to have been so calculating that, on the one hand, long before trial, he began planting the seeds of concealment that ultimately would grow into the surprisingly revealed plants he could harvest if and when he would want to provoke a mistrial, *but*, on the other hand, he would also have had to have been so careless as to inadvertently disclose the very documents he intended to conceal together with the very note that would expose his Machiavellian maneuvers.

The record establishes that Ms. Shellow's attacks on Mr. Simpson's integrity were inaccurate and irresponsible.

The 1994 phone record and the 1996 911 record were two of the four documents not disclosed until Detective Gracyalny produced them during the interruption of his trial testimony. The trial court, however, failed to distinguish the relative insignificance of the information on the former from the importance of the information on the latter, *and* failed to recognize that all the information on the latter was also contained in the offense narrative the defense already had. Granting the mistrial motion, the trial court based its decision on "the four documents referred to … all that would have been extremely relevant to [the] defense in making that assessment [of a possible battered woman syndrome defense]." The trial court specifically emphasized the 1996 911 record that, the court stated, "documents [the] 911 call and the threat to kill, and the mailing of a citation.… All of this information was revealed yesterday [during the detective's testimony]."

Clearly, therefore, the nondisclosure of the 1996 911 record was important to the trial court's mistrial decision. Then, in its dismissal decision, although the trial court did not explicitly refer to the 1996 911 record, the trial court did refer to the 1994 phone record in a manner clearly reflecting its confusion about the two records. Granting dismissal, the trial court stated that the 1994 phone record "cannot be analyzed in a vacuum. It must be analyzed in light of the post-it note. It must be analyzed in light of the defense's pre-trial motions clearly informing the State that she intended to introduce *other acts of violence by the victim toward the defendant*." (Emphasis added.) But it was the 1996 911 record (and the disclosed 1996 offense narrative), not the 1994 phone record, that described the alleged threats of violence by the victim toward the defendant.

Therefore, while we understand defense counsel's assessment of the corroborative value of the 1994 phone record in relation to Buettner's account of

her relationship with Patterson, we also appreciate the State's contention that the *nondisclosed* 1994 phone record, reporting that Buettner "was getting phone calls" from Patterson, was *relatively* inconsequential, at least in comparison to the *disclosed* 1996 offense narrative describing Patterson's threat to kill Buettner just four days before the alleged homicide. And we understand the State's further contention that the *nondisclosed* 1996 911 record was inconsequential given the disclosure of the 1996 offense narrative containing the same and more information about Patterson's threats.

Had the State failed to disclose the 1996 offense narrative, and had the State failed to disclose it intentionally, we would be faced with a very different case on appeal. But the State did disclose the 1996 offense narrative, to which the post-it note was attached, at the preliminary hearing. The trial court's neglect of any reference to the offense narrative (or perhaps, more accurately, the failure of the parties to introduce the offense narrative; *see* note 3, above, and note 6, below), and its grafting of the information from the 1996 911 record to the 1994 phone record, were critical. Thus, we conclude, in granting dismissal with prejudice based on the perceived nondisclosure of the *information* contained in the nondisclosed 1996 911 record, the trial court based its decision, in part, on a very important factual finding that was clearly erroneous.[6]

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[6] The genesis of at least part of the trial court's misunderstanding, and the apparent defense effort to cultivate that same misunderstanding before this court, must not pass without mention.

When Ms. Shellow came upon the phone records in the materials Detective Gracyalny produced during the break in his testimony, she first appears to have misconstrued the 1994 phone record (not surprisingly, given the computer-coded content we have described; *see* slip op. at 6-8, above), stating to the trial court that it referred to the 1996 incident. About eight transcript pages later, however, she corrected her statement and distinguished the two computer print-outs reflecting Buettner's telephone calls to the West Allis Police Department:

(continued)

> THE COURT: Okay. Miss Shellow, didn't you say earlier there was an incident four days before—
>
> MS. SHELLOW: This is –
>
> THE COURT: —May 7?
>
> MS. SHELLOW: I looked at this and that's what I assumed this was. And now as I look at it, it's the 1994, so this—I have—I thought this was initial corroboration from the May 2nd [1996] incident. This is now entirely new corroboration for a 1994 incident that we've been seeking ….

