

FILED

11-15-2021

Clerk of Circuit Court

Kenosha County

2020CF000983

STATE OF WISCONSIN

CIRCUIT COURT

KENOSHA COUNTY

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STATE OF WISCONSIN,

Plaintiff,

vs.

Case Nos. 20 CF 983

KYLE RITTENHOUSE,

Defendant.

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**MOTION FOR MISTRIAL WITH PREJUDICE**

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COMES NOW, the defendant, Kyle Rittenhouse, appearing specially by his attorneys Mark Richards and Corey Chirafisi upon all the files, records and recordings heretofore had herein respectfully moves this court for entry of an Order granting a mistrial with prejudice. As grounds for this motion, the defendant asserts the following:

1. On August 18, 2021, the state filed a “Second Other Acts Motion” seeking to admit evidence regarding a video showing the defendant sitting in a vehicle having a discussion regarding what he would like to do to people he believed were looting.
2. That other acts motion was heard, along with additional “other acts motions” filed by the State on September 17, 2021. Notes from CCAP indicate the court was “taking under advisement with a bias against admitting the evidence.”
3. The state did not file a Motion for Reconsideration on any of their motions.

4. On November 8, 2021, Kyle Rittenhouse chose to exercise his right to testify in his defense. Prior to testimony, the Court conducted a colloquy with Mr. Rittenhouse regarding his rights. Further, the Court inquired about other areas of possible inquiry, including Wis. Stat. §906.08 and §904.04. The state indicated they believed the Court “left the door open on some of those things.”
5. The Court then indicated that after thinking about it, there was nothing that the Court heard in the case that would change the Court’s mind on any of the rulings.
6. The Court then stated, “unless there is something else on that?” The state did not indicate they had anything else to say about that ruling.
7. On cross examination, the state asked the defendant, “since August 25, 2020, this is the first time you told this story.” The Court sustained the defense objection. Shortly thereafter, the prosecution stated to the defendant, that he sat through the trial, had an opportunity to watch videos played in court, he had the opportunity to listen to testimony of all 30 witnesses that testified and after all that, now you are telling your side of the story.
8. That question required the Court to excuse the jury and remind the state that the defendant has a constitutional right to post arrest silence. The Court indicated that the prosecution was either over the line or right up on the line and that the Court didn’t want any other problems.

9. Then after being warned about post arrest silence, the state violated the Court's order regarding the admission of "other acts evidence" by asking the defendant, "you have previously indicated that you wished you had your AR 15 to protect someone's property." The Court again admonished the state for violation of the previous court order.
10. The defendant moved for a mistrial with prejudice. The Court indicated that it would take the motion "under advisement."
11. After lengthy comment, the prosecutor then stated, "I thought, my good faith belief- you had left the door open a little bit, now we had something new and I was going to probe it." The court responded, "I don't believe you."
12. On November 5, 2021, the fifth day of trial on this case, the prosecution turned over to the defense footage of a drone video which captured some of the incident from August 25, 2020. The problem is, the prosecution gave the defense a compressed version of the video. What that means is the video provided to the defense was not as clear as the video kept by the state. The file size of the defense video is 3.6 MB and the state's is 11.2 MB. Further, the dimensions on our video are 480 x 212, the state's, 1920 x 844. The video which was in the state's possession, wasn't provided to the defense until after the trial concluded. During the jury instructions conference, the defense played their version of the video for the court to review. The state indicated their version was much clearer and had their tech person come into court to have the court review their clearer video. The video is the same, the

resolution of that video, however, was not. The state did not provide their quality video to the defense until Saturday, November 13, 2021, and only did so upon specific request by Attorney Wisco—two days before closing arguments and after the evidence had been closed.

13. Ordinarily, where mistrial is granted on the motion of the defendant, it is presumed that defendant has made the election to abandon the valuable right of being tried before a single tribunal. However, a different rule applies when the mistrial motion is induced by prosecutorial “overreaching.” In such a case, it is asserted, the constitutional prohibition against double jeopardy will bar retrial. *State v. Copenig*, 100 Wis.2d 700, 303 N.W.2d 821 (1981).

14. The following elements are required in order 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 and awareness that his activity would be prejudicial to the defendant; and (2) the prosecutor’s action was designed either to create another change to convict, that is, 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. *Id.* at 714.

15. The prosecutor’s conduct was clearly intentional. Initially he asked the defendant about post-arrest silence and that objection was sustained. He then did it again, moments later. Further, prior to the defendant taking the

stand, the Court not only foreclosed the introduction of “other acts evidence,” the Court stated, “unless there is something else on that” and the state said nothing. Shortly thereafter, they violated the Court ruling. That behavior by the state was intentional and he knew it would be prejudicial to the defendant, he had previously attempted to get the evidence admitted as a bad act.

16. As it relates to the compressed drone footage. The prosecution should be required to explain to the court why they did not copy the footage for the defendant with the same quality as their copy. The video footage has been at the center of this case. The idea that the state would provide lesser quality footage and then use that footage as a linchpin in their case and it is the very reason they requested and were granted the provocation instruction by the Court. The failure to provide the same quality footage in this particular case is intentional and clearly prejudices the defendant.
17. This record has bad faith on the part of the prosecutor. We know that because he attempted to inform the court of his good faith basis for asking questions regarding the inadmissible evidence, and was told “I don’t believe you.”
18. If it is not a good faith basis for seeking admission of previously excluded evidence, then it is bad faith. The Court has made the statement that it does not believe the prosecutor’s statement. It is reasonable to conclude the court believes bad faith was involved.

19. Further, the outcome of this case is in no way a foregone conclusion for the state. Unlike the facts of *Copenig* in which the trial court stated, “At that point....in the Court’s view Mr. Zapf could have gone on vacation and not argued the case and it probably would have been difficult for you (the defense counsel) to convince the jury that they should find him not guilty.” *Id.* at 720.

20. The testimony in this case up to that point had not gone very well for the prosecution. Mr. Grosskreutz acknowledged that he was worried for the defendant’s safety when “jump kick man” and Anthony Huber were attacking him. Mr. Grosskreutz stated that any time head trauma was involved it was a concern. Thereby assisting the defendant’s self-defense claim for “jump kick man” and Anthony Huber. Further, Mr. Grosskreutz testified that the defendant did not fire at him until he had advanced on the defendant with his gun pointing at the defendant. Thereby providing a reasonable basis for self-defense on that charge.

21. Testimony by the medical examiner was also problematic for the state. Dr. Kelly testified that the soot on Mr. Rosenbaum’s hand made it likely he was holding onto the barrel of the defendant’s firearm and the time he was shot. Which supports the testimony of Richie McGinniss.

22. The state has repeatedly violated instructions from the Court, acted in bad faith and intentionally provided technological evidence which was different from theirs.

23. For those reasons, the defendant respectfully requests the Court find “prosecutorial overreaching” existed, that overreaching was intentional and in bad faith and thereby grant the defendant’s motion for a mistrial with prejudice.

Dated this 14<sup>th</sup> day of November, 2021

Electronically signed by:

*s/Mark D. Richards*

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