

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0882**

State of Minnesota,
Respondent,

vs.

Shawn Francis Mortensen,
Appellant.

**Filed June 2, 2025
Affirmed
Wheelock, Judge**

St. Louis County District Court
File No. 69DU-CR-18-327

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Kimberly J. Maki, St. Louis County Attorney, Chris Florey, Assistant County Attorney,
Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota; and

Robert M. Christensen, Special Assistant Public Defender, Robert M. Christensen, P.L.C.,
Minneapolis, Minnesota (for appellant)

Considered and decided by Wheelock, Presiding Judge; Worke, Judge; and
Connolly, Judge.

NONPRECEDENTIAL OPINION

WHEELOCK, Judge

Appellant challenges the district court's order denying his motion to dismiss the criminal complaint against him on double-jeopardy grounds following a mistrial. We affirm.

FACTS

In January 2018, respondent State of Minnesota charged appellant Shawn Francis Mortensen with three counts of first-degree criminal sexual conduct with a child under the age of 13 in violation of Minn. Stat. § 609.342, subd. 1(a), (h)(iii) (2010), and one count of fifth-degree criminal sexual conduct in violation of Minn. Stat. § 609.3451, subd. 1(2) (2012), based on reports of sexual abuse of his daughter, R.A., between February 2012 and October 2015. R.A. initially reported the abuse in October 2015, and the first forensic interview related to sexual abuse of R.A. by Mortensen took place at First Witness Child Advocacy Center¹ that same month. First Witness records all forensic interviews, maintains its files in a database, and provides a copy of the video recording and corresponding report of the interview to the investigators observing the interview. R.A. returned to First Witness for forensic interviews twice more related to allegations of sexual abuse by Mortensen, in 2017 and 2021.

¹ First Witness is an independent organization that coordinates the multidisciplinary interview process in cases involving allegations of child sexual abuse in St. Louis County and works with social-services agencies and law enforcement.

Prior to the October 2015 forensic interview, R.A. participated in another forensic interview at First Witness after reporting sexual contact from an 11-year-old family member, E.W., in May 2015 (E.W. interview). The forensic interviewer for both the May and October 2015 interviews was the same.² Mortensen’s motion for a mistrial was based on the state’s failure to discover and disclose the video recording of the E.W. interview.

In June 2019, roughly a year and a half after the state filed its initial complaint against Mortensen, a new prosecutor took over the case. The prosecutor later testified that, when he received the casefile, it did not include a video recording of the E.W. interview, but that “everybody knew” about the allegations of abuse by E.W. The former prosecutor testified that she was aware of the E.W. interview but did not recall whether she had attempted to obtain the video recording.

A jury was selected and sworn, and trial began on October 4, 2022. On the morning of October 6, the forensic interviewer appeared at the courthouse to testify about the interviews she conducted with R.A. regarding the allegations of sexual abuse by Mortensen. When the prosecutor met with the forensic interviewer that morning prior to her taking the stand, he empathized that she must be ready for this matter to finally end because she had conducted two interviews with R.A. The forensic interviewer then corrected the prosecutor, stating that she had conducted three interviews with R.A.—the

² The same interviewer conducted one other interview of R.A. related to allegations against Mortensen. In total, R.A. participated in four forensic interviews at First Witness—one related to E.W. and three related to Mortensen. Of the four interviews, three were conducted by the same forensic interviewer.

first being the E.W. interview—and produced a video recording of the E.W. interview from her trial-preparation materials. Immediately after receiving the recording from the forensic interviewer, the prosecutor disclosed the video and made copies for Mortensen and the district court. The district court then released the jury for the day, and Mortensen moved for a mistrial based on the state’s failure to disclose the E.W. interview.

The next morning, the parties returned to discuss Mortensen’s motion for a mistrial. The district court stated its concerns about granting the motion because of how long the case had been pending, notwithstanding that some of the delay was due to the COVID-19 pandemic and multiple requests for continuances, most of which were Mortensen’s requests. The state opposed the motion. Ultimately, the district court granted the motion in the interests of justice.

