Illinois Official Reports

Appellate Court

People v. Weinke, 2021 IL App (1st) 180270

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. WAYNE WEINKE, Defendant-Appellant.
District & No.	First District, First Division No. 1-18-0270
Filed	September 30, 2021
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 06-CR-22436; the Hon. Carol Howard, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	Jed Stone, of Stone and Associates, of Waukegan, and Andrea D. Lyon, of Lyon Law, of Chicago, for appellant. Kimberly M. Foxx, State's Attorney, of Chicago (Alan J. Spellberg, Assistant State's Attorney, of counsel), for the People.
Panel	PRESIDING JUSTICE HYMAN delivered the judgment of the court, with opinion. Justices Pierce and Coghlan concurred in the judgment and opinion.

OPINION

¶ 1 The trial court found Wayne Weinke guilty of first degree murder for the death of his mother, Gloria Weinke, and sentenced him to 40 years' imprisonment. We reversed and remanded for a new trial because the trial court erred when it granted the State's request to take Gloria's emergency evidence deposition without satisfying Illinois Supreme Court Rule 414 (eff. Oct. 1, 1971). See *People v. Weinke*, 2016 IL App (1st) 141196, ¶¶ 3, 72. The court further erred when it ruled the deposition admissible at trial. *Id.* ¶¶ 3, 56. Before his second trial began, Weinke moved to dismiss his indictment on double jeopardy grounds. The trial court denied his motion.

¶ 2 Weinke now seeks interlocutory review (see Ill. S. Ct. R. 604(f) (eff. July 1, 2017)) and argues we should bar his retrial, relying on principles of double jeopardy. Weinke would have us either extend or depart from the federal double jeopardy standard, which only bars retrial when the State goads the defense into moving for a mistrial. *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982). Weinke advocates adopting a broader retrial prohibition beyond the mistrial context when a prosecutor deliberately commits misconduct to avoid anticipated acquittal. *United States v. Wallach*, 979 F.2d 912, 916 (2d Cir. 1992). The State argues against departing from *Kennedy* and contends that even if Illinois adopted *Wallach*'s proposed standard, Weinke's retrial would not offend double jeopardy principles.

¶ 3 We affirm the trial court's denial of Weinke's motion to dismiss on double jeopardy grounds. *Kennedy* and the Illinois cases applying it do not bar retrial after a successful appeal based on trial error, even where the appeal focuses on prosecutorial misconduct. Besides, the evidence fails to demonstrate that the prosecutor intended to goad either a mistrial or a successful appeal. Double jeopardy does not bar Weinke's retrial.

¶ 4 Background

¶ 5 Our decision in Weinke's first appeal recounts the essential facts. *Weinke*, 2016 IL App (1st) 141196, ¶¶ 6-28. We relate only the procedural history and the facts necessary to address the issue before us.

¶ 6 In July 2006, a security guard for the residential retirement community where Gloria Weinke lived found her at the bottom of her unit's basement stairs. She told police and paramedics that her son, Weinke, had pushed her over the first-floor railing, causing her fall and injuries. At Weinke's bond hearing, a prosecutor asked to preserve Gloria's testimony by video deposition. The State described Gloria's multiple injuries as "critical" and stated it was "unclear" whether she would survive. Weinke's counsel objected, and the court held the case to the next day.

¶ 7 The following morning, the State formally moved to take Gloria's video deposition that afternoon based on the "substantial possibility" she would be unavailable for trial. The State provided no details or documentation.

¶ 8 In court, the State said Gloria would have surgery in two days to repair her fractured pelvis, and the surgery was not scheduled sooner only because she had other extensive injuries that needed to stabilize first. The State provided no evidence of Gloria's condition. Weinke's counsel objected. He did not have Gloria's medical records or history and did not know

whether she was receiving medication that might affect her ability to testify, so he could not effectively cross-examine her.

¶ 9 After hearing arguments, the motion judge granted the State's request for an emergency evidence deposition based on Gloria's age, injuries, and history of cancer. The court scheduled the deposition for 2 p.m. that same day. Weinke's counsel objected and requested postponement to prepare. The State insisted on deposing Gloria before her impending surgery. Again, the court asked whether Gloria's condition was so critical that she might not survive the next two days, and the State answered, "I think that's quite possible, [Y]our Honor. Every day, she is declining in her condition. She has a collapsed lung, that is a recent development."

