COURT OF APPEALS
DECISION
DATED AND FILED

August 3, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1544-CR **Cir. Ct. No. 2009CT350**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD K. NUMRICH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: RICHARD J. NUSS, Judge. *Affirmed*.

¶1 BROWN, C.J.[1] Richard K. Numrich appeals his conviction for operating a motor vehicle with a prohibited alcohol content (fourth offense), contrary to WIS. STAT. § 346.63(1)(b) and operating while intoxicated contrary to § 346.63(1)(a). Numrich claims that the trial court improperly denied his motion

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

for a mistrial based on inappropriate comments made by the prosecutor. Alternatively, he claims that a new trial is warranted based on the combined prejudicial effect of several improper remarks by the prosecutor. We hold that although the prosecutor's statements were inappropriate, the trial court acted within its discretion in refusing to grant a mistrial, and a new trial is unnecessary. We affirm.

FACTS

¶2 On Sunday, April 5, 2009, an off-duty police officer observed one vehicle go through a stop sign and almost strike another. The officer decided to follow the vehicle, and he observed it cross the center line. He then contacted dispatch to send an on-duty officer to conduct a traffic stop.

¶3 When the on-duty officer arrived and conducted the stop, Numrich, the driver of the vehicle, admitted to having consumed three beers that day. The officer performed some tests to determine if Numrich was fit to drive. Numrich exhibited all of the signs of intoxication during the first test and was unable to complete the other two tests because of a bad back and knees. The officer then took Numrich to get a blood test, which showed a blood alcohol content of 0.25. Numrich had his own independent testing done on the blood, but he did not offer the results of this test into evidence.

¶4 Numrich took his case to a jury and it found him guilty of operating a motor vehicle with a prohibited alcohol content (fourth offense), contrary to WIS. STAT. § 346.63(1)(b), and operating while intoxicated (fourth offense), contrary to § 346.63(1)(a).

¶5 At the trial the State called the phlebotomist who drew Numrich's blood. During cross-examination, the defense attorney questioned the witness about the possibility of air entering the blood sample and skewing the results. The prosecutor interrupted with the following objection, made in front of the jury:

> [Prosecutor]: Your Honor, I'm going to object to this line of questioning at this point. Um, all this stuff about air in the bottle, the mixture, counsel had the sample available, he knows he had it tested, and the implication in front of the jury at this point is that there's potentially a problem here. Counsel knows there was no problem and is—
>
> [Defense Counsel]: Judge, I object—
>
> [Prosecutor]: —again, and therefore this line of questioning is both irrelevant and improper because Counsel knows there's no factual basis for the implication of those questions.

¶6 At the next break in the proceedings, out of the presence of the jury, the defense attorney clarified his objection to the prosecutor's statements and moved for a mistrial, stating that he had no intention of introducing the independent testing results. He argued that the prosecutor's comment put the information in front of the jury, and so the defense now would be forced to introduce the evidence or let the jury guess as to the results of the independent testing. Numrich also argued that the prosecutor's objection accused the defense attorney of unethical conduct, and did so in front of the jury. The trial court denied the motion for a mistrial, and found that the statement was not "in any way prejudicial to the defendant." However, the trial court suggested that the "less said the better about this."

¶7 Next the State called the chemist who tested Numrich's blood sample. During redirect, the prosecutor asked if the blood sample had been picked up for independent testing, and the chemist answered that it had been forwarded to

another lab for testing. Numrich's objection was sustained and the trial court instructed the jury to "disregard that line of questioning." Out of the presence of the jury, the trial court again rejected a motion for mistrial and reiterated that it did not find the line of questioning to be prejudicial. The trial court did say, however, that the line of questioning might be considered "somewhat inappropriate" and that "it probably would have been more desirable that it not be mentioned."

¶8 Later in the trial, Numrich took the stand. He testified in direct examination that he had consumed the equivalent of twenty-six twelve-ounce beers on Saturday, April 4, 2009, and that he consumed the equivalent of four twelve-ounce beers on the morning of Sunday, April 5, 2009, prior to driving. He further testified that he did not feel impaired by the alcohol, and that he had been drinking his entire adult life and he knew when he had had too much to drink. The State argued that this opened the door for evidence of Numrich's past OWI convictions to impeach his testimony that he knew when he had had too much to drink. The trial court agreed, and the State was allowed to ask Numrich on cross-examination whether he had, on previous occasions, been caught drunk driving, to which Numrich answered that he had.

¶9 The defense later called an expert to testify regarding Numrich's blood alcohol content at the time he drove. The expert testified that, according to his calculations, Numrich's blood alcohol content should have been around 0.09 when he drove, and not 0.25. The expert also testified about how possible contamination would affect the blood testing. On cross-examination the prosecutor asked the defense expert if he was involved with the independent testing of the blood sample. The trial court allowed the question over Numrich's objection. The expert answered that he was not involved in the testing, but he had

had access to the results. He further stated that it was impossible to tell from the results alone whether there was contamination.

