COURT OF APPEALS
DECISION
DATED AND FILED

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Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-0482-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JESSE L. POMEROY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: RICHARD T. BECKER, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Jesse L. Pomeroy appeals from a judgment of conviction of leaving the scene of a car accident which involved injury to a person and of obstructing a police officer. He argues that the evidence was insufficient to establish that he was the driver of the car involved in the accident, that a mistrial should have been granted when the prosecutor violated a pretrial ruling excluding

evidence of his blood alcohol content, and that he was prejudiced by the trial court's failure to give a special instruction that the giving of a false statement to the police officer could not be considered in determining guilt on the hit-and-run charge. We reject Pomeroy's claims of error and affirm the judgment.

The charges arose out of an intersection accident which occurred at approximately 11:15 p.m. on September 18, 1994. A car driven by Robert Malsack was struck broadside by another car, a red Beretta. Malsack suffered an injury to his leg which required transportation to the hospital by ambulance. The driver of the Beretta did not exit the vehicle and the Beretta drove away from the accident scene. The Beretta was discovered abandoned just beyond the accident scene. Police were informed that an individual had been seen running through a nearby field. Then there were reports of an unidentified individual in the backyard of a residence approximately three-tenths of a mile west of the accident scene.

The Beretta belonged to Pomeroy. After the accident the police looked for Pomeroy at his residence but he was not home. The police left a message that he should contact them. Later that evening, Pomeroy called the police station and indicated that he would meet them at the home of his friend, Rick Clune. Pomeroy told the investigating officer that he had heard from his father that his car had been involved in an accident. He explained that earlier in the evening he had been at a tavern and had gone home with Clune, leaving his car at the tavern. Although Clune originally told police that Pomeroy had come home with him, he later admitted that when he left the tavern at about 10:30 p.m., Pomeroy remained behind. Clune revealed that Pomeroy had shown up at his house about 11:30 p.m. that evening. Clune explained that after Pomeroy's father

called, Pomeroy asked him to say that Pomeroy came home with him and that they left Pomeroy's car at the tavern.

Pomeroy argues that the evidence at trial was insufficient to establish that he was the driver of the Beretta at the time of the accident. Our review of the sufficiency of the evidence is to determine whether the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *See* ***State v. Ray***, 166 Wis.2d 855, 861, 481 N.W.2d 288, 291 (Ct. App. 1992). The standard of review is the same whether it is a direct or circumstantial evidence case. *See* ***State v. Poellinger***, 153 Wis.2d 493, 501-02, 451 N.W.2d 752, 755 (1990). Thus, in reviewing the sufficiency of circumstantial evidence, an appellate court need not concern itself in any way with evidence which might support other theories of the crime. *See* ***id.*** at 507-08, 451 N.W.2d at 758. An appellate court need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence. *See* ***id.*** at 508, 451 N.W.2d at 758.

Although neither Malsack nor his passenger, his wife Christi, were able to give any description of the driver of the Beretta, strong circumstantial evidence supports the conclusion that it was Pomeroy. Police found out that the car belonged to Pomeroy and that he had taken the car that day. Pomeroy admitted to being at the tavern that night. The accident scene was on Pomeroy's route home from the tavern. Clune's residence was about seven miles from the accident scene "as the crow flies." Pomeroy arrived at Clune's house in an unexplained manner after the accident. Pomeroy presented himself to police in only his work-tattered blue jeans. His shirt, socks and shoes were never recovered. Pomeroy admitted to drinking at the tavern and appeared intoxicated.

The investigating officer noted and photographed small cuts on Pomeroy's hands, face and legs through the holes in his jeans. The same officer had received similar cuts while wading through prickly bushes when searching for the unidentified individual who had been seen in a backyard shortly after the accident.

These facts permit the reasonable inference that Pomeroy drove away from the tavern shortly before 11:15 p.m. and on the way home was involved in the accident. That Pomeroy appeared intoxicated explains the cause of the accident and why he left the scene so as not to be discovered as driving while under the influence. The jury could also conclude that Pomeroy took off on foot and was the unidentified person reported by homeowners in the area between the accident site and Clune's residence. Pomeroy did not offer any evidence to support what he contends is a reasonable hypothesis that his car was stolen from the tavern and the thief struck the Malsacks' car. We conclude that the evidence supports the conviction.