Nevertheless, two pages later, Ms. Shellow again inaccurately connected "threats" to the 1994 report, stating, "This is a 1994 report of threats and behavior by Maurice Patterson towards my client."

Subsequently, in his testimony at the hearing on the motion to dismiss with prejudice, Mr. Simpson accurately distinguished the two computer print-outs. Further, in the State's trial court response to the dismissal motion, although, surprisingly, he did not include a copy of the offense narrative with the exhibits he attached, Mr. Simpson did point out the trial court's misunderstanding and again emphasized that the information contained in the 1996 911 record had been disclosed:

> The [trial court decision granting the mistrial] makes reference to a May 2, 1996 incident, to wit:
>
> > **Then we have the incident report of May 2, 1996. The** [sic] **documents** [sic] **911 call and the threat to kill, and the mailing of a citation.**
>
> This is an entirely mistaken reference. The defense was given <u>every detail</u> known to the State about this incident on May 15, 1996 or May 16, 1996 (see above regarding compliance with discovery demand). If the [trial court's] decision is in any way based upon a belief that this event was untimely disclosed to the defendant, that conclusion is, to that extent, in error.

Nevertheless, despite the critical differences between the information contained in the two documents—differences clarified by both Ms. Shellow and Mr. Simpson in the trial court, and despite the fact that all the information in the nondisclosed 1996 911 report also was contained in the disclosed 1996 offense narrative, Ms. Shellow's brief to this court asserted that "the district attorney's office and its agents … failed to turn over the one document which corroborated Shannon Buettner's claim that Maurice Patterson had threatened her in the past."

At oral argument, Ms. Shellow was confronted with this court's assumption that her brief's reference to "the one document which corroborated Shannon Buettner's claim that Maurice Patterson had threatened her in the past" must have been related to the 1996 911 record because it, unlike the 1994 phone record, did describe Patterson's threats. Ms. Shellow then clarified, however, that that reference in her brief did, in fact, relate to the 1994 phone report.

(continued)

C. Other Documents and the Prosecutor's Conduct

Although the trial court's erroneous finding regarding the post-it note and its confusion about the information on the 1994 phone record and 1996 911 record substantially undermine its legal conclusion that Mr. Simpson's conduct constituted "overreaching," we briefly touch on the other factors that figured prominently in the trial court's decision to dismiss with prejudice. We do so, in

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Ms. Shellow then went on to repeatedly emphasize that, even though she had received the 1996 offense narrative, the revelation of the 1996 911 record was crucial because it, for the first time, informed her that Patterson had been cited for disorderly conduct as a result of the May 2, 1996 incident. She stated: "We had the underlying facts of the 1996 incident [in the offense narrative]. What we didn't have is what happened in the 1996 incident, i.e., that he was issued a citation for disorderly conduct."

Setting aside for the moment the issue of whether the issuance of a citation would have made any difference, this court, at the end of Ms. Shellow's oral argument, then ordered her to submit a concise letter distinguishing and attaching copies of the two documents—the 1996 offense narrative and the 1996 911 record—and clarifying which document had been disclosed, and which had not, in order to ensure this court's definitive understanding of her argument. Then, and only then, did Ms. Shellow concede that she might "have to back off" and reconsider whether, as the offense narrative would establish, she knew all the information on the nondisclosed 1996 911 record including that about the citation.

Thirty days later, this court, having received nothing from Ms. Shellow, contacted her office to learn whether the court-ordered letter and attachments had been submitted. Ms. Shellow then complied.