¶ 10 The court denied postponement based on the State's representation of Gloria's precarious condition. The court ordered the State to tender discovery immediately, and they gave Weinke's counsel photographs of Gloria's home and other documents two hours before the deposition.

¶ 11 In the video deposition taken from her hospital bed, Gloria described, among other details, the family quarrel over her and her late husband's estate plan. The couple's two sons, Kenneth and Weinke, had objected to a recent change in the estate plan favoring their sister, Gail, over them. Gloria said her son, Weinke, had unexpectedly come to her home early one morning to talk. After Gloria referenced the disagreement over the inheritance, Weinke suddenly picked her up and threw her over the railing into the basement. She described Weinke turning the light on, looking down at her, ignoring her pleas to press the emergency call button on the wall, turning off the light, and leaving her there. A guard found her hours later.

¶ 12 Weinke's counsel cross-examined Gloria about her cancer, conversations with Weinke, role in the family business, and estate arrangements.

¶ 13 Gloria died three months later. Before Weinke's trial, the State moved to admit Gloria's deposition into evidence under section 10.4 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.4 (West 2006)). Weinke objected, arguing the State failed to comply with Rule 414 to obtain the emergency deposition, depriving defense counsel of adequate opportunity to cross-examine Gloria. Weinke also alleged that, to persuade the court to grant its request, the State had lied about both the severity of Gloria's condition and prosecutors' communication with her doctors. See *Weinke*, 2016 IL App (1st) 141196, ¶¶ 20-23 (recounting State's multiple inaccurate, misleading statements to persuade trial court to grant Gloria's immediate deposition).

¶ 14 Weinke's counsel sought an evidentiary hearing to determine whether, to obtain the deposition, the State had provided accurate and honest information. The trial court denied the request. After arguments on the motion *in limine*, the court ruled the deposition admissible. The court found the State had complied with Illinois Supreme Court rules but did not address the issue of the State's allegedly false statements. Even if the State had lied, the court said, the undisputed facts of Gloria's age, cancer diagnosis, and impending surgery justified the deposition.

¶ 15 The State presented Gloria's deposition at Weinke's bench trial. The court found Weinke guilty of first degree murder, finding Gloria's video deposition persuasive along with the State's other evidence. Weinke received a 40-year prison sentence.

¶ 16 Weinke appealed his conviction and sentence, challenging the Rule 414 emergency deposition ruling and admission. We held the State did not meet its Rule 414 burden to provide

evidence that the deposition was "necessary" due to a "substantial possibility" the witness will be unavailable at trial. *Id.* ¶ 40. We found "[t]he State's written motion requesting Gloria's deposition was perfunctory, cursory, and without any supporting documentation." *Id.* ¶ 41. We also held the trial court's admission of the improperly obtained deposition violated Weinke's constitutional right to confront witnesses against him. *Id.* ¶ 56. We reversed and remanded for a new trial. *Id.* ¶ 72.

¶ 17 Weinke then moved to dismiss his indictment on double jeopardy grounds, based on the prosecutorial misconduct that led to his conviction's reversal. Weinke argued the United States and Illinois Constitutions bar retrial "where an appellate court has made a finding of fact that the State's attorney deliberately misled the Court." Weinke acknowledged this would be the first time an Illinois court extended the double jeopardy bar to retrial under such circumstances. The State argued jeopardy had not attached when it sought the emergency deposition, so any misconduct failed to trigger the *Kennedy* bar to retrial. The trial court denied Weinke's motion to dismiss, agreeing with the State that jeopardy had not attached when the prosecutorial misconduct took place.

¶ 18 Analysis

¶ 19 *Weinke* argues both the United States and Illinois Constitutions' double jeopardy clauses should bar his retrial after we reversed his conviction for prosecutorial misconduct. He concedes Illinois follows federal double jeopardy principles, which bars retrial only when the State goads the defense into moving for a mistrial. See *People v. Griffith*, 404 Ill. App. 3d 1072, 1080 (2010) (discussing Illinois courts' adoption of standard in *Kennedy*, 456 U.S. at 675-76). But Weinke never moved for a mistrial. Acknowledging the difference between mistrials and appellate reversals, he proposes expanding the interpretation of Illinois's constitution to prohibit retrial under double jeopardy principles when the State commits any misconduct to avoid acquittal without a mistrial. See *Wallach*, 979 F.2d at 916. The State contends the trial court correctly found jeopardy had not attached when prosecutorial misconduct—if any—happened. The State also denies *Kennedy* applies because the State never intended to provoke a mistrial.

