COURT OF APPEALS
DECISION
DATED AND FILED

May 10, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1363-CR **Cir. Ct. No. 2014CF88**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN D. STONE,

DEFENDANT-PETITIONER.

APPEAL from an order of the circuit court for Washburn County: EUGENE D. HARRINGTON, Judge. *Affirmed and cause remanded for further proceedings.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Steven Stone has petitioned this court for leave to appeal a nonfinal order denying his motion to dismiss on double jeopardy grounds following a mistrial. Stone argues a retrial is barred by double jeopardy principles

because he has established, as a matter of law, that the prosecutor in this case committed prosecutorial overreaching by failing to adequately prepare a police witness who inadvertently offered prohibited testimony regarding Stone's prior offenses. We grant Stone's petition and reject his legal arguments because they are unsupported by controlling case law. Accordingly, we affirm and remand for further proceedings.

BACKGROUND

¶2 The State filed a criminal complaint charging Stone with fifth-offense operating while intoxicated (OWI) and operating a motor vehicle while revoked. The factual basis for the complaint was Washburn County sheriff's deputy Joshua Christman's report that he apprehended an intoxicated Stone after Stone crashed his truck into a ditch. Stone pleaded not guilty to the offenses, and the case proceeded to trial.

¶3 At the final pretrial hearing, Stone requested that the circuit court, not the jury, determine the number of prior offenses. Stone then conceded that he was guilty of four prior OWI offenses and that those offenses were "already proven." The court stated it would decide the matter at a later date, presumably at sentencing.

¶4 During trial, the State called deputy Christman as its fourth witness. After eliciting some basic facts about Christman's background, the district attorney questioned Christman about events on the night in question. Christman discussed his encounter with Stone, including Stone's admission that he had consumed a twenty-four-pack of beer, as well as Stone's injuries and his failure to adequately perform field sobriety testing.

¶5 Christman testified Stone consented to an evidentiary test of his blood. The district attorney then asked: "So what did you do then?" Christman responded: "After that, I ran his information through my [squad computer]. I also ran his pertinent information through the dispatch center. After getting his return, I observed he had four or five OWI —" Defense counsel immediately objected, and the jury was excused.

¶6 After the jury left, the circuit court questioned the district attorney regarding his witness preparation. The district attorney stated he did not specifically warn the witness not to address Stone's prior convictions, but the assistant district attorney had done so. Defense counsel then moved for a mistrial and dismissal with prejudice. The State did not oppose the mistrial motion, but it argued the officer's statement regarding prior offenses was an "inadvertent mistake" and unintentional. Accordingly, the State opposed Stone's request for dismissal with prejudice. The circuit court granted a mistrial and requested briefing on the double jeopardy issue.

¶7 The parties submitted briefs and supporting affidavits. The district attorney averred he did not intentionally elicit testimony about Stone's prior offenses. The assistant district attorney averred that she had advised Christman and other prospective witnesses not to refer to Stone's prior convictions, but Christman averred he did not hear the assistant district attorney say anything about the matter. Christman stated he did not know Stone's prior OWI convictions were prohibited topics at trial.

¶8 The circuit court concluded dismissal with prejudice was not warranted. The court stated Christman was asked a "seemingly innocuous question," but his answer "violated the stipulation and the agreement that the

Court and counsel had arrived at during the pretrial process." Relying on ***State v. Jaimes***, 2006 WI App 93, 292 Wis. 2d 656, 715 N.W.2d 669, the circuit court concluded that jeopardy did not attach because there was no evidence that the prosecution was intentionally attempting to provoke a mistrial to "salvage a bad case." Rather, "[i]t was just a case that was being presented by the district attorney, and the officer, inexperienced, blurted something out that he probably shouldn't have." Accordingly, the court set the matter for a second jury trial.

¶9 Stone petitioned this court for leave to appeal a nonfinal order. By order dated July 10, 2015, we instructed the parties to file briefs regarding the merits of the double jeopardy issue. Pursuant to our supreme court's decision in ***State v. Jenich***, 94 Wis. 2d 74, 292 N.W.2d 348 (1980) (per curiam) (opinion on reconsideration), we now grant Stone's petition for leave to appeal.[1]

DISCUSSION

¶10 The parties agree ***Jaimes*** sets forth the controlling principles of law regarding whether jeopardy attaches to a mistrial. The double jeopardy clauses of both the federal and state constitutions protect a defendant's right to have his or

[1] The per curiam opinion on reconsideration in ***State v. Jenich***, 94 Wis. 2d 74, 292 N.W.2d 348 (1980), modified that portion of the supreme court's earlier opinion holding that a pretrial order denying a motion to dismiss on double jeopardy grounds was a final order and, as such, appealable by right. ***Id.*** at 76. The court clarified that such a pretrial order is a nonfinal order appealable only by permission of the court of appeals under WIS. STAT. § 808.03(2). ***Jenich***, 94 Wis. 2d at 97a. However, the supreme court advised that this court should "be careful in exercising that discretion when the order sought to be appealed is one which denies a motion to dismiss for double jeopardy." ***Id.*** Given the "serious constitutional questions raised by claims of double jeopardy," we elect to grant Stone's petition in this case, although we ultimately conclude he is not entitled to relief. *See* ***id.*** at 97b.