We admonish Ms. Shellow, and direct her attention to SCR 20:3.3 Candor toward the tribunal**,** which in part provides, "A lawyer shall not knowingly: … make a false statement of fact or law to a tribunal," SCR 20:3.3(a)(1); and to SCR 20:3.4 Fairness to opposing party and counsel, which in part provides, "A lawyer shall not: … knowingly disobey an obligation under the rules of a tribunal …." SCR 20:3.4(c).

At the evidentiary hearing on the dismissal motion, it appears that Mr. Simpson and the prosecutor questioning him also were responsible for some of the trial court's confusion. At the very least, they missed an obvious opportunity to definitively distinguish between the 1996 911 record and the 1996 offense narrative. When asked, "And those two reports [received from the liaison officer] were basically what?", Mr. Simpson described one as a report of "a reported phone threat by Mr. Patterson to the defendant in May of 1996." He did not, however, distinguish between the 1996 911 record and the 1996 offense narrative and, as far as we can tell from the transcript of this hearing, and as confirmed at oral argument in this court, neither document was marked as an exhibit or referred to with any further specificity.

part, because the trial court based the dismissal "on the totality of the conduct of the prosecutor" leading it to conclude that "the prosecutor's action [in not disclosing documents] was intentional and designed to create another chance to convict."

1. The Photographs

The West Allis police took six photographs of Buettner following her arrest. The defense was provided with all six through the ordinary course of pre-trial discovery. At the trial, however, Mr. Simpson introduced only five of the photos and elicited the following testimony from Detective Gracyalny:

> Q: Has anyone ever showed you any other pictures of the defendant regarding her appearance on that date?
>
> A: No, sir.

The trial court, granting dismissal, commented that "the conduct in marking only five as exhibits and eliciting testimony that only five were available" was troubling and "[g]iven the fact that the sixth photograph … shows physical injury to the defendant, an inference is raised as to the intent [of Mr. Simpson]."

We have examined all six photos. We acknowledge that the photo the State did not introduce—a left profile of Buettner—shows apparent abrasions to Buettner's left cheek and neck. We also note, however, that two of the photos the State did introduce show similar injuries—exhibit 33 showing Buettner's right profile and apparent abrasions to her neck and right cheek, and exhibit 32 showing a front view and the injuries to her neck and both cheeks. Thus, while the failure of the State to introduce the sixth photo is puzzling, and the questioning of

Detective Gracyalny may have been misleading,[7] we do not see how that leads to any inference about Mr. Simpson's intent. Indeed, failing to introduce all the photos and eliciting Detective Gracyalny's testimony about only five of them left both Detective Gracyalny and Mr. Simpson wide open for embarrassing cross-examination. The State's conduct may have been careless, but it reveals nothing about Mr. Simpson's intent to conceal anything. The defense had all six photos.

2. The Medical Intake Report

The medical intake report, to which Detective Gracyalny referred just before the interruption of his testimony, contained a reference to a "[b]ruise on [Buettner's] right calf." The trial court, granting dismissal, commented that "the exculpatory nature of the entry concerning a bruise on the defendant's leg is significant and raises an inference of a decision not to disclose." The trial court viewed the delayed disclosure as "an intentional decision by the prosecutor and a willful persistence in improper procedures such as in ***Copening***, because it ignored the order of the Court to have disclosure before reference in front of a jury."

Mr. Simpson conceded that he should have copied and disclosed the medical intake report to the defense the morning that Detective Gracyalny gave it to him, several hours before the detective referred to it during his testimony. He also accepted responsibility for the nondisclosure of the documents produced by the detective when his testimony was interrupted. In his brief responding to the

[7] At the hearing on the dismissal motion, Mr. Simpson testified that West Allis Police Detective Eversdyk took one photo and Detective Gracyalny took the others. The photos, however, reflecting the names of the photographers on the backs, indicate that Detective Eversdyk took the photo introduced as exhibit 33 and the photo that was not introduced, and that Detective Gracyalny took the other four. At oral argument, the State's appellate counsel explained that Detective Eversdyk took two photos and Detective Gracyalny took four.

