COURT OF APPEALS
DECISION
DATED AND RELEASED

OCTOBER 8, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

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

No. 96-1118-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DOUGLAS WOLFF,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for St.Croix County: SCOTT NEEDHAM, Judge. *Affirmed.*

LaROCQUE, J. Douglas Wolff appeals a judgment of conviction for operating a motor vehicle while having a prohibited alcohol concentration (second offense criminal) and an order denying postconviction relief. He makes four claims: (1) trial counsel was ineffective for introducing evidence of a preliminary breath test (PBT); (2) the court erred by giving part of the pattern jury instructions, WIS J I—CRIMINAL 2669 applicable if there is no problem with the defendant's position on the "blood-alcohol curve"; (3) the court erred by prematurely giving the supplementary instruction, WIS J I—CRIMINAL 520, relating to a deadlocked jury; and (4) the court should have allowed trial counsel to voir dire a juror who complained following the supplementary instruction that further deliberations created a "real serious problem."

This court concludes: (1) the reference to the PBT did not elicit the test result and, under the circumstances presented, did not prejudice the defense; (2) because the trial court immediately followed pattern instruction 2669 with pattern instruction WIS J I—CRIMINAL 234 relating to the blood-alcohol curve, explaining that the jury had the right to consider the evidence as to how the body absorbs and eliminates alcohol, the instructions did not constitute reversible error; (3) the use of the supplementary instruction was appropriate; and (4) the absence of a request to voir dire the complaining juror constituted a waiver. This court therefore affirms the judgment and order.

The jury heard testimony only from one witness, the arresting state patrol officer. He said he stopped Wolff for speeding and a defective headlight at 1 a.m. After observing signs of intoxication, he arrested Wolff who, shortly before 2 a.m., tested slightly over .10% by weight of grams of alcohol in 210 liters of his breath, analyzed by an Intoxilyzer machine. On cross-examination, the officer acknowledged that the alcohol curve can be on an upward swing up to an hour and a half after intoxicants are consumed. There was no evidence offered as to the time Wolff consumed intoxicants. Wolff told the officer that he had a couple of beers and also "had one downtown."

The jury convicted Wolff of operating a vehicle while having a prohibited alcohol concentration (BAC) and acquitted him of operating a motor vehicle while under the influence of an intoxicant (OWI).

Wolff first contends that trial counsel was ineffective for introducing testimony that a PBT was administered at the scene of arrest by the state patrol officer. The State was then allowed to elicit testimony from the officer that the PBT test confirmed his belief that Wolff was under the influence.

Strickland v. Washington, 466 U.S. 668 (1984), describes the analysis applicable to an ineffective counsel claim. Wisconsin holds that the defendant bears the burden of proving both deficient performance and prejudice. ***State v. Sanchez***, 201 Wis.2d 219, 232, 548 N.W.2d 69, 74 (1996). This court concludes that there was no showing of prejudice or, to put it another way, trial counsel's error was harmless.

The State does not contest the inadmissibility of the PBT test result.[1] Rather, it argues that neither defense counsel nor the prosecutor elicited evidence of the result. In this case, defense counsel elicited the fact that a PBT test was taken, inviting the State's response to show that the test did not undermine the officer's belief that Wolff was under the influence. Counsel apparently conceded at the postconviction hearing that this violated the first prong of the ***Strickland*** standard.

Nevertheless, this court agrees with the State's contention that if performance was deficient, it was not prejudicial. Wolff's argument to the contrary is premised on a claim that the jury heard the PBT test result of .13, a number higher than the Intoxilyzer test of .10. With that premise, he contends that his defense that the alcohol curve was upward bound at the time of the Intoxilyzer test is called into question. The record reveals that the test result was never discussed. The evidence of a PBT test merely suggested a confirmation of the Intoxilyzer. The defense based upon the alcohol curve was not impacted.

Finally, as a matter of equal importance, the trial court instructed the jury that PBT test results are inadmissible in evidence and not to be

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[1] Section 343.303, STATS., provides:

> Preliminary breath screening test. If a law enforcement officer has probable cause to believe that the person is violating... [the OWI statute]...the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test using a device approved by the department for this purpose. The result of this preliminary breath screening test may be used by the law enforcement officer for the purpose of deciding whether or not the person shall be arrested ... and whether or not to require or request chemical tests as authorized under s. 343.305 (3). 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).

considered by the jury. Juries are presumed to obey the instructions given by the court absent a contrary indication. ***State v. Knight***, 143 Wis.2d 408, 414, 421 N.W.2d 847, 849 (1988). This court therefore concludes that the PBT evidence constituted harmless error at best.

Wolff next contends that the trial court erred by presenting pattern jury instruction WIS J I—CRIMINAL 2669. This instruction informs the jury that if it finds that the defendant had .10 grams of alcohol in 210 liters of the defendant's breath (the Intoxilyzer reading), then it may find from that fact alone that he had a prohibited alcohol concentration at the time of driving, but need not do so. This language alone, in a case where the alcohol curve is in dispute, is inaccurate. The court, however, immediately followed the preceding instruction with language from pattern jury instruction WIS J I—CRIMINAL 234:

> Evidence has also been received as to how the body absorbs and eliminates alcohol. You may consider this evidence regarding the analysis of the breath sample and the evidence of how the body absorbs and eliminates alcohol along with all the other evidence in the case giving it just such weight as you determine it is entitled to receive.
>
> You the jury are here to decide these questions on the basis of all of the evidence in the case, and you should not find that the defendant ... had a prohibited alcohol concentration of .10 or more at the time of the alleged operating ... unless you're satisfied of that fact beyond a reasonable doubt.