The parties immediately began planning a new trial, and in February 2023, jury selection began. On the first day of the second trial, Mortensen filed a motion to dismiss the charges on multiple grounds, including double jeopardy. The district court held an evidentiary hearing on the motion in October 2023 that was limited in scope to the circumstances of the late disclosure of the E.W.-interview recording.

At the hearing, the prosecutor testified that he served as a member of the board of directors for First Witness, assisted with training staff there, and was familiar with First Witness’s forensic-interview protocols. He explained that, when he began preparing for the original trial in this case, he met with the forensic interviewer and, at that meeting, she commented that R.A. was one of the first interviews she ever conducted. The prosecutor testified that he “was confused because [he] knew [the forensic interviewer] had been

around longer and [he] did not think that the interview [regarding conduct by] Mr. Mortensen was one of her first.” The prosecutor did not follow up at that time. The original trial date was continued due to the pandemic, and the prosecutor testified that, during the pandemic lockdown, he attempted to find the E.W. interview. The prosecutor said that he called First Witness and was told that the video recording did not exist, but he admitted that he could not recall with whom he spoke and did not have notes of this call. The prosecutor stated that, based on his knowledge of First Witness protocol, he had guessed that R.A. had refused to participate in the interview because that would explain why there was no video recording. The prosecutor said that he did not inform Mortensen of his conversation with the forensic interviewer or his call to First Witness to ask about the video recording. He agreed during his testimony that he was not “intentionally goading the defendant or the defense into moving for a mistrial” through his actions regarding the E.W.-interview recording.

The First Witness staff member who located the E.W.-interview recording testified that, during lockdown, First Witness’s files were all retrieved through a virtual private network (VPN) that sometimes did not work well and that, because of this, even if staff was diligent and the records existed, sometimes they could not be found. In her affidavit, this staff member explained that she found the E.W. interview in August or September 2022 after running a search with the alternate spelling of “Mortenson,” with an “o,” in the database, which produced three results—one from 2015, one from 2017, and one from 2021. She was able to locate recordings in the physical archives consistent with those search results. But when she went to the physical archives for all 2015 records, she also

found a video recording that had been filed with the spelling “Mortensen,” with an “e.” The staff member reviewed the file and noticed that both spellings, “Mortensen” and “Mortenson,” appeared in the file, and thus, the staff member assumed this was the video recording the forensic interviewer needed for her trial preparation. The video recording was of the E.W. interview, however, not the October 2015 interview about Mortensen’s conduct.

The forensic interviewer testified that she believed spelling errors in the files are uncommon at First Witness and that she did not discuss the E.W. interview with the prosecutor at any point prior to October 2022 because she did not think it was relevant to the prosecution of Mortensen. The law-enforcement investigator who had observed the E.W. interview testified that, in May 2023, the prosecutor reached out to ask if law enforcement had a copy of the E.W.-interview recording. The investigator and the IT department for the police searched various databases at the police department, including both the evidence and report systems in the records unit and both old and new programs used, for the video recording but could not find it. The investigator testified that, when a child’s disclosure is unlikely to lead to a criminal charge, which was the case with the E.W. interview, it was uncommon for law enforcement to receive a copy of the video recording. The social worker who observed the E.W. interview also could not find any record of the video recording but stated that it was uncommon to receive a video recording in a child-welfare investigation, which was how the E.W. interview had been classified because the alleged abuser was a minor.

In March 2023, the district court denied, on all grounds presented to it, Mortensen's motion to dismiss the criminal complaint. As to the state's conduct, the district court found that the state "knew or should have known" that the E.W.-interview recording existed, that the state failed to act with due diligence or reasonable care, and that the state was negligent but "did not intentionally or willfully fail to locate and disclose this video." The district court's order concluded:

It is clear to the Court that the State was not purposefully trying to goad the defense into moving for a mistrial. . . .

