COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP1333-CR **Cir. Ct. No. 2008CF1114**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT E. HAMMERSLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: SUE E. BISCHEL, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Robert Hammersley appeals a conviction for operating while under the influence, sixth offense. He argues the circuit court erroneously exercised its discretion by denying his motion for a mistrial after an eyewitness to Hammersley's vehicular accident testified that Hammersley

repeatedly pled with him not to call the police because he had prior convictions for drunk driving. We reject his argument and affirm.

¶2 At approximately 6:10 p.m. on October 17, 2008, Hammersley was heading west on Highway 29 in Brown County. Chris Kolinski and Peter Cherovsky were heading east in separate cars when they witnessed a car cross the eastbound lane of traffic, proceed into a ditch, and roll over.

¶3 Both men stopped at the scene to offer assistance. Kolinski and Cherovsky saw one person crawl out of the car in the field, and at trial they identified Hammersley as that person. Kolinski testified he smelled alcohol and suspected Hammersley was drunk. Hammersley offered to pay Cherovsky for a ride away from the scene and told Cherovsky that he would "get a drunk driving" out of the incident. Hammersley repeatedly pled with Kolinski not to call the police. When asked if Hammersley stated why, Kolinski stated, "He said he has had convictions for his driving drunk before." Nevertheless, Kolinski called the police and Hammersley fled the scene.

¶4 When the police arrived, they determined that the car in the field was registered to Hammersley. The car was described as being fifty to seventy-five feet into a cow pasture. The passenger window was shattered and the officer saw beer cans scattered in and around the car, some open and some closed. There was also a red substance consistent with blood near the driver's seat and headrest. The officer found a prescription bottle with Hammersley's name on it inside the vehicle, and one shoe in the driver's side area.

¶5 About three hours later, the police received a call from Thomas Brumlic, who lived three-quarters of a mile south of Highway 29. Brumlic stated that Hammersley appeared at Brumlic's home around 8:30 p.m. and asked to use a

telephone. Hammersley was wearing one shoe on the wrong foot and was "confused." Hammersley used Brumlic's phone to call friends and a taxi to pick him up.

¶6 Brumlic called 911 while Hammersley was waiting in the garage for his ride. Hammersley asked for a drink and Brumlic told him to help himself from the refrigerator. Hammersley drank at least two cans of Busch beer, one of which Brumlic believed was a non-alcoholic beer. Hammersley was holding an open can of beer in his hand when police arrived.

¶7 Hammersley subsequently failed two field sobriety tests, and was taken to a hospital where a blood sample almost five hours after the accident revealed a blood alcohol concentration of .09%. A crime lab analyst concluded that a retrograde extrapolation to the time of driving resulted in a BAC of approximately .16% to .17%. He also calculated an extrapolation that took into account up to two beers that Hammersley drank after the accident, resulting in a BAC of .12% to .13%.

¶8 At trial, Kolinski was the State's first witness. On direct examination, he testified that Hammersley repeatedly asked him not to call the police and that "he said … he would be put in jail, I think, if I called the police."[1] On redirect, the State sought to respond to cross-examination questions that suggested Hammersley's demeanor at the scene was caused by the roll-over accident, not the use of alcohol. In response to a question asking why

[1] This statement was within the limits of a pretrial ruling limiting references to Hammersley's statements at the scene. At a pretrial conference, the court told the prosecutor to instruct Kolinsky to testify that Hammersley said he did not want Kolinski to call the police because, "it would be a drunk driving."

Hammersley was pleading with him not to call the police, Kolinski stated, "He said he has had convictions for driving drunk before." The court immediately struck the statement and instructed the jury to disregard it. Hammersley moved for a mistrial, which the court denied.

¶9 A jury found Hammersley guilty of both operating while intoxicated and operating with a prohibited alcohol concentration. The circuit court imposed a sentence of three years' initial confinement and three years' extended supervision. Hammersley now appeals.

¶10 The decision whether to grant a mistrial lies within the sound discretion of the circuit court. *See* ***State v. Doss***, 2008 WI 93, ¶69, 312 Wis. 2d 570, 754 N.W.2d 150. The court must consider, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial. ***Id.*** We will reverse the denial of a motion for a mistrial only upon a clear showing of erroneous exercise of discretion. ***Id.***

¶11 Hammersley argues the circuit court erred by proceeding sua sponte to instruct the jury without counsel's input and "in a manner that exacerbated rather than ameliorated the problem and by discounting the prejudice of Kolinski's statement that Hammersley has prior convictions for the very same offense for which he is on trial." According to Hammersley, the danger of unfair prejudice

"and the court's instructions that highlighted the danger made it likely the jury disregarded the court's instructions."[2]

¶12 The circuit court's actions in this case illustrate something much different than what Hammersley contends. We conclude any possible unfair prejudice was erased by the court's prompt, repeated and unequivocal instructions, which the jury indicated they would obey.[3]

¶13 Immediately after Kolinski testified that Hammersley said he had prior drunk driving convictions, the circuit court struck the testimony and instructed the jury, "You cannot consider that testimony at all." This was not a case where the jury was told to consider the evidence for one purpose and not another. Rather, the jury was instructed to totally disregard the information.

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[2] Hammersley did not object to any of the instructions. His position was that instructions were inadequate to cure the prejudice of the remark, and that a mistrial was the only appropriate remedy. We therefore will not consider his current complaint about the content of the instructions. *See* ***State v. Becker***, 2009 WI App 59, ¶16, 318 Wis. 2d 97, 767 N.W.2d 585. We reject Hammersley's contention that "once the instruction was given and the cat was out of the bag, further objection was futile." In any event, the instructions did not suggest that Hammersley may have actually had prior convictions, but indicated it was unknown whether he had any such convictions.