¶ 20 We review *de novo* dismissal of a double jeopardy claim "where 'neither the facts nor the credibility of witnesses is at issue.' " *Griffith*, 404 Ill. App. 3d at 1079 (quoting *In re Gilberto G.-P.*, 375 Ill. App. 3d 728, 730 (2007)).

¶ 21 The United States and Illinois Constitutions prohibit repeat prosecutions for the same offense. See U.S. Const., amend. V ("No person shall *** be twice put in jeopardy of life or limb ***."); Ill. Const. 1970, art. I, § 10 ("No person shall *** be twice put in jeopardy for the same offense."). We interpret and apply the double jeopardy clauses from both constitutions in the same way. See *People v. Kimble*, 2019 IL 122830, ¶ 28 ("We interpret our state's double jeopardy provision identically to the federal provision." (citing *People v. Levin*, 157 Ill. 2d 138, 159 (1993))). The double jeopardy clause usually allows reprosecution after a mistrial except when the State intentionally misbehaves to goad the defense into moving for a mistrial. *Kennedy*, 456 U.S. at 675-76. But appellate reversal after conviction usually does not bar a second prosecution even if we reverse for the same error that could have resulted in a mistrial had Weinke asked for one. See *id.* at 676 ("If a mistrial were in fact warranted under the applicable law, of course, the defendant could in many instances successfully appeal *** on the same grounds ***, and the Double Jeopardy Clause would present no bar to retrial.").

¶ 22 Though *dicta*, the distinction *Kennedy* draws between mistrials and appellate reversals defeats Weinke's claim. Weinke never moved for a mistrial for prosecutorial misconduct; we reversed Weinke's conviction for trial error. *Weinke*, 2016 IL App (1st) 141196, ¶ 3. Our supreme court has expressly stated what *Kennedy* implied: when we reverse for trial error, double jeopardy principles allow retrial. *People v. Casler*, 2020 IL 125117, ¶ 57.

¶ 23 Despite this, Weinke contends *Kennedy*'s underlying rationale bars retrial. He asks us to find the remedy of appellate reversal on an equal footing with a mistrial. But granting the defense's motion for a mistrial differs markedly from remanding for a new trial following reversal. See *People v. Sales*, 357 Ill. App. 3d 863, 868 (2005) (citing *People v. Hooker*, 96 Ill. App. 3d 202 (1981)). Mistrials implicate double jeopardy concerns because they prematurely end the proceedings, destroying a defendant's right to be tried once by a single tribunal. *Hooker*, 96 Ill. App. 3d at 204. On the other hand, new trials awarded after judgment correct an error. *Id.* at 205.

¶ 24 We could resolve Weinke's claim on this basis alone. But the State's brief fails to distinguish between mistrials and appellate reversals, instead relying on traditional double jeopardy principles in the mistrial context. Because we reach the same result either way, we will analyze Weinke's appeal on the parties' terms.

¶ 25 Double jeopardy bars retrial when the State intentionally provokes a mistrial through deliberate prosecutorial misconduct. *Kennedy*, 456 U.S. at 676. The State's intent to abort trial controls: "[p]rosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, *** does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause." *Id.* at 675-76; see also *United States v. Oseni*, 996 F.2d 186, 188 (7th Cir. 1993) ("[U]nless [the prosecutor] is trying to abort the trial, his misconduct will not bar retrial. It doesn't even matter that he knows he is acting improperly, provided that his aim is to try to get a conviction. [Citation.] The only relevant intent is intent to terminate the trial, not intent to prevail at this trial by impermissible means.").

¶ 26 We follow *Kennedy* and bar retrial when the misconduct intends to goad the defense into moving for a mistrial. *People v. Bennett*, 2013 IL App (1st) 121168, ¶ 16; see also *People v. Ramirez*, 114 Ill. 2d 125, 129-30 (1986) (following *Kennedy*); *People v. Davis*, 112 Ill. 2d 78, 85-86 (1986) (following *Kennedy*). Bad faith misconduct alone does not suffice. *Bennett*, 2013 IL App (1st) 121168, ¶ 16. "Double jeopardy attaches only when the prosecutor's actual intent was to 'goad' the defendant into moving for a mistrial, a rare circumstance." (Internal quotation marks omitted.) *Id.*

¶ 27 Applying *Kennedy*, the trial court considered whether jeopardy attached when the alleged misconduct happened rather than the State's intent to provoke a mistrial. The court said,

> "I do not think that jeopardy had attached when this conduct *** took place. So I don't think that the doctrine of double jeopardy is *** the right vehicle to right this wrong. *** [A]ll the cases that the defense relied on involve situations in which *** jeopardy had attached at trial."