The preceding language advised the jury that it was entitled to consider the absorption evidence along with the test result.

A trial judge may exercise wide discretion in issuing jury instructions based upon the facts and circumstances of a particular case. ***State v. Vick***, 104 Wis.2d 678, 690, 312 N.W.2d 489, 495 (1981). It is a well-established proposition that a single jury instruction is not to be judged in artificial isolation. ***Id***. at 691, 312 N.W.2d at 495. While there was a total absence of evidence to show when Wolff consumed intoxicants, and the test was taken

almost an hour after the arrest, the jury was entitled to infer that some drinking may have occurred within an hour and a half of the test. The instructions in this case allowed the jury to adopt that inference and to conclude that the .10 test result was higher than Wolff's status at the time he drove. The fact that the jury chose not to do so does not render the instructions erroneous.

Next, Wolff contends that the court prematurely resorted to the use of WIS J I—CRIMINAL 520. That instruction is sometimes used where the jury indicates it is deadlocked. The record shows that the jury initially retired to deliberate at 3:03 p.m. The State does not dispute Wolff's allegation that the following proceedings occurred at approximately 6:10 p.m., or that the final verdict was received at approximately 6:45 p.m.:

> THE COURT: We're back on the record .... Court has now received a message from the jury indicating that they have reached a verdict on one count, but we are deadlocked ten ... deadlocked on the other count. This is a very solid deadlock is the message from --
>
> [PUBLIC DEFENDER]: Ten to two?
>
> THE COURT: Is what the indication is?

The court, after hearing from counsel, indicated that it would give the supplementary instruction.

Defense counsel objected to the use of the instruction. The court then read the previous instruction. At this point, a juror raised his hand and the following occurred:

> THE COURT: I can't entertain questions if that's --
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> JUROR ... : I got a real serious problem. I'm a dairy farmer. I told [the clerk of court] about this. I'm 2 1/2 hours late the way it is.

THE COURT: I understand that, and all I can do is rely on the instruction that I just gave and ask you to again retire to the jury room.

The supplementary instruction reads:

[Y]ou jurors are as competent to decide the disputed issues of fact in this case as the next jury that may be called to determine such issues.

You are not going to be made to agree, nor are you going to be kept out until you do agree. It is your duty to make an honest and sincere attempt to arrive at a verdict. Jurors should not be obstinate; they should be open-minded, they should listen to the arguments of others and talk matters over freely and fairly and make an honest effort to come to a conclusion on all of the issues presented to them.

... [You will] please retire again to the jury room ....

As the comment to the pattern jury instruction explains, the text of the instruction is believed to be consistent with the *ABA Standards for Criminal Justice (Trial by Jury)* (2d ed. 1978), and this standard is emerging as the preferred response to the "deadlocked jury" problem.

Contrary to Wolff's contention, the use of the deadlocked jury instruction does not pose the problem presented in ***Knight***. In ***Knight***, after the jury indicated it had reached a verdict in four of six counts against the defendant but was deadlocked on the other two, the prosecution and defense counsel agreed that it would accept the verdicts "as they were" in lieu of the deadlocked jury instruction. ***Id.*** at 412, 421 N.W.2d at 849.

After the jury was called into open court, the verdict results were read to the jury. The jury indicated that it did not want more time to deliberate. After a sidebar conference, the trial court gave the instruction over defendant's objection and excused the jury for further deliberation. Later the court indicated that it had changed its mind upon learning to its surprise which of the

particular charges caused the deadlock. The jury found the defendant guilty on all counts. ***Id.*** at 413, 421 N.W.2d at 849. Our supreme court decided that generally a verdict is considered accepted by the court when it is received and announced in open court. ***Id.*** at 416, 421 N.W.2d at 850. Thus, the ***Knight*** court decided that the court's action constituted an acceptance of the jury verdicts as well as the deadlock. ***Id.*** at 417, 421 N.W.2d at 850.

In this case, although the jury disclosed that it had reached a verdict, the court did not inquire further into that verdict. The jury did not disclose whether it had found Wolff guilty or not guilty or which of the two charges it could not agree upon. This court is satisfied that the court acted within its broad discretion in instructing the jury and allowing it to return to deliberate further.

Finally, this court concludes that counsel's failure to seek voir dire of the juror constituted a waiver. The waiver rule is viewed with favor because failure to bring a matter to the trial court's attention denies the trial court the opportunity to rule on the matter after it gives consideration to the request; notice allows the trial court to prevent error. ***State v. McMahon***, 186 Wis.2d 68, 93, 519 N.W.2d 621, 631 (Ct. App. 1994).

By the Court.—Judgment and order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.