COURT OF APPEALS
DECISION
DATED AND FILED

July 3, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP833-CR **Cir. Ct. No. 2014CT1419**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DALE R. DELVOYE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: TIMOTHY A. HINKFUSS, Judge. *Affirmed*.

¶1 HRUZ, J.[1] Dale Delvoye appeals a judgment, entered after a jury trial, convicting him of second-offense operating a motor vehicle with a prohibited alcohol concentration (PAC). Delvoye argues the circuit court should have

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

ordered a mistrial when the deputy who arrested Delvoye briefly testified about his request that Delvoye submit to a preliminary breath test. We affirm.

BACKGROUND

¶2 Delvoye was charged with operating a motor vehicle while intoxicated (OWI) and PAC, both as second offenses. According to a report authored by deputy Nicholas Nerat, Delvoye submitted to a preliminary breath test prior to his arrest, which test "returned a reading of .122%." Before the trial, the State filed a motion in limine to, among other things, prohibit Delvoye "from introducing the result, or eliciting testimony regarding the result" of the preliminary breath test, citing WIS. STAT. § 343.303. The circuit court granted the motion without objection from Delvoye.[2]

¶3 At trial, Nerat testified that he stopped a vehicle at 11:20 p.m. after he observed its left-side tires cross the center line and after a licensing check revealed the vehicle's registration had expired. Nerat then made contact with and spoke to Delvoye, who was the sole occupant of the vehicle. Nerat smelled the odor of intoxicants on Delvoye's breath and noticed that Delvoye slurred his speech and had glassy eyes. Delvoye admitted he had consumed three cans of beer about one hour before driving, and when Nerat asked for Delvoye's phone number, he provided his wife's cell phone number before eventually providing his

[2] Delvoye's briefs repeatedly misstate the scope of the circuit court's order granting the motion in limine by stating (often with italicized emphasis) that the order prohibited "the mention of any [preliminary breath test]" or "evidence of Mr. Delvoye submitting to a [preliminary breath test]," and that it required the "[preliminary breath test] … not [be] mentioned at all," and so forth. However, the order only prohibited the parties "from introducing the result, or eliciting testimony regarding the result," of the preliminary breath test.

own. Delvoye also did not satisfactorily answer Nerat's questions about where Delvoye had been that night and the route Delvoye was taking home.

¶4 Based on his observations, Nerat had Delvoye perform some field sobriety tests. Nerat testified he believed after the tests that Delvoye was impaired and could not drive safely. Nerat then further testified that he "asked [Delvoye] if he'd submit to a preliminary breath test or PBT as we call it." Defense counsel objected. Outside the presence of the jury, counsel moved for a mistrial on the grounds that Nerat testified he had requested a preliminary breath test, and counsel argued such testimony was precluded by the pretrial motion. The circuit court denied the mistrial motion, noting that Nerat testified he only requested Delvoye submit to a breath test and that the result of the breath test was not presented to the jury. The evidentiary portion of the trial continued without any further reference to a breath test.

¶5 Nerat testified that Delvoye consented to a blood draw after his arrest. A chemical test of Delvoye's resulting blood sample revealed a blood-ethanol concentration of 0.130 grams per 100 milliliter.[3]

¶6 During deliberations, the jury submitted the following question to the circuit court (which we have modified for ease of reading): Why was the breathalyzer (breath test) administered? Defense counsel renewed the earlier

[3] A partial transcript of the trial proceedings is in the appellate record, but this transcript does not appear to contain the testimony regarding Delvoye's blood test results and blood-alcohol concentration. Considering that Delvoye was ultimately convicted of PAC and that he takes aim at the State's allegedly "weak case" on appeal, the omission of that testimony is peculiar. For our purposes, the record does contain the report on the results of the blood test that was admitted at trial, and Delvoye does not dispute the State's assertion that the jury "heard testimony from the lab analyst" on those results.

motion for a mistrial, arguing that the note proved the jury was "speculating about evidence that they have no business speculating about" and that the jury posed "an unanswerable question" to the court. The circuit court denied the renewed motion for a mistrial, again stressing that Nerat never testified about the results of the breath test. Instead, the circuit court permitted the following instruction, drafted by Delvoye's counsel, to be sent to the jury: "You have not heard … evidence of a breath test result in this case and should not speculate about any breath test evidence. You should decide this case solely on the evidence that was properly admitted."