The State relies partially on this rationale to affirm.

¶ 28 But the trial court and the State misplace their focus. The relevant error was introducing the deposition at trial. We acknowledge our earlier opinion describes both granting the deposition and using it at trial as separate reversible errors. See *Weinke*, 2016 IL App (1st)

141196, ¶¶ 53, 65. But, we based reversal primarily on the ill-gotten deposition's use at trial. If the State had never used the deposition, we could not have reversed Weinke's conviction, regardless of how egregious the State's misconduct might have been. Thus, the relevant inquiry under *Kennedy* is whether the State intended to provoke a mistrial when it introduced the deposition at Weinke's trial. Contrary to the trial court's conclusions and the State's argument, jeopardy had attached at that point. *E.g.*, *People v. Bellmyer*, 199 Ill. 2d 529, 538 (2002) ("In a bench trial, jeopardy attaches when the first witness is sworn and the court begins to hear evidence." (Internal quotation marks omitted.)).

¶ 29 Weinke then argues the State committed intentional prosecutorial misconduct when seeking Gloria's emergency deposition, triggering *Kennedy* to bar his retrial. See *Kennedy*, 456 U.S. at 676. He claims this misbehavior's effects extended to the trial, "infecting" all stages of the proceedings such that a mistrial—or its equivalent—can remedy its consequences. But only the State's intent to provoke a mistrial matters. *Id.* We can infer "the existence or nonexistence of intent from objective facts and circumstances." *Id.* at 675. We do not think the record supports a finding of the requisite intent, whether we look at the State's conduct in seeking the deposition or admitting it.

¶ 30 The State deposed Gloria three days after a security guard found her at the bottom of her stairs and one day after Weinke was arrested. We find it near impossible to imagine the prosecutor had enough information about the relevant facts to even begin to game out the possibility of success at trial. Without an understanding of how Gloria's deposition testimony might fit into the rest of the yet-to-be-gathered evidence, the State could not have developed the requisite intent to use her deposition to throw the case. Under *Kennedy*, "harassment or overreaching" misconduct is insufficient to invoke a double jeopardy bar. *Id.* Even if the prosecutor acted negligently, recklessly, dishonestly, maliciously, or any other host of unsavory adjectives, that does not indicate an intent to goad a mistrial.

¶ 31 Further, the State sought and received the trial court's permission to admit the evidence deposition and present it at trial. In other words, by the time the State used the deposition at trial, it was acting with the imprimatur of the trial court. We find the State cannot have demonstrated its intent to provoke a mistrial when it admitted the deposition following a court's order. At that point, the trial court had determined the propriety of the deposition. Indeed, Weinke never moved for a mistrial, and the trial court never declared one. As we have observed, that both defense counsel and the trial court failed to recognize a need for a mistrial is evidence the State did not intend to provoke one. *People v. Harbold*, 262 Ill. App. 3d 1067, 1070 (1994).

¶ 32 As we mentioned at the outset, we have analyzed this case as if dealing with a mistrial. Of course, we are not. And Weinke's claims become even more tenuous when situated in the proper procedural context—our reversal of his conviction after an appeal. It seems even more far-fetched that the State either three days after the offense or at trial would have developed the intent to goad the defendant into filing a successful appeal. One would have to assume that Weinke would seek an appeal raising the admission of the deposition as an error, that we would agree allowing and admitting the deposition was error, and that we would not find the error harmless.

¶ 33 Applying *Kennedy* as Illinois law requires, nothing in the record suggests the State intended to goad Weinke into pursuing a successful appeal. Similarly, nothing in the record suggests the State developed the requisite intent to goad Weinke into moving for a mistrial when it sought

Gloria's testimony and presented it at trial—particularly when no mistrial occurred. The State can prosecute Weinke again without offending double jeopardy principles.