mistrial motion, Mr. Simpson apologized profusely for his "contribution to the mistrial of this matter."[8]

While we agree with the trial court (and, indeed, with Mr. Simpson) that there is no satisfactory excuse for Mr. Simpson's delay in disclosing the medical intake report, that delay, standing alone, reveals nothing. After all, Mr. Simpson did not receive the report until that morning. Further, the report's reference to Buettner's bruise was inconsequential considering the fact that one of

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[8] Between the grant of the mistrial and the litigation of the dismissal motion, Mr. Simpson also wrote a letter to the West Allis Chief of Police stating, in part:

> The judge made it clear [in granting the mistrial motion], however, that she expects my office to have a better (fuller) knowledge of all of the records and documents created or obtained during an investigation. To assist this office in meeting that expectation, I recommend a system of file content organization and indexing be developed, to be used where major or complex offenses are under investigation.
>
> Again, it is my duty to ascertain what is in the "State's" possession and to make sure the defense is made aware of all matters to which they are entitled.

The letter resulted, at least in part, from what had become apparent during the hearings regarding the nondisclosure of the medical intake report and municipal jail record: the West Allis Police Department, unlike the Milwaukee Police Department with whose cases and reports the prosecutor and trial court were far more familiar, did not maintain a filing system that automatically included booking records in the case file. The trial court repeatedly referred to that factor and, therefore, we infer that the trial court accepted that Mr. Simpson, as much as Ms. Shellow, was surprised to learn of the existence of the nondisclosed medical intake report and jail record.

In fact, when the medical intake report first came to the trial court's attention, Ms. Shellow stated, "I accept the representation of [Mr. Simpson] that he did not have this document" prior to that morning. Moreover, Ms. Shellow never disputed Mr. Simpson's testimony that Ms. Shellow's investigator (and, possibly, Ms. Shellow) had gone to the West Allis Police Department and that he (Mr. Simpson) had never done anything to "restrict any inspection" by her investigator. While, of course, this does not alter the State's obligation to disclose all required documents, Mr. Simpson's ignorance of the nondisclosed documents and Ms. Shellow's equal opportunity to locate them does enlarge the context within which Mr. Simpson's alleged "overreaching" is properly appraised.

the photos introduced by the State, exhibit 36, is a close-up of Buettner's right calf and is labeled "BRUISE ON RIGHT LEG OF SUSPECT SHANNON O. BUETTNER."[9]

Buettner argues, however, that this delayed disclosure does not stand alone; that it must be viewed together with the prosecutor's other conduct. The trial court agreed. The trial court's assessment of this delayed disclosure, however, was explicitly and implicitly connected to its perception of and inferences from other documents about which, as we have explained, the trial court had reached clearly erroneous findings. While this part of Mr. Simpson's trial conduct was improper, it revealed little, if anything, about his intentions.

3. Pre-Trial Discovery Motions

The trial court also commented that the dismissal with prejudice "takes into account the conduct of the prosecutor throughout these proceedings; the response to the motions, the demeanor in Court and actions taken after the rulings made by the Court." We have studied the record and can appreciate the trial court's impressions. In both his pre-trial motion litigation and in his testimony at the dismissal hearing, Mr. Simpson's words, at times, seem somewhat sarcastic and unbending—unwilling to give a single inch when giving several would have been quite reasonable. Zealous advocacy, however—even foolishly over-zealous advocacy—must not be confused with "overreaching."

[9] Indeed, Ms. Shellow's questioning of Mr. Simpson at the hearing on her dismissal motion reflects her understanding that the report's entry about the leg bruise related to the very injury apparent in one of the photographs the State introduced. She asked, "And so, when you looked at that [medical intake report], you realized that that was a relevant document *because it corroborated one of the photos*; right?" (Emphasis added.)