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

her trial completed by a particular tribunal; these provisions also protect a defendant against repeated attempts by the State to convict him or her for an alleged offense. ***Jaimes***, 292 Wis. 2d 656, ¶7 (citing ***State v. Hill***, 2000 WI App 259, ¶10, 240 Wis. 2d 1, 622 N.W.2d 34). "However, when a defendant successfully requests a mistrial, the general rule is that the double jeopardy clause does not bar a retrial because the defendant is exercising control over the mistrial decision[,] … in effect choosing to be tried by another tribunal." ***Id.*** (citing ***Hill***, 240 Wis. 2d 1, ¶11).

¶11 The exception to this general rule is "that retrial is barred when a defendant moves for and obtains a mistrial due to prosecutorial overreaching." ***Id.***, ¶8. To constitute "overreaching," the defendant must demonstrate the existence of two elements:

> (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 [or her] 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 [or her] by successive prosecutions.

State v. Quinn, 169 Wis. 2d 620, 624, 486 N.W.2d 542 (Ct. App. 1992) (quoting ***State v. Copening***, 100 Wis. 2d 700, 714-15, 303 N.W.2d 821 (1981)).

¶12 We therefore consider whether Stone has demonstrated that the prosecutor had the requisite intent "to subvert the protections against double jeopardy." *See* ***id.*** at 625. Examining the prosecutor's intent involves a factual finding. *See* ***id.*** at 626 (citing ***Oregon v. Kennedy***, 456 U.S. 667, 675 (1982)). The circuit court in this case determined the prosecutor was not aiming to provoke

a mistrial but had instead committed a simple oversight by failing to ensure he had advised a relatively inexperienced officer not to mention Stone's prior convictions at trial. Stone does not argue this factual finding was clearly erroneous. *See* ***id.*** (factual findings will not be overturned unless they are clearly erroneous).

¶13 Rather, Stone appears to make two arguments for finding the requisite intent in this case as a matter of law. First, he appears to argue that when a prosecutor does not oppose a mistrial, the defendant has established the requisite intent. He also argues that a prosecutor has a "culpable" state of mind under ***Jaimes*** and ***Quinn*** when the prosecutor fails to adequately prepare a witness—even without the specific intent to provoke a mistrial.

¶14 First, we reject the notion that intent to derail the trial may be inferred as a matter of law when a prosecutor does not object to the defendant's motion for a mistrial. Nothing cited or argued in Stone's brief persuades us to depart from the longstanding rule that determining the prosecutor's intent is a factual matter for the circuit court. Certainly the prosecutor's opposition to the defendant's motion is one factor for the circuit court to take into account when determining whether intent exists as a factual matter. *See* ***Jaimes***, 292 Wis. 2d 656, ¶10. However, other factors include, but are not limited to, how far the State's case had progressed at the time of the mistrial motion, whether the witness was expressly advised against offering the prohibited testimony, and whether the prosecutor's questioning invited the witness to explore prohibited topics. *See* ***id.*** Given these factors, the record supports the circuit court's finding that the prosecutor did not intend to derail the trial, notwithstanding Stone's failure to argue such a finding was clearly erroneous.

¶15 Second, Stone's argument that the prosecutor's mere negligence in witness preparation establishes the requisite intent is contrary to ***Jaimes***, which explicitly rejected the argument that "the prosecutor's responsibility to avoid provoking a mistrial must extend to the law enforcement officers who testify at trial." ***Id.***, ¶11. The defendant in that case, like Stone here, asserted the officer's testimony "must be imputed to the prosecutor, and when an officer testifies about explicitly excluded evidence, it is binding on the prosecutor so as to attach double jeopardy." ***Id.*** However, we determined that, unless there is some form of prosecutorial misconduct like collusion between the prosecutor and the police witness, an officer's inappropriate trial testimony does not bind the State and therefore preclude retrial on double jeopardy grounds. ***Id.***, ¶13 (citing ***People v. Walker***, 720 N.E.2d 297, 301 (Ill. App. 1999)).

¶16 Stone asserts "it would be impossible for [him] to establish a design to create another chance to prosecute based on the failure of the prosecutor to instruct a witness on inadmissible evidence." However, ***Jaimes*** acknowledged that "showing collusion between a prosecutor and a police witness may be a difficult proposition for a defendant to sustain." ***Id.***, ¶14. The test for "overreaching" is "meant to be an onerous one as many trials admittedly will have some evidentiary error, and the remedies of striking the testimony, admonishing the prosecutor or witness or issuing a cautionary instruction typically are viewed as sufficient to remove prejudice to a criminal defendant." ***Id.*** Stone did not identify any evidence of collusion in this case.

By the Court.—Order affirmed and cause remanded for further proceedings.

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