¶ 34 The Second Circuit, in *dicta*, raised the possibility of expanding *Kennedy*'s rationale beyond the mistrial context to preclude retrial when a prosecutor deliberately misbehaves at trial to avoid a likely acquittal. *Wallach*, 979 F.2d at 916. Other federal circuits have declined to adopt this expansion. See *United States v. Catton*, 130 F.3d 805, 808 (7th Cir. 1997) ("Any greater extension of *Kennedy* must be left to the Supreme Court, in view of the danger of adding a double jeopardy tail to every appellate-reversal dog."); *United States v. Doyle*, 121 F.3d 1078, 1087 (7th Cir. 1997) (declining to adopt *Wallach* but reserving question); *Jacob v. Clarke*, 52 F.3d 178, 182 (8th Cir. 1995) (declining to adopt *Wallach* but reserving question).

¶ 35 Weinke mentions that some state supreme courts have interpreted their respective constitutions' double jeopardy protections as broader than *Kennedy*'s narrow intent standard. Weinke does not propose we follow another state's specific standard. Rather, he argue states may adopt broader constitutional protections than the federal standard affords. See *Commonwealth v. Smith*, 615 A.2d 321 (Pa. 1992) (holding Pennsylvania Constitution's double jeopardy clause prohibits retrial when the prosecutor intentionally commits misconduct to prejudice defendant, denying a fair trial); *State v. Kennedy*, 666 P.2d 1316, 1326 (Or. 1983) (concluding Oregon Constitution bars retrial "when improper official conduct is so prejudicial to the defendant that it cannot be cured by means short of a mistrial, and if the official knows that the conduct is improper and prejudicial and either intends or is indifferent to the resulting mistrial"); *State v. Breit*, 930 P.2d 792, 803 (N.M. 1996) (holding New Mexico Constitution bars retrial after mistrial or reversal on appeal when (i) only new trial can cure prejudice to defendant, (ii) the State knows its conduct is improper and prejudicial, and (iii) "the official either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal"); *State v. Rogan*, 984 P.2d 1231 (Haw. 1999) (holding Hawaii Constitution bars reprosecution after mistrial or reversal on appeal when (i) defendant faced egregious prosecutorial misconduct and, thus, (ii) did not receive a fair trial beyond a reasonable doubt).

¶ 36 Taking this cue from *Wallach* and several other states' supreme courts, Weinke argues Illinois should adopt more expansive state constitutional double jeopardy protections to bar his retrial. He says the State deliberately misbehaved to avoid acquittal, first by lying to secure the deposition and then presenting wrongfully obtained evidence at trial, thus satisfying *Wallach*'s proposed "expansion" of *Kennedy*. See *Wallach*, 979 F.2d at 916.

¶ 37 Weinke invokes *Wallach* to avoid the procedural complication of his failure to move for a mistrial, as *Kennedy* requires. But *Wallach* would not help him, even if we took a position—which we decline to do—on whether Illinois should adopt its *dicta*. *Wallach* suggests "[i]f any extension of *Kennedy* beyond the mistrial context is warranted, it would be a bar to retrial only where the misconduct of the prosecutor is undertaken, not simply to prevent an acquittal, but to prevent an acquittal that the prosecutor believed at the time was likely to occur." *Id.* In *Wallach*, the State's trial witness perjured himself. *Id.* at 913-14. Wallach discovered the perjury after his conviction and moved for a new trial. *Id.* at 914. The reviewing court reversed the conviction, holding the State knew or should have known of the perjured testimony, which unfairly prejudiced Wallach. *Id.* Wallach moved to dismiss the State's new indictment on double jeopardy grounds under the *Kennedy* exception for intentional prosecutorial misconduct, despite failing to move for a mistrial. *Id.* at 914-15.

¶ 38 The Second Circuit contemplated extending *Kennedy* beyond the mistrial context when prosecutorial misconduct came to light after conviction. *Id.* at 916 ("Indeed, if *Kennedy* is not extended to this limited degree, a prosecutor apprehending an acquittal encounters the jeopardy bar to retrial when he engages in misconduct of sufficient visibility to precipitate a mistrial motion, but not when he fends off the anticipated acquittal by misconduct of which the defendant is unaware until after the verdict."). In other words, the trial is going badly, the prosecutor anticipates a loss, believes cheating is the only way to win, and cheats subtly enough to dodge a mistrial motion. See *id.* In *Wallach*, as in *Kennedy*, the State's intent when committing misconduct controls. *Id.*; *Kennedy*, 456 U.S. at 676.