In addition, the State's failure to obtain this video prior to trial was negligent, not intentional, or willful and not "gross negligence" as urged by the defense. It was a failure of the State to use ordinary care in putting the puzzle pieces together on this E.W. incident. [The] Prosecutor[']s . . . effort to seek out the video from First Witness during the pandemic shows there was an attempt and not a complete "indifference" to his legal duties.

Mortensen appeals.

DECISION

Mortensen argues that the district court erred by denying his motion to dismiss on double-jeopardy grounds because the state was grossly negligent when it failed to disclose the E.W.-interview recording.³ The state asserts that the district court did not err in its

³ Mortensen also argues that this court should adopt a new standard under the Minnesota Constitution to protect defendants from grossly negligent conduct by the state. Because we conclude that the district court did not clearly err in determining that the state's actions were negligent but not intentional, willful, or grossly negligent, we decline this invitation.

finding that the state acted with negligence and thus that the district court did not err by denying Mortensen's motion because the state did not act intentionally or willfully.

The Minnesota Constitution provides that “no person shall be put twice in jeopardy of punishment for the same offense.” Minn. Const. art. I, § 7. At present, the Minnesota Constitution has not been interpreted to provide broader protections against double jeopardy than the United States Constitution provides, and thus we are persuaded by caselaw that interprets the United States Constitution's Double Jeopardy Clause. *State v. Fuller*, 374 N.W.2d 722, 727 (Minn. 1985). The Double Jeopardy Clause “protects a criminal defendant from repeated prosecutions for the same offense.” *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982) (footnote omitted). However, if the district court grants a defendant's motion for a mistrial, it “does not bar a second trial unless the mistrial resulted from governmental misconduct intended to provoke the mistrial request.” *Fuller*, 374 N.W.2d at 726 (applying the test announced by the United States Supreme Court). If the prosecutor is “merely negligent” in their actions and is not “willful” or “intentional,” double-jeopardy protections are not invoked. *Id.* at 726-27.

Appellate courts review double-jeopardy challenges de novo. *State v. Leroy*, 604 N.W.2d 75, 77 (Minn. 1999). Whether the prosecutor held the intent required to bar a second trial based on double-jeopardy protections is a question of fact that we review for clear error. *State v. McCormick*, 835 N.W.2d 498, 509 (Minn. App. 2013), *rev. denied* (Minn. Oct. 15, 2013). “A finding of fact is clearly erroneous when it is either manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.” *Id.* (quotation omitted). We consider “the evidence in the light most favorable to

the district court's findings" and will reverse the district court's findings only if we reach a "definite and firm conviction that a mistake was made." *Id.* (quotations omitted).

Here, the district court found that the state knew or should have known that the video recording existed, that the state did not act with due diligence or reasonable care in its attempt to acquire the video recording, and that these actions amounted to negligence. The district court's order explained that the state's actions were "negligent, not intentional, or willful and not 'gross negligence' as urged by the defense. It was a failure of the State to use ordinary care in putting the puzzle pieces together on this E.W. incident."

The district court's findings are supported by the record. The prosecutor testified that he attempted to track down the E.W.-interview recording but a First Witness staff member told him that no video recording existed. A First Witness staff member explained that the relevant files used two different spellings of the name "Mortensen" and that this error was not discovered until the staff member searched for the physical files needed to prepare the forensic interviewer to testify. The criminal investigator and social worker both testified that they searched their databases and did not find the video recording. The prosecutor testified that "everybody knew" of E.W.'s sexual contact with R.A. and that this knowledge was clear during discovery. In addition, after the forensic interviewer produced the E.W.-interview recording, the prosecutor immediately made copies of the recording and provided them to Mortensen and the district court. The prosecutor expressed at the evidentiary hearing that he was not "intentionally goading the defendant or the defense into moving for a mistrial." All of this evidence supports the district court's finding that the state acted with negligence and did not act intentionally or willfully.

Because the district court did not clearly err in its findings of fact and its determination of negligence on the part of the state is not contrary to the weight of the evidence, the district court did not err when it denied Mortensen's motion to dismiss on double-jeopardy grounds.

Affirmed.