¶10 The defense expert later recalculated Numrich's blood alcohol content based on the number of drinks Numrich admitted to consuming in his testimony, which gave a blood alcohol content of 0.12. The defense expert then admitted that, based on his calculations, even without any evidence of blood testing, Numrich would have had a blood alcohol content over the legal limit[2] at the time he was pulled over.

¶11 During closing arguments, the defense attorney reviewed the evidence and stated that, in his mind, the evidence created a doubt as to Numrich's guilt. During the State's closing argument the prosecutor said that "[j]ust because [the defense attorney] says something doesn't mean it's true, it means he wants you to think that because it's his job to create doubt." Numrich made no objection to this comment at the time, but now claims that the prosecutor was improperly disparaging the defense attorney.

DISCUSSION

¶12 Numrich argues that the trial court improperly denied his motion for a mistrial. Alternatively, he claims that the combined prejudicial effect of the prosecutor's several inappropriate remarks warrants a new trial.

¶13 First, we consider the motion for mistrial. "The decision whether to grant a motion for a mistrial lies within the sound discretion of the trial court."

[2] The legal limit for Numrich was 0.02 because of his prior driving while intoxicated convictions. *See* WIS. STAT. § 340.01(46m)(c).

State v. Pankow, 144 Wis. 2d 23, 47, 422 N.W.2d 913 (Ct. App. 1988). The denial of a motion for a mistrial will only be reversed on appeal if there is a clear showing that the trial court erroneously exercised its discretion. ***Id.*** A trial court erroneously exercises its discretion if it fails to consider the appropriate facts, bases its conclusion on a misinterpretation of the law, or fails to "reason its way to a rational conclusion." ***State v. Seefeldt***, 2003 WI 47, ¶36, 261 Wis. 2d 383, 661 N.W.2d 822.

¶14 Numrich's motion for a mistrial was based on the prosecutor's objection in front of the jury to defense counsel's cross-examination of the phlebotomist. As we have explained in the past, it is inappropriate for an attorney to "assert personal knowledge of facts in issue." SCR 20.3.4(e); *see generally* ***State v. Albright***, 98 Wis. 2d 663, 676, 298 N.W.2d 196 (Ct. App. 1980). The prosecutor's statements that the defense counsel "had the sample available," "had it tested," and knew "there was no problem" with it were based on his personal knowledge of the pretrial testing rather than any admitted evidence. The comment was made in front of the jury, which was inappropriate. The better course of conduct would have been to ask for a sidebar, or for the jury to be removed while the objection was made. The prosecutor, who also wrote the State's brief on appeal, agrees with this assessment. The prosecutor wrote that he "does regret the speaking objection." By means of this "speaking objection," as he called it, the jury heard the prosecutor mention the independent testing, and it heard the prosecutor accuse the defense attorney of improper behavior.[3]

[3] The prosecutor also excuses his behavior as committed "in the heat of trial." That is understandable to those who have litigation experience, but it is no excuse.

¶15 However, it does not automatically follow that the trial court erroneously exercised its discretion by failing to grant the motion for mistrial. A mistrial based on prosecutorial misconduct is only appropriate if the improper comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ***State v. Patterson***, 2010 WI 130, ¶58, 329 Wis. 2d 599, 790 N.W.2d 909 (citing ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995)). The trial court "is the governor of the trial for the purpose of assuring its proper conduct." ***U.S. v. Young***, 470 U.S. 1, 10 (1985) (citing ***Quercia v. U.S.***, 289 U.S. 466, 469 (1933)). The trial court witnessed the prosecutor's inappropriate comments, and was best situated to determine, "in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial." ***State v. Sigarroa***, 2004 WI App 16, ¶24, 269 Wis. 2d 234, 674 N.W.2d 894 (Ct. App. 2003).

¶16 The trial court found that the prosecutor's statements, when viewed in their proper perspective, were not "overly damaging to the point where the defendant's day in court is being unfairly compromised." Rather than grant a mistrial, the trial court issued jury instructions informing the jury that any remarks by the attorneys that suggest facts not in the evidence should be disregarded and that no adverse inferences should be drawn from attorneys' objections. In Wisconsin, juries are presumed to follow a court's instructions. ***State v. Edwardsen***, 146 Wis. 2d 198, 210, 430 N.W.2d 604 (Ct. App. 1988). This court may conclude that any possible prejudice has thus been erased. ***Id***. The trial court

was within its discretion to deny the motion for a mistrial and give a curative instruction instead.[4]

¶17 Next, Numrich complains that when he testified as part of his own defense, the prosecutor was allowed to cross-examine Numrich regarding his prior OWI convictions. Numrich cites to ***State v. Alexander***, 214 Wis. 2d 628, 571 N.W.2d 662 (1997), as support for the proposition that the evidence of his prior convictions was unduly prejudicial. However, ***Alexander*** explicitly held that the probative value of prior convictions is far outweighed by the danger of unfair prejudice "when the sole purpose … is to prove the status element and the defendant admits to that element." ***Id.*** at 672. That situation was not present here.

