

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 24, 2010

David R. Schanker
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. 2009AP2067-CR

Cir. Ct. No. 2007CF1368

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HAROLD IRA HOLMES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County:
R.A. BATES, Judge. *Affirmed.*

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Harold Ira Holmes appeals a judgment convicting him of eighth offense operating a vehicle while under the influence (OWI). Holmes argues that the court improperly exercised its discretion when it denied his motion for a mistrial after the State's witness violated an order *in limine* barring

testimony about prior OWI offenses. Because we conclude that the court properly exercised its discretion, we affirm the judgment.

BACKGROUND

¶2 The State's only witness was Sheriff's Deputy Anthony Goth, the arresting officer. Goth testified that at 12:37 a.m. he came upon a running vehicle sitting by the side of the road with its lights on, apparently abandoned. Upon approaching the vehicle, Goth heard loud music coming from the car and discovered Holmes slumped over in the front seat, sleeping or passed out. Goth reached through the open driver's window and turned off the vehicle. Following department protocol, he removed the keys from the ignition and placed them in his breast pocket. Goth then lifted Holmes to an upright position to wake him up and, just as another vehicle was approaching, asked Holmes what he was doing. Holmes responded, "I'm waiting for that car." When asked where he was going, Holmes said he was going home. Holmes told Goth he had "drank like four beers."

¶3 After Holmes failed an initial field sobriety test and refused to perform other tests, Goth arrested him and took him to the jail for booking. Goth explained that, because they could not find a responsible party to pick up Holmes, Holmes was required to stay at the jail and Goth completed a "temporary detention form." The form indicated that Holmes's keys were placed in property bag 202. Goth also testified that, after Holmes refused to provide a breath test, "At that point, because it was, uh, not his first offense, uh, and it's a criminal act, we are able to take his blood." The defense stipulated that the blood test showed a blood alcohol content of .297%.

¶4 After the State rested, Holmes moved for a mistrial because Goth's comment that it was not Holmes's first offense violated an order *in limine* that precluded the prosecution from making any reference to Holmes's previous OWI convictions, although Holmes would have to answer that he was convicted of six crimes if he decided to testify. The circuit court denied the motion for a mistrial, finding that Goth's testimony was unintentional. The court concluded that, if Holmes testified, as he later did, that would lessen the impact of Goth's statement because the jury would be informed of six prior convictions, although not the nature of the convictions. The court offered to instruct the jury to disregard Goth's statement, but the defense declined the offer, fearing that the instruction would only call more attention to the inadvertent statement.

¶5 The defense presented five witnesses. Holmes testified that he did not operate the vehicle, which was his girlfriend's car. He explained that he met a man in a bar, whose name he did not know, and that man drove him in Holmes's girlfriend's car to a party at a house in the country. There, he met a woman named Sandra, who initially agreed to drive him home, followed by another man who would pick her up later. Instead, an unknown man drove Holmes's girlfriend's car while Sandra followed in another car. They left the party at approximately 11:00 or 11:30 p.m. After about fifteen to twenty minutes, Holmes said something that offended the driver. The driver pulled over to the side of the road, turned off the ignition, and left with Sandra. When he later looked for his keys, Holmes could not find them. Holmes testified that he started walking, but saw no houses in the vicinity. He then got into the back seat of the car and drank a beer. He later got into the front seat, where he fell asleep.

¶6 Holmes also testified that, when he left the jail the next day, he did not have the keys to his car, his girlfriend's car, or other keys that were on the key

ring. His friend, Keith Burlingame, drove him back to his car, but they could not find his keys. Burlingame called the jail to inquire about the keys, but they were never found. Holmes did not personally call the jail or go back to the jail to search for his keys.

¶7 The defense also presented testimony from Lieutenant Jude Maurer, who was subpoenaed to bring jail records regarding Holmes's property. He testified that he could not locate any property receipt with regard to Holmes for this incident.

¶8 Burlingame, Holmes's girlfriend, and Holmes's girlfriend's son all testified regarding their efforts to locate the keys. Holmes's girlfriend and her son also testified about having to change locks when the keys were not found. Burlingame produced telephone records and identified a phone number that he says he called to ask the jailers about the missing keys.

¶9 In rebuttal, Goth testified that Holmes never told him at the time of the arrest that someone else was driving the vehicle. Goth also testified that there was a well-lit farmhouse 150 to 200 feet away from the car, contradicting Holmes's testimony that he could not find a house. Goth also identified the phone number on Burlingame's phone bill as the police non-emergency number, not the phone number for the jail.

DISCUSSION

¶10 Whether to grant a mistrial is a matter committed to the circuit court's discretion. *State v. Adams*, 223 Wis. 2d 60, 83, 588 N.W.2d 336 (Ct. App. 1998). In making its decision, the circuit court must determine whether the claimed error is sufficiently prejudicial to warrant a mistrial. *State v. Givens*, 217

Wis. 2d 180, 191, 580 N.W.2d 340 (Ct. App. 1998). Not all errors warrant a mistrial, and the law prefers a less drastic alternative if practical. *Id.*

¶11 The circuit court properly exercised its discretion when it refused to grant Holmes's motion for a mistrial. Citing *State v. Alexander*, 214 Wis. 2d 628, 651, 571 N.W.2d 662 (1997), Holmes contends that he was prejudiced by the evidence of his prior conviction. *Alexander* holds that admitting evidence of prior OWI convictions for the purpose of proving the status element is impermissible because it raises an inference that the defendant has a propensity to drink and drive. *Id.* at 650. Even if we assume that the jury would infer from Goth's testimony that Holmes had a prior OWI conviction, we are confident that, in light of the whole proceeding, granting a mistrial was not necessary. See *State v. Sigarroa*, 2004 WI App 16, ¶24, 269 Wis. 2d 234, 674 N.W.2d 894 (Ct. App. 2003). The inadvertent statement was made only once and was not highlighted by any inappropriate argument. The court ultimately instructed the jury that evidence of prior convictions was to be considered only insofar as it might bear on Holmes's credibility, not on the matter of his actual guilt or innocence.

¶12 Given the particular evidence in this case, the inference that Holmes may have had a prior OWI conviction would not affect a reasonable juror when determining Holmes's guilt or innocence. Holmes's own testimony established that he had six prior convictions for unidentified crimes. In addition, he offered no reason why Goth would lie about seeing exhaust from Holmes's engine, the lights and radio operating, turning off the ignition, and taking Holmes's keys. He offers no explanation for Goth filing a form indicating that Holmes's keys were placed in a property bag *before* Holmes made an issue of who was driving. Holmes also offered no explanation for his statement to Goth minimizing the degree of his intoxication by saying he only had four beers if he in fact had not been driving.

Finally, his implausible testimony lacking any detail regarding the identity of the drivers to and from the party and the location of the party strongly suggests a fabricated story. Under these circumstances, it is highly doubtful that the verdict was the result of the jury's belief that Holmes has a propensity to drink and drive.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