Thus, we note, although Mr. Simpson initially sought clarification and specification of the defense motion for disclosure of *district attorney* files (not *police files* as sometimes stated in the record) relating to Patterson's numerous, previous arrests, he litigated the motion fairly and ultimately stated that he would "request that all of the referenced items be produced" for the trial court's *in camera* review, just as defense counsel had requested. At the next hearing, two days later, Mr. Simpson produced the files and the trial court conducted the review.[10]

[10] One remaining file, dealing with an obstructing case rather than a domestic violence case, still had to be produced. As Mr. Simpson explained at the hearing on the dismissal motion:

> The original request was for prior acts of prior violence or domestic violence. I don't remember the exact language in the motion, but there was one entry in the JUSTUS [sic] printout which was for obstructing an officer. I did not obtain that file.
>
> When we came to Court for the hearing, the defense made it clear that their opinion was that that file was also relevant.
>
> I later obtained that file and gave it to them.

Mr. Simpson's prompt compliance with the court's order to produce the district attorney's files, together with his expression of reasonable concern about disclosure of some of the materials in those files, further militates against any notion that his litigation of this motion reflected any intent to conceal anything. The day he produced the district attorney files, Mr. Simpson stated:

> Judge, since the last time we were here, the state has obtained a printout of all of the contacts that are listed in the JUSTIS computer regarding the victim, Mr. Patterson, and I supplied the defense with a copy of that printout, and I supplied the court for its inspection the documents which were generated for each of those contacts. And that is without—with the exception of one document, that is the obstructing.
>
> I got a motion this morning which asks that the obstructing case also be made available. The court did not inspect it, I did not provide—I didn't think obstructing fit within the domestic violence stuff that they were asking for. So if they're maintaining that request, I'll see what I can do, but I, quite frankly, don't see it within the scope of their request originally. I gave the court each of the documents and a notation what, if any, objections I had. The objections of the state are principally to handwritten notes of Assistant D.A.s and the district attorney staff and a memorandum written by one of the

(continued)

Further, we also note that when Detective Gracyalny's testimony was interrupted following his reference to the medical intake report, and after the break during which he produced additional documents, Mr. Simpson continued to probe for more, stating: "The defense just went through the entire file and asked for copies, including a copy of some handwritten yellow paper. All of those were copied — At the risk of missing anything, [if] Detective Gracyalny knows of some piece of paper, please describe it." This question led to the detective's description of an additional document he termed a "booking sheet," and his offer to produce that, as well.

In this case, both Ms. Shellow and Mr. Simpson were extremely zealous advocates. Apparently, Mr. Simpson's conduct and demeanor caused the trial court to reach certain conclusions about his intentions. As we have explained, however, those conclusions were based, in significant part, on the trial court's misunderstanding of certain critical facts. That misunderstanding was generated, in part, by Ms. Shellow's initial contribution to, and subsequent acquiescence in, the trial court's confusion regarding some of the documents, and by the parties' failure to introduce the 1996 offense narrative despite its significance to their respective arguments. Ultimately, the trial court's conclusion that Mr. Simpson's conduct constituted "overreaching" was based on very shaky and, in some critical respects, clearly erroneous factual grounds.

In summary, therefore, as we have explained:

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district attorneys to a file explaining a particular charging or discharging decision. The other objection was to mental health records of Mr. Patterson which were contained in one of the files. With those objections, the state is prepared to accept whatever ruling the court makes regarding inspection by the defense. I have no objection to inspection of those documents generated by the various police agencies involved.

(1) The trial court interpreted the post-it note to imply Mr. Simpson's intention to conceal information from the defense—an interpretation that does not follow logically from the record.

(2) The trial court confused the information on the 1994 phone record and the 1996 911 record, and then failed to recognize that the information on the latter was contained in the disclosed 1996 offense narrative.