¶7 The jury found Delvoye guilty of PAC, for which Delvoye was later sentenced as a second offense, but not guilty of OWI. Delvoye appeals.

DISCUSSION

¶8 A motion for a mistrial is committed to the sound discretion of the circuit court, and we review its ruling on such a motion for an erroneous exercise of that discretion. ***State v. Ford***, 2007 WI 138, ¶28, 306 Wis. 2d 1, 742 N.W.2d 61. A court properly exercises its discretion when it has examined the relevant facts, applied the proper standard of law, and engaged in a reasoned decision-making process. ***State v. Bunch***, 191 Wis. 2d 501, 506-07, 529 N.W.2d 923 (Ct. App. 1995). The circuit court must determine, in light of the whole proceeding, whether the claimed error was prejudicial enough to warrant a mistrial. ***Id.*** at 506.

¶9 Delvoye contends the circuit court erred when it declined to order a mistrial after Nerat testified he requested Delvoye submit to a preliminary breath test. Delvoye argues WIS. STAT. § 343.303 prohibits all evidence regarding a preliminary breath test from being admitted during a trial, which would include testimony regarding a request to perform the test. Proceeding from that premise,

Delvoye asserts there was an "absolute certainty that harm befell him" when Nerat mentioned that he requested a breath test. This is so, he reasons, because the jury found him not guilty of the OWI charge, and it also submitted a question regarding administration of a preliminary breath test during deliberation, without there being any evidence that a test was actually administered.

¶10 We conclude the circuit court properly exercised its discretion. As an initial, yet important, matter, we agree with the court's interpretation of WIS. STAT. § 343.303.[4] The statute provides, in relevant part: "The *result* of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest, if the arrest is challenged, or to prove that a chemical test was properly required or *requested* of a person under s. 343.305(3)." (Emphasis added.) The text of § 343.303 only refers to the "result" of a preliminary breath test as not being admissible; it does not refer to a "request" for a test or even whether one was administered. And contrary to Delvoye's implicit suggestion, the statute's use of the term "requested" when delineating an exception for the admissibility of a "result" strongly indicates these terms are not equivalent or interchangeable. *See* ***id.***

¶11 Delvoye argues in his reply brief that the legislature could not have intended such a reading of WIS. STAT. § 343.303, and he insists that allowing admission of requests for preliminary breath tests is bad public policy. Delvoye's argument ignores both the proper method of statutory interpretation and a clear statutory history to the contrary of his argument. Statutory interpretation must

[4] Statutory interpretation presents a question of law that we review independently. ***State v. Obriecht***, 2015 WI 66, ¶21, 363 Wis. 2d 816, 867 N.W.2d 387.

begin with the language of the statute, given the assumption that the enacted language expresses the legislature's intent. ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶¶44-45, 271 Wis. 2d 633, 681 N.W.2d 110. Delvoye does not even attempt an interpretation of the text of § 343.303 that would support his conclusory assertions.

¶12 What is more, prior amendments to WIS. STAT. § 343.303 confirm that the plain language of the statute's current version does not mandate the exclusion of evidence regarding requests for preliminary breath tests. *See* ***State v. Obriecht***, 2015 WI 66, ¶46, 363 Wis. 2d 816, 867 N.W.2d 387 (we may confirm a plain meaning analysis by examining statutory history). When the legislature amended and recreated WIS. STAT. § 343.303 in 1981, *see* 1981 Wis. Laws, ch. 20, §§ 1568b & 1568d, it excluded language that previously did bar the admission of evidence regarding the administration of a preliminary breath test. *Compare* WIS. STAT. § 343.305(2)(a) (1979-80) ("Neither the results of the preliminary breath test nor the fact that it was administered shall be admissible") *with* WIS. STAT. § 343.303 (1981-82) ("the result of this preliminary breath screening test shall not be admissible"). If the legislature specifically removed "administ[ration]" of a breath test from this prohibition, it follows that the current version does not prohibit evidence regarding a request for the administration of such a test. Notably, nowhere in his briefing does Delvoye acknowledge or address this history of the relevant statute, even after the State highlighted it in its response brief. In all, Delvoye offers no plausible interpretation of § 343.303 that supports his argument that Nerat's testimony violated that statute.

