

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 1, 2011

A. John Voelker
Acting 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. 2010AP1614-CR

Cir. Ct. No. 2009CF288

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GERRIT R. VAN DOORN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: WILLIAM M. GABLER, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Gerrit Van Doorn appeals a judgment, entered on a jury verdict, convicting him of operating while intoxicated, fifth offense; operating with a prohibited alcohol concentration, fifth offense; operating after revocation;

and resisting or obstructing an officer.¹ Van Doorn argues the circuit court erroneously exercised its discretion when it read back a portion of the arresting officer's testimony in response to a jury question. We affirm.

BACKGROUND

¶2 Police officer Arthur Jaquish provided the following testimony at trial. Jaquish responded to an Eau Claire grocery store after a woman reported that Van Doorn continued unwanted contact with her after their relationship ended. Jaquish found Van Doorn sitting in his car in the parking lot. Jaquish activated his squad's emergency lights. Van Doorn then exited his car and started walking toward the grocery store, but Jaquish ordered him to return to the car and produce identification. As they spoke, Jaquish smelled alcohol on Van Doorn's breath. Van Doorn told Jaquish that he had driven to the store to get groceries. During a field sobriety test, Van Doorn missed some steps, then threw up his hands and said, "[W]hy am I even doing this[?] I wasn't driving." He claimed his cousin drove him to the store, but twice failed to provide Jaquish with his cousin's correct telephone number. Van Doorn was arrested and charged with the offenses for which he was ultimately convicted.

¶3 During deliberations, the jury sent the circuit court two questions. One asked, "May we view a transcript of the police officer['s] testimony[?]" The circuit court denied that request, noting that a transcript was unavailable at the time. The jury also asked, "Did the defendant say to the police officer 'I drove to

¹ The court did not impose a sentence on the prohibited alcohol concentration conviction.

the store to get groceries[?]" In response, the court read back a portion of Jaquish's redirect testimony that directly answered the jury's question:

Q. What did the defendant tell you about how he got to the Mega Foods parking lot?

A. He told me he had driven to the Mega Foods parking lot to get groceries.

Q. And is that reflected in your report?

A. It is.

¶4 Van Doorn appeals. He argues the circuit court should have read back additional testimony elicited from Jaquish during cross-examination.²

DISCUSSION

¶5 "When a jury has questions regarding testimony, 'the jury has a right to have that testimony read back to it, subject to the discretion of the trial judge to limit the reading.'" *State v. Anderson*, 2006 WI 77, ¶83, 291 Wis. 2d 673, 717 N.W.2d 74 (quoting *Kohlhoff v. State*, 85 Wis. 2d 148, 159, 270 N.W.2d 63 (1978)). We therefore review the circuit court's refusal to read testimony to the jury for an erroneous exercise of discretion. *Id.* "A circuit court erroneously exercises its discretion when it fails to exercise its discretion, when the facts do not support [its] decision, when [it] applies the wrong legal standard, or when [it] fails to use a demonstrated rational process to reach a reasonable conclusion." *Id.* (citations omitted).

² Van Doorn also argues the circuit court erroneously exercised its discretion by denying a read back of Jaquish's entire testimony. We refuse to consider that argument for two reasons. First, the record demonstrates that Van Doorn agreed with the circuit court's response to that question. Second, Van Doorn's argument regarding the jury's first question does not address his failure to object. We therefore deem the argument undeveloped. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶6 We conclude the circuit court properly exercised its discretion when it read the jury only a portion of Jaquish’s redirect testimony. The jury’s question was specific, and the circuit court read back testimony that directly answered it. The jury asked, “Did the defendant say to the police officer ‘I drove to the store to get groceries?’” After searching the record, the circuit court discovered responsive testimony elicited on redirect after the State refreshed Jaquish’s memory with his police report. The court proposed to read back the following portion of Jaquish’s testimony:

Q. What did the defendant tell you about how he got to the Mega Foods parking lot?

A. He told me he had driven to the Mega Foods parking lot to get groceries.

Q. And is that reflected in your report?

A. It is.

Van Doorn objected, arguing that the court should also read back a portion of Jaquish’s cross-examination testimony.

¶7 However, the additional testimony requested by Van Doorn is not responsive to the jury’s specific question. Van Doorn requested testimony in which Jaquish indicated that he did not remember what he asked Van Doorn at the time of the stop:

Q. Did you specifically ask[] him if he drove there?

A. I don’t recall the question that I asked him.

The jury did not ask for clarification of Jaquish’s question; it asked for clarification of Van Doorn’s response. The cross-examination testimony was simply not responsive to the jury’s very specific question, and the circuit court properly refused to read it back. See *State v. Booth*, 147 Wis. 2d 208, 212-13, 432

N.W.2d 681 (Ct. App. 1988) (citing *Davis v. Greer*, 675 F.2d 141, 145 (7th Cir. 1982)) (circuit court has a duty to respond to the jury's inquiry with sufficient specificity to clarify the jury's problem).

¶8 The circuit court applied the correct legal standard and used a demonstrated rational process to reach a reasonable conclusion. First, the circuit court correctly stated the applicable standard of law:

Among the things I have to consider in determin[ing] what, if anything, to read back to [the jury] include such things as will the evidence lead the jury in the proper consideration of the case, whether the evidence could be subjected to improper use for the jury, whether a party will be unduly prejudiced if the jury is allowed to hear the evidence again, and whether reading the transcript or part of it would be unduly lengthy.

See *Anderson*, 291 Wis. 2d 673, ¶93. The court then reasonably concluded that the brief, direct response contained in Jaquish's redirect testimony was the most appropriate testimony to read back:

It is my ruling and determination in this instance that the purpose of responding is to answer the question as crisply and concisely as possible. The question is a crisp and concise question. It asks whether Mr. Van Doorn said to the police officer something to the effect [of], ["I drove to the store to get groceries[""] and we have isolated in the redirect examination of Officer Jaquish [testimony] that specifically answers that question. It's not too long, it doesn't unduly highlight what the defendant said. While it's true that the police officer testified to a lot of other things, I do recollect, and the transcript reflects[,] that according to the police officer the defendant said he drove to the store for groceries and so it's fair that that be read and I'm going to have that read and other testimony of the officer at this point won't be.

The circuit court's decision bears all the hallmarks of a proper exercise of discretion. See *Anderson*, 291 Wis. 2d 673, ¶83.

By the Court.—Judgment affirmed.

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

