COURT OF APPEALS
DECISION
DATED AND FILED

September 29, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP210-CR **Cir. Ct. No. 2007CM980**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW J. FOLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County: VINCENT K. HOWARD, Judge. *Judgment reversed and cause remanded with directions.*

¶1 BRUNNER, J.[1] Matthew Foley appeals a conviction for operating while under the influence of an intoxicant in violation of WIS. STAT.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

§ 346.63(1)(a) as a second offense. Foley argues that the circuit court admitted unlawfully seized evidence in violation of his constitutional rights. In addition, Foley claims the court erroneously exercised its discretion by refusing to declare a mistrial when the jury was improperly presented with evidence of Foley's prior OWI conviction. We conclude that the trial court properly denied Foley's suppression motion, but erroneously denied his request for a mistrial. We remand for a new trial.

BACKGROUND

¶2 James Armstrong, a patrol deputy for fourteen years, testified at trial that on April 22, 2007, he responded to a one-vehicle crash on a state highway. When Armstrong arrived at the scene, Foley was receiving treatment from medical personnel for multiple injuries. Foley was "verbally disagreeable" with the medics and "kept repeating over and over that he was so stupid for having done this." Armstrong testified that "a person who had been involved in a car crash would most likely want somebody to help them and yet [Foley] was being resistive towards the help that was being offered to him." Armstrong could detect the odor of intoxicants on Foley, and asked him if he had been drinking. Foley responded that he had consumed a twelve pack.

¶3 Armstrong further testified that based on his experience and the totality of the circumstances, he concluded "the primary cause of the crash was most likely intoxicants." April 22 was a clear day, road conditions were good, and the accident occurred in daylight. There were no obvious signs of a second vehicle occupant and no other person at the scene was injured. Armstrong concluded that "had that vehicle been driven prudently, [there was no reason that] it would have wound up traveling across an intersection, overturning numerous

times, and landing on its roof." Based on similar testimony during a suppression hearing, the circuit court found that Armstrong had probable cause to detain Foley for a blood draw after he failed field sobriety tests.

¶4 Foley's defense theory at trial focused on his identity as the driver. Foley claimed that Armstrong hastily concluded that he was the driver even though Armstrong did not personally observe him operating the car. Foley argued that no one knew the precise time of the accident. The State did not submit any fingerprint or DNA evidence to prove Foley was the driver, a point Foley emphasized at trial. When Foley asked why no fingerprint or DNA evidence was taken, Armstrong testified that the crime lab would not process the evidence unless a felony was involved.

¶5 The forensic evidence questioning led to an exchange that forms the basis for this appeal. Prior to trial, Foley stipulated to the element of the offense requiring proof of a prior OWI conviction. During cross-examination, the court advised Armstrong that "if a question invites a yes or no answer, it really helps the case speed along and helps the jury understand it if you just answer yes or no." Despite the stipulation and the court's admonition, the following exchange occurred in the jury's presence:

> Q. This is a criminal charge, isn't it, Officer?
> A. This is a second offense O.W.I. –

The judge immediately dismissed the jury and Foley moved for a mistrial, which the judge denied. The trial continued and the jury convicted Foley.

DISCUSSION

¶6 Foley first argues that Armstrong lacked probable cause to detain him for blood testing after he failed the field sobriety tests. Whether an arrest is supported by probable cause is a question of constitutional fact. ***State v. Popke***, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569. "A finding of constitutional fact consists of the circuit court's findings of historical fact, which we review under the 'clearly erroneous standard,' and the application of these historical facts to constitutional principles, which we review de novo." ***Id.*** (citation omitted).

¶7 Probable cause refers to the "quantum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime." ***State v. Secrist***, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999). An officer's conclusions must be reasonable given the totality of the circumstances, but they need not be technically certain. ***Id.*** at 215. "Whether probable cause exists in a particular case must be judged by the facts of that case." ***Id.*** at 212.

¶8 Foley claims that numerous factors undermine the circuit court's probable cause determination. Foley argues that we should reverse the suppression decision because no one observed him driving the car. Foley dismisses his failure of the field sobriety tests, claiming he was prejudiced by "the lack of a standardized field sobriety test for people in his condition." In short, Foley maintains his trial strategy on appeal and argues that Armstrong jumped to conclusions.

¶9 We disagree and conclude that Armstrong had probable cause to believe Foley was operating while intoxicated. The one-car rollover occurred on a clear day with good road conditions. Armstrong observed only one injured person

at the scene being treated by medics. He detected the odor of alcohol on Foley when he approached and Foley admitted that he had been drinking. Armstrong heard Foley make several other incriminating statements and Foley failed the field sobriety tests. The totality of the circumstances surrounding the scene gave Armstrong probable cause to believe that Foley was operating while intoxicated. The trial court committed no error in denying Foley's suppression motion.[2]

¶10 Next, Foley argues that the trial court should have declared a mistrial when the jury heard Armstrong's testimony regarding Foley's prior OWI offense. Declaring a mistrial is an act within the sound discretion of the trial court. ***State v. Thurmond***, 2004 WI App 49, ¶10, 270 Wis. 2d 477, 677 N.W.2d 655. "When no mistrial is declared, our review … is limited to whether the trial court erroneously exercised its discretion in refusing to do so." ***Id.*** A circuit court erroneously exercises discretion "when it fails to exercise its discretion, when the facts do not support the circuit court's decision, when the circuit court applies the wrong legal standard, or when the circuit court fails to use a demonstrated rational process to reach a reasonable conclusion." ***State v. Anderson***, 2006 WI 77, ¶83, 291 Wis. 2d 673, 717 N.W.2d 74.