¶18 The trial court allowed the State limited questioning about Numrich's prior convictions on the rationale that Numrich opened the door to that line of questioning. *See* WIS. STAT. § 904.04(1)(a). We agree. The theory of Numrich's defense was that he was not intoxicated—in support of that, he testified that he knows when he consumes too much alcohol and that he was counting his drinks that day because it was important to him to "be responsible, safe." In other words, he was painting a picture of himself as someone who is safe and responsible and would not cross the line of driving while intoxicated. After that

[4] As we noted earlier, Numrich again moved for a mistrial when the prosecutor asked the chemist who tested Numrich's blood whether the sample had been picked up for independent testing. The trial court sustained Numrich's objection, but chose to order the jury to disregard the line of questioning rather than ordering a new trial. Under the same reasoning as above, we conclude that the trial court did not abuse its discretion in denying this motion.

Additionally, Numrich complains that the State was allowed to question the defense expert regarding test results without a "proper foundation." Numrich did not develop this argument, so we decline to address it. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139; *see also* WIS. STAT. RULE 809.19(1)(e).

testimony, it was not improper for the State to cross examine him regarding his prior convictions in order to show that Numrich either did not know or did not care when he had crossed that line in the past.

¶19 Finally, Numrich complains that the prosecutor also commented during closing argument that the defense attorney wanted the jury to think there was a problem because "it's his job to create doubt." The prosecutor, in his brief, claims that he was simply countering the defense attorney's statement in his closing argument where he said that the evidence, in his mind, "create[d] a doubt."

¶20 The defense attorney's statement that the evidence, in his mind, created a doubt, is an appropriate comment based on the evidence. *See* ***State v. Adams***, 221 Wis. 2d 1, 19, 584 N.W.2d 695 (Ct. App. 1998). Attorneys are allowed to "detail the evidence, argue from it to a conclusion, and state that the evidence convinces him or her and should convince the jurors," but they are not allowed to argue facts that are not in the evidence. *See* ***id.*** The defense attorney's comment was based on the evidence of the case. The prosecutor's comment that defense counsel's job is to "create doubt," on the other hand, concerned the defense attorney's role in general, completely apart from any evidence that had been offered in the case, and was improper.[5]

[5] Our supreme court addressed a similar case in ***State v. Mayo***, 2007 WI 78, 301 Wis. 2d 642, 734 N.W.2d 115. In ***Mayo***, the prosecutor stated in closing arguments that the defense attorney's job was to "get his client off the hook" and "not to see justice done but to see that his client was acquitted." ***Id.***, ¶42. The supreme court found the comments to be inappropriate, but went on to determine that they did not prejudice the defendant. ***Id.***, ¶43.

In his brief, the prosecutor likens this issue to "the specious nature of Apellant's strategy to attack" him. He accuses Numrich of hypocrisy, of making specious allegations against him and disingenuously taking issue with the common phrase "create doubt." But the issue is a legitimate one, according to the ***Mayo*** court. We decline to view this argument as a personal attack on the prosecutor, because it is not.

¶21 Numrich correctly points out that we can consider the cumulative effect of several errors in deciding whether to grant a new trial. *See* ***State v. Harris***, 2008 WI 15, ¶110, 307 Wis. 2d 555, 745 N.W.2d 397. Although we hold that the prosecutor did comment inappropriately three times, they do not warrant a new trial when considered together. A new trial is only warranted based on improper remarks by the prosecutor if the statements were so prejudicial as to "make the resulting conviction a denial of due process." ***State v. Mayo***, 2007 WI 78, ¶43, 301 Wis. 2d 642, 734 N.W.2d 115 (citation omitted). In determining whether to overturn a conviction, we must look at these statements "in the context of the entire trial." *See* ***id.***

¶22 In the present case, although the prosecutor's trial conduct was somewhat imprudent at times, there is simply no substantial probability that a new trial would have a different result. *See* ***id.***, ¶65. Numrich showed all of the signs of intoxication in the one road-side test that he was able to complete. His blood test revealed a blood alcohol content of 0.25, well over the legal limit, and while Numrich raised the specter of sample contamination during cross-examination of the State's witness, when he completed his defense, he had not shown any evidence of actual contamination of his sample. Thus, during closing arguments, the prosecutor was finally on solid ground in commenting that there was no evidence of contamination of the sample. As well, the defense expert admitted that based on the number of drinks Numrich testified to consuming, Numrich's blood alcohol content should have been around 0.12, also well over the legal limit. Because the improper statements of the prosecutor are inconsequential when viewed against the weight of the evidence against Numrich, we decline to order a new trial.

By the Court.—Judgment affirmed.

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