¶13 Beyond WIS. STAT. § 343.303, Delvoye argues that Nerat's request for a preliminary breath test was not probative and was unduly prejudicial, *see* WIS. STAT. § 904.03, to the point that ordering a mistrial was the circuit court's

only reasonable option once the jury heard that testimony. Delvoye understandably points to the jury's question in support of his contention that prejudice necessarily ensued from Nerat's testimony. But the mere existence of the question is not dispositive of a finding of prejudice, much less undue prejudice warranting a mistrial. First, the jury asked merely *why* a preliminary breath test was administered. It is not, as Delvoye variously argues, self-evident how or why the jury's posing of such a question establishes that Nerat's brief testimony on his asking Delvoye to take a breath test unduly influenced the jury's verdict on the PAC charge.

¶14 Second, and more important, after the jury's question was submitted, the circuit court provided a proper answer/curative instruction directing the jury to "not speculate" about anything regarding a preliminary breath test, which instruction the jury is presumed to have followed. *See* ***State v. Collier***, 220 Wis. 2d 825, 837, 584 N.W.2d 689 (Ct. App. 1998). "The law prefers less drastic alternatives, if available and practical," to that of granting a mistrial. ***Bunch***, 191 Wis. 2d at 512. The court's instruction to the jury not to consider any evidence regarding a preliminary breath test was a suitable and proportionate remedy to the alleged error. Delvoye's assertion that the jury's question itself proves that undue harm or prejudice to him necessarily occurred from Nerat's single reference to the breath test is unpersuasive.

¶15 Delvoye also emphasizes his acquittal on the OWI count in an attempt to cast the State's evidence as "weak" and to accentuate the allegedly prejudicial effect of Nerat's testimony. Delvoye cites no authority—and makes no compelling argument—supporting his apparent notion that we may infer the evidence supporting his PAC conviction was lacking because of his OWI acquittal. As the State rightfully observes, an OWI charge requires proof that a

person was intoxicated "to a degree which renders him or her incapable of safely driving," WIS. STAT. § 346.63(1)(a), whereas a PAC charge only requires proof of "a prohibited alcohol concentration," sec. 346.63(1)(b). *See* ***State v. Smet***, 2005 WI App 263, ¶23, 288 Wis. 2d 525, 709 N.W.2d 474 (explaining that § 346.63(1)(b) is a "status offense[] without proof of impairment required"). It is well within a jury's province to acquit a defendant of an OWI charge but still convict him or her on a PAC charge.

¶16 In fact, while attempting to show undue prejudice, Delvoye raises no real challenge regarding the evidence supporting his PAC conviction. Nor could he. Nerat testified Delvoye admitted to drinking alcohol before driving. Most probative, the evidence showed that a properly conducted test of Delvoye's blood sample revealed he had a blood-alcohol concentration of 0.13, which was above the legal limit of 0.08. *See* WIS. STAT. § 340.01(46m). Other than proffering what he concedes are "speculations,"[5] Delvoye does not explain why the circuit court was compelled to conclude Nerat's one-time mention of this request for a preliminary breath test was unduly prejudicial in light of this evidence and the proceeding as a whole. *See* ***Bunch***, 191 Wis. 2d at 506. Delvoye is not entitled to a new trial on his PAC conviction.

[5] Delvoye contends there are "myriad ways in which the erroneously admitted [preliminary breath test] result could have had a negative effect … on the PAC verdict." Delvoye, in this statement, misrepresents that the preliminary breath test result was admitted into evidence. It was not. And rather than respond to each of Delvoye's "speculations," it suffices to note, as does the State, that the fact Nerat requested a preliminary breath test would, if anything, seem to bolster evidence of Nerat's subjective belief that Delvoye was intoxicated. Again, the jury acquitted Delvoye of OWI, and we fail to see how the brief testimony on the request for a breath test caused Delvoye any harm regarding the PAC charge.

By the Court.—Judgment affirmed.

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