¶11 Our decision on this issue is controlled by ***State v. Alexander***, 214 Wis. 2d 628, 571 N.W.2d 662 (1997). In ***Alexander***, the defendant was stopped for erratic driving and the officer detected the odor of intoxicants, observed the

[2] We note that Foley's citation to ***State v. Swanson***, 164 Wis. 2d 437, 475 N.W.2d 148 (1991), *overruled by* ***State v. Sykes***, 2005 WI 48, 279 Wis. 2d 742, 695 N.W.2d 277, is misleading. In ***Swanson***, the supreme court clearly stated that it was not addressing whether probable cause existed to arrest the defendant. ***Swanson***, 164 Wis. at 453. Furthermore, to the extent that the footnote Foley cites has any applicability, it suggests that Foley's failure of the field sobriety tests gave Armstrong a reasonable basis for believing that Foley's "physical capacities were sufficiently impaired by the consumption of intoxicants to warrant an arrest." *See* ***id.*** at 454 n.6.

defendant's red and glassy eyes, and heard the defendant make incriminating statements. ***Id.*** at 635. Prior to trial for operating while intoxicated, Alexander offered to stipulate that he had two prior OWI convictions, thus eliminating the need for that evidence. ***Id.*** at 637. The supreme court concluded that the prior conviction evidence was inadmissible:

> [W]e hold that when the sole purpose of introducing any evidence of a defendant's prior convictions ... is to prove the status element and the defendant admits to that element, its probative value is far outweighed by the danger of unfair prejudice to the defendant. We hold that admitting any evidence of the defendant's prior convictions ... and submitting the status element to the jury in this case was an erroneous exercise of discretion.

Id. at 651.[3]

¶12 Here, as in ***Alexander***, the trial court erroneously exercised its discretion by denying Foley's mistrial motion. The court refused to declare a mistrial because it found that "the public is well informed now about the O.W.I. laws to know that [the] first offense is not a criminal offense." The court erred by assuming all jurors understand the distinction between a first- and second-offense OWI. No evidence in the record supports the court's assumption that most jurors know the noncriminal nature of first offense OWI. The court's speculation that "60 to 75 percent of the population know if it's a criminal offense it has to be at least a second" is similarly unfounded. The trial court's decision to deny the

[3] The State notes that "[i]nterestingly, in ***State v. Alexander***[, 214 Wis. 2d 628, 571 N.W.2d 662 (1997),] the Supreme Court of Wisconsin concluded that the trial court's error was harmless due to the quality of the State's trial case. The State believes that the situation in the present case is similar." This bare statement is the extent of the State's harmless error analysis. We do not address undeveloped arguments. ***Herder Hallmark Consultants, Inc. v. Regnier Consulting Group***, 2004 WI App 134, ¶16, 275 Wis. 2d 349, 685 N.W.2d 564.

mistrial motion cannot be considered an appropriate exercise of discretion given such faulty reasoning.

¶13 The State does not argue that Armstrong's testimony has value independent of proving the status element. Instead, the State attempts to distinguish ***Alexander*** because in that case the prosecution elicited the offending statement from the witness and here the witness was under cross-examination by the defense. We do not see the relevance of the State's distinction. Foley's question was proper in light of earlier testimony that the State took fingerprints and tested DNA only in felony cases. The court previously cautioned the officer to provide "yes" or "no" answers. Armstrong, an experienced veteran of the police force, ignored the court's admonition and provided an answer he knew to be improper and unresponsive.[4] We cannot ascertain how the identity of the party examining the witness could have dispositive significance under these facts.

¶14 "[P]rejudice to a defendant is presumptively erased from the jury's collective mind when admonitory instructions have been properly given by the court." ***Roehl v. State***, 77 Wis. 2d 398, 413, 253 N.W.2d 210 (1977); *see also* ***State v. Payano***, 2009 WI 86, ¶99, 768 N.W.2d 832. "The jury is presumed to follow all instructions given." ***State v. Grande***, 169 Wis. 2d 422, 436, 485 N.W.2d 282 (Ct. App. 1992). Although Foley requested a cautionary instruction and the court agreed to provide one, the record reveals that no cautionary instruction was ever given to the jury. The prejudicial effect of Armstrong's

[4] Immediately prior to the prejudicial testimony, Armstrong inquired whether he was allowed to answer whether this was a criminal case. The court advised Armstrong that he could, no doubt assuming that he would act in accordance with the numerous instructions to answer questions with a "yes" or "no." Armstrong acknowledged that he understood defense counsel was not soliciting the answer he provided.

testimony was therefore never mitigated. While the court properly exercised its discretion by agreeing to provide a jury instruction, it did not properly exercise discretion by failing to follow through. A new trial is appropriate where the prejudicial effect of improper testimony is not cured by a cautionary instruction. *See* ***State v. Penigar***, 139 Wis. 2d 569, 581, 408 N.W.2d 28 (1987).

¶15 Finally, Foley argues that the district attorney failed to lay a proper foundation for the admission of the blood draw evidence pursuant to WIS. STAT. § 885.235(1g). We decline to reach that issue in light of the remand for a new trial.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.