¶ 39 Applying *Wallach*'s limited extension of *Kennedy* beyond the mistrial context, Weinke cannot show the State apprehended a loss at trial and then deliberately misbehaved to avoid probable acquittal. As we discussed, assuming the worst—that the State knowingly and intentionally lied about Gloria's condition to the court to get her deposition—the record appears to show the State wanted to secure vital testimony for its investigation. Two days after Gloria's fall, the State could not possibly have apprehended a likely loss at trial and lied to save itself. The investigation had just started; trial—if any—was well into the future. Indeed, Gloria was alive then, so the State had not yet charged Weinke for her murder.

¶ 40 While the State presented the prejudicial deposition at trial when jeopardy attached, the record does not show the State intentionally engaged in misconduct to avoid acquittal, as *Wallach* contemplated. The trial court had ruled the deposition admissible after extensive briefing and oral argument. Though the court erred on that issue, the State was not trying to subvert the trial's fundamental fairness. When trial began, the State could not have committed misconduct by presenting apparently admissible evidence, in accord with the trial court's ruling. The State thought it could use the deposition, so it did. This varies significantly from cases where the State misbehaves by deliberately ignoring the court's instructions regarding proper evidence and lines of argument. See *Harbold*, 262 Ill. App. 3d at 1068; *Griffith*, 404 Ill. App. 3d at 1075-76. This also differs from *Wallach* itself, where the State's alleged misconduct was surreptitious; here, the State openly sought to obtain and admit the deposition throughout the proceedings, allowing Weinke to move for a mistrial if he thought one was warranted.

¶ 41 Accordingly, Weinke does not satisfy *Wallach*'s proposed extension of *Kennedy*, even if Illinois adopted it. Weinke cannot show the State had developed the requisite intent to commit misconduct, dodge a mistrial, and sidestep an anticipated acquittal.

¶ 42 Weinke urges his "circumstances warrant" departing from the limited-lockstep doctrine of interpreting our state's constitutional double jeopardy protections identically to those of the United States Constitution. See *People v. Caballes*, 221 Ill. 2d 282, 299 (2006). He argues the prosecution should not benefit from its initial misconduct. His "circumstances," however, fall far short of *Griffith*, 404 Ill. App. 3d 1072. In *Griffith*, we declined to expand Illinois's interpretation beyond the federal standard and bar retrial after reversal for egregious prosecutorial misconduct at trial. *Id.* at 1087. We observed in *Griffith* that "[u]nder the current state of Illinois law, the only relief the defendant can claim, even in the face of a clear showing of egregious prosecutorial misconduct, is that which the *** court provided: a new trial." *Id.* Weinke likewise fails to persuade us to change course.

¶ 43 In *Griffith*, we noted an earlier appellate panel had affirmed Griffith's conviction " 'despite the intentional and systematic misconduct of the prosecutor.' " *Id.* at 1077 (quoting *People v. Griffith*, 334 Ill. App. 3d 98, 119 (2002)). The trial court denied all Griffith's motions for

mistrial after multiple instances of blatant misconduct. *Id.* at 1076. A federal district court later granted Griffith's petition for a writ of *habeas corpus* and overturned his conviction, concluding the State's "repeated, deliberate prosecutorial misconduct" denied due process and deprived Griffith of a fair trial. (Internal quotation marks omitted.) *Id.* at 1077. Although two separate courts affirmed gross prosecutorial misconduct at Griffith's trial and evident basis for a mistrial, we allowed retrial and declined to expand our state's constitutional double jeopardy protections on this basis. *Id.* at 1087.

¶ 44 As stated, we have not found deliberate, systematic prosecutorial misconduct. See *Weinke*, 2016 IL App (1st) 141196, ¶ 52. The trial court ruled Gloria's deposition admissible, so the State legitimately introduced it at trial. Before that, we cannot say whether the State intentionally lied to mislead the court to secure Gloria's testimony, as no court has so found. Unlike in *Griffith*, where two courts identified undeniable "systematic" prosecutorial misconduct, here the alleged misconduct affected one piece of evidence at trial. And, again, even if all the State's statements before the court had been true—had no basis for prosecutorial misconduct existed at all—the trial court would still have erred in granting and admitting the deposition. *Id.* ¶¶ 42, 66. Thus, Weinke's recourse is retrial without the improper evidence. See *Griffith*, 404 Ill. App. 3d at 1087; *Burks v. United States*, 437 U.S. 1, 15 (1978).

¶ 45 Affirmed.