(3) The trial court attached some significance to Mr. Simpson's failure to introduce one of six photos—a failure that has little if any significance given that the photo showed injuries observable in two of the other photos, given that all the photos had been disclosed to the defense, and given that the failure to introduce one of the photos could only have embarrassed Mr. Simpson and the detective had the defense cross-examined on that point.

(4) The trial court interpreted the several-hour delay in disclosing the medical intake report as a further reflection of Mr. Simpson's intent to conceal information—an interpretation that breaks down when separated from the clearly erroneous findings that established the context in which the trial court viewed this delayed disclosure.

(5) The trial court interpreted Mr. Simpson's "response to the [discovery] motions" as further reflecting his intent to conceal information, but the record reflects his fair, albeit zealous, litigation of the defense motions and his prompt compliance with the trial court's orders.

Finally, the trial court concluded that "it was not irrational for the prosecutor to manipulate the trial in order to create a better subsequent opportunity to convict, and given the conduct of the prosecutor throughout this case,

culminating in the failure to disclose relevant information to the defense until the witness was on the stand," Mr. Simpson had overreached. We disagree.

The circumstances of this case contrast sharply to those in ***Copening*** where, we must remember, despite the overwhelming record establishing a prosecutor's "adamant and unreasonable refusal to follow the plain words of the [discovery] statute and the recently given admonitions of the trial court," ***id.*** at 713, 303 N.W.2d at 828, the supreme court *reversed* the trial court's decision to dismiss with prejudice, *see* ***id.*** at 724-25, 303 N.W.2d at 833-34. Nothing in Mr. Simpson's conduct comes close to that of the prosecutor in ***Copening***.[11]

The record clearly establishes that Mr. Simpson's conduct was not "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 was not "designed either to create another chance to convict … because the first trial is going badly, or to prejudice [Buettner's] rights to successfully complete the criminal confrontation at the first trial …." ***Id.*** at 714, 303 N.W.2d at 829. The record all but refutes Buettner's wholly speculative contention that the State's case had proven unexpectedly weak and that Mr. Simpson would be able to strengthen it at a second trial. The record exposes the absurdity of Ms. Shellow's allegations of

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[11] In fact, Mr. Simpson vigorously opposed the motion for mistrial. As in ***State v. Copening***, 100 Wis.2d 700, 303 N.W.2d 821 (1981):

> The record shows that the prosecutor opposed the motion for mistrial, and contended that if the court considered his conduct culpable, he personally should be punished, but not the public or system of justice, which would suffer as the result of a mistrial. On the face of the record, then, it appears that the prosecutor did not intend by his conduct to subject the defendant to the harassment of another trial.

Id. at 716 n.6, 303 N.W.2d at 829 n.6.

Mr. Simpson's Machiavellian maneuvers (*see* note 6, above). The record provides no "explicit evidence of bad faith prosecutorial or manipulative motivation." ***Id.*** at 717, 303 N.W.2d at 830.

Reviewing the record carefully, and fully conceding the trial court's critical vantage point in assessing the demeanor of the witnesses and the lawyers at all the proceedings, we conclude that Mr. Simpson's conduct did not constitute "overreaching." Therefore, we conclude that the trial court erred in granting Buettner's motion to dismiss with prejudice. Accordingly, we reverse the order dismissing the charge against Buettner and remand for further proceedings consistent with this decision.[12]

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.

[12] We have said little about the jail record and its reference to "suicide watch." It did not appear to be influential in the trial court's mistrial or dismissal decisions except to the extent that it could have had a bearing on Buettner's potential theory in her ***Miranda/Goodchild*** motion. We emphasize that our decision leaves the trial court's mistrial decision intact (*see* ***Copening***, 100 Wis.2d at 716, 303 N.W.2d at 830 ("the propriety of the ordering of the mistrial is not a subject for appellate review")); our decision does not preclude the trial court from conducting another ***Miranda/Goodchild*** hearing now that Buettner will be able to utilize the previously nondisclosed jail record and other documents.