[3] Kolinski's statement that Hammersley said he had been convicted of drunk driving before was arguably admissible in any event, and thus not overly prejudicial. As the circuit court recognized, this remark was not an assertion that Hammersley had been convicted of drunk driving before, a fact the witness would have no way of knowing. Rather, it was an assertion that *Hammersley said* he had been convicted of drunk driving before. Although arguably this demonstrates little linguistic difference, the legal difference is significant. Hammersley's statement amounted to an admission that he did not want the police called because if the police came, he would be convicted of driving drunk again. Thus, Hammersley was essentially admitting that he was driving drunk on this occasion. A defendant's admission of guilt has enormous probative value. ***State v. Crowell***, 149 Wis. 2d 859, 877, 440 N.W.2d 352 (1989). The court also properly observed that Hammersley's statement was not submitted solely to prove the status of his prior convictions. *See* ***State v. Alexander***, 214 Wis. 2d 628, 651, 571 N.W.2d 662 (1997). Here, the potential prejudice was balanced by the probative value of the statement as an admission of wrongdoing.

¶14 After the witness finished testifying, the court addressed the jury again:

> Before [the prosecutor] calls her next witness, I want to emphasize that you can consider all of the first witness's testimony. All of Mr. Kolinski's testimony is admissible. And you decide how much weight or credit or faith or credibility to give to it. With the exception of his testimony that the Defendant said something about drunk drivings in the past or drunk driving convictions in the past. I want to emphasize that is stricken. This case gets decided on the facts in this case. As I said, I don't know if he has a prior drunk driving convictions [sic], because it isn't relevant. It just does not matter. You decide this case based on the facts and circumstances in this case.

¶15 Where a trial court gives the jury curative instructions, we may conclude that such instruction erased any possible unfair prejudice, unless the record shows that the jury disregarded the admonitions. ***State v. Sigarroa***, 2004 WI App 16, ¶24, 269 Wis. 2d 234, 674 N.W.2d 894. Here, the record demonstrates that the jury indicated it was able to follow the instructions to disregard Hammersley's statement about prior convictions.

¶16 After giving the second admonitory instruction, the court asked the jurors if anyone thought they would struggle with disregarding the testimony. No juror indicated that they would have any trouble assuming that Hammersley had no prior convictions. In addition, the court stated that the jurors' demeanor and eye contact indicated they were being sincere. This, coupled with the court's admonitory instructions, erased any potential unfair prejudice.

¶17 In any event, we conclude any uncured error was harmless because there was overwhelming evidence to prove that Hammersley was driving while under the influence. As the circuit court properly noted, our supreme court reiterated in ***State v. Alexander***, 214 Wis. 2d 628, 652-54, 571 N.W.2d 662

(1997), that the test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction.

¶18 Two eyewitnesses saw Hammersley's car coming from the opposite direction and swerve in front of them, with no apparent reason to deviate from his lane, then go into the ditch and roll over in a field. Both eyewitnesses saw Hammersley get out of the car. Cherovsky testified that, "[the] first thing he asked me was to give him a ride out of there … he actually offered to pay me to give him a ride out of there."

¶19 Hammersley was stumbling and fell down several times. He smelled of alcohol and Kolinski testified, "I suspected he was drunk." Hammersley asked Kolinski not to call the police because "he would be put in jail … if I called the police." When the eyewitness called the police anyway, Hammersley fled the scene on foot, certainly suggestive under these facts of a guilty mind. *See* ***State v. Jackson***, 147 Wis. 2d 824, 833-34, 434 N.W.2d 386 (1989).

¶20 A police officer testified that there were so many beer cans in Hammersley's car that it looked like a recycling center. When Hammersley showed up at Brumlic's house after fleeing, he was wearing only one shoe, on the wrong foot. The other shoe had been found in the driver's side of his car. Hammersley told Brumlic that his car was "broke down." When asked if Brumlic should go look at his car, Hammersley said, "No, no … we'll just leave it there." He told Brumlic he was coming from Kewaunee, but "he kept pointing to the south," in the wrong direction.

¶21 Hammersley was the vehicle's registered owner and had the car keys in his pocket when he was arrested. Hammersley also had shattered glass in his

pocket consistent with the shattered glass in the vehicle. He admitted to the police that he was driving.[4]

¶22 When the police arrested Hammersley, he urinated in his pants without telling the police he had to use the bathroom. He failed two field sobriety tests, and the police did not even ask him to do the balance test because they thought it would not be safe in his condition. His blood alcohol concentration five hours after driving was .09%. Even subtracting for the beer Hammersley was drinking when he was arrested, his blood alcohol level was still .07. Extrapolating back to the accident, his blood alcohol level was six to seven times more than his prohibited level of .02 at the time he was driving.[5]

¶23 There is no reasonable possibility that the purported error in this case contributed to the conviction. The circuit court properly exercised its discretion when it denied the motion for a mistrial.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2009-10).

[4] Prior to the field sobriety test, Hammersley admitted to police that he was driving. When later asked by an officer if he would submit to an evidentiary chemical test of his blood, Hammersley said he would "submit to any test you want, but I wasn't driving."

[5] In this case, "drunk" meant a concentration of more than .02% because Hammersley had three or more prior convictions. *See* WIS. STAT. § 340.01(46m)(c) (2009-10).