In response to Pomeroy's motion in limine, the trial court ordered that there could be no reference to "either a preliminary breath test or a Breathalyzer of Intoxilyzer, if one was run, and to what the actual reading was." During direct examination, the investigating officer testified that he arrested Pomeroy for operating a motor vehicle while under the influence of intoxicants. Pomeroy contends that this was a violation of the pretrial order and that his motion for mistrial should have been granted. The decision of whether to grant a motion for a mistrial lies within the sound discretion of the trial court. *See* ***State v. Pankow***, 144 Wis.2d 23, 47, 422 N.W.2d 913, 921 (Ct. App. 1988). The trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial. *See* ***id.***

The trial court noted that the pretrial ruling allowed the prosecution to address the issue of Pomeroy being under the influence. Implicit is a finding that the reference to arresting Pomeroy for being under the influence did not violate the pretrial order because it made no reference to Pomeroy's BAC or that any measurement was taken of his BAC. We agree that there was no violation of the pretrial order. The answer did not reference the forbidden BAC evidence. At most, the officer's testimony was unresponsive and was not anticipated.

The trial court also concluded that there was no prejudice to the defense. No prejudice resulted because Pomeroy admitted to police that he had drank too much at the tavern and Clune testified that Pomeroy was drunk when he came to Clune's residence. In any event, the trial court struck the officer's answer and admonished the jury to disregard it. The admonition eliminated any residual prejudice. *See* ***State v. Williamson***, 84 Wis.2d 370, 391, 267 N.W.2d 337, 347 (1978) (prejudice to a defendant is presumptively erased when admonitory instructions are properly given by a trial court).

Pomeroy's final claim is that a special jury instruction was required to eliminate the "double-teaming effect" of joinder of the hit-and-run charge with the obstruction charge for trial. *See* ***Peters v. State***, 70 Wis.2d 22, 28, 233 N.W.2d 420, 424 (1975). ***Peters*** recognizes that the fabrication of an alibi cannot be relied upon by the prosecution as affirmative proof of elements of the other charged crime. *See* ***id.*** at 30-31, 233 N.W.2d at 425. ***Peters*** notes that a cautionary instruction, in clear and certain terms, must be given to reduce the strong likelihood that the jury will regard the false alibi as sufficient in itself to find the defendant guilty of the other crime. *See* ***id.*** at 32, 233 N.W.2d at 426.

The trial court gave the standard instruction adopted in response to the ***Peters*** holding. The jury was instructed:

> It is for you to determine whether the defendant is guilty or not guilty of each of the offenses charged. You must make a finding as to each count of the information. Each count charges a separate crime, and you must consider each one separately. Your verdict for the crime charged in one count must not affect your verdict on any other count.

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The special instruction Pomeroy asked for and was denied would have added:

> You cannot use the evidence relating to the making of a false statement to an officer to find the Defendant guilty of failing to give information or render aid following the accident. The State must introduce separate, independent evidence of the elements of the crime of failing to give information or rendering aid following an accident that shows guilt beyond a reasonable doubt.

It is well established that a trial judge may exercise wide discretion in issuing jury instructions based on the facts and circumstances of the case. *See* ***State v. Vick***, 104 Wis.2d 678, 690, 312 N.W.2d 489, 495 (1981). "This discretion extends to both choice of language and emphasis. A trial judge should exercise discretion in order 'to fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence.'" ***Id.*** (quoted source omitted; citations omitted).

Peters only requires that the point be made that "the jury must not employ such [obstruction] evidence as affirmative proof of elements of the [other] crime … for which the state must introduce separate and independent evidence showing guilt beyond a reasonable doubt." ***Peters***, 70 Wis.2d at 32, 233 N.W.2d at 426. Wisconsin's pattern jury instructions are viewed as persuasive and trial

courts should use them. *See* ***State v. Kanzelberger***, 28 Wis.2d 652, 659, 137 N.W.2d 419, 422-23 (1965). Here, the trial court used the pattern instruction to inform the jury of the applicable law.

Because ***Peters*** recognizes that evidence regarding fabrication of an alibi is admissible to establish a consciousness of guilt, it is subject to debate as to whether Pomeroy's proposed special instruction correctly states the law. Even assuming Pomeroy's suggested instruction is a correct statement of law, the pattern instruction stated the same thing, albeit not in the exact language of the ***Peters*** holding. "Error cannot be predicated upon a refusal to give a requested instruction, even though it correctly states the law, where the substance of the requested instruction is embodied in another instruction." ***Peot v. Ferraro***, 83 Wis.2d 727, 732, 266 N.W.2d 586, 589 (1978). We conclude that the trial court did not erroneously exercise its discretion in refusing the special instruction.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.