

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 6, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2013AP787-CR

Cir. Ct. No. 2012CF620

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

NANCY JEAN WALL,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for La Crosse County:
ELLIOTT M. LEVINE, Judge. *Reversed and cause remanded.*

Before Blanchard, P.J., Lundsten and Sherman, JJ.

¶1 SHERMAN, J. The State of Wisconsin appeals a judgment of the circuit court dismissing with prejudice the State's action against Nancy Wall. The court dismissed with prejudice on the basis that the prosecutor had engaged in prosecutorial overreaching during the prosecutor's opening statement. Under the

applicable test, we need not resolve whether the record supports the circuit court's view that the prosecutor intentionally violated a pretrial order because we conclude the record does not support a finding that the prosecutor intended to provoke a mistrial in order to harass Wall or prompt a new trial at a future date. Therefore, we reverse the judgment of dismissal.

BACKGROUND

¶2 In September 2012, Nancy Wall was charged with operating a motor vehicle while under the influence of an intoxicant (OWI) and operating a motor vehicle with a prohibited alcohol concentration (PAC), both as fifth or sixth offenses, as well as operating a motor vehicle with a revoked license. The charges against Wall stemmed from an incident in which a vehicle belonging to Wall struck an apartment building. When officers arrived at the scene of the accident, the driver of the vehicle was no longer present. During the investigation into the accident, an officer made contact with Wall, who denied having been the driver of the vehicle when it struck the building. However, during the officer's contact with Wall, the officer observed that Wall's speech was slow and slurred, her eyes were bloodshot, and the officer detected an odor of alcohol on Wall's breath.

¶3 Shortly before trial, Wall offered to stipulate to the following facts: she had five prior OWI offenses; she was under the influence of an intoxicant at approximately the time the officer made contact with her; and a blood test indicated that her blood alcohol concentration (BAC) exceeded 0.02. At the beginning of trial, the circuit court addressed Wall's motion to stipulate. The court confirmed with Wall that she wished to stipulate to the number of her prior OWI offenses, that she was under the influence of an intoxicant on the night in question, and that her BAC exceeded 0.02. Wall agreed to the stipulations and the

court found that her stipulations were given freely, voluntarily, and intelligently. Without going into detail, we observe that the apparent purpose of the stipulation was Wall's attempt to prevent the jury from learning that she had multiple OWI convictions.¹

¶4 During opening statements, the prosecutor referenced the PAC charge against Wall and stated that the charge meant Wall was operating a motor vehicle with a BAC greater than she was allowed, which the prosecutor stated "was more than 0.02 grams." The prosecutor went on to explain to the jury that the PAC charge would be proven because Wall had "operated a motor vehicle on a highway" and because her blood alcohol concentration on the night in question was 0.104, which was just "over five times" greater than the "0.02" "the law says she can have."

¶5 Following the prosecutor's opening statements, Wall moved the circuit court for a mistrial on the basis that the prosecutor inappropriately talked to the jury about the 0.02 BAC standard, which effectively communicated to the jury that Wall had two or more prior OWI convictions. After a lengthy discussion about what the stipulation limited in terms of what could or could not be said to the jury regarding Wall's blood alcohol concentration limit and level, the court granted Wall's motion. Wall then moved the court for an order dismissing the information against her with prejudice on the basis that the prosecutor had "overreach[ed]" at trial. The court granted the motion, finding that the prosecutor had overreached by violating the stipulation by referring to the 0.02 standard. A

¹ We need not and do not address the State's argument that the prosecutor was not required to enter into such a stipulation.

judgment dismissing the charges against Wall was then entered. The State appeals. Additional facts will be discussed below as necessary.

DISCUSSION

¶6 The State challenges the circuit court’s finding that the prosecutor intended to provoke a mistrial when the prosecutor referenced the 0.02 BAC standard during opening statements, which the court determined warranted granting Wall’s motion to dismiss the charges against her with prejudice. As we shall see, the issue is not whether the prosecutor intentionally violated a pretrial order, but instead whether the prosecutor intended to provoke a mistrial.

¶7 The Fifth Amendment to the United States Constitution protects individuals from repeated attempts by the State to convict an individual for alleged offenses. U.S. CONST. amend. V. However, as a general matter, retrial of a defendant is *not* barred when a defendant successfully moves for a mistrial. *See State v. Jaimes*, 2006 WI App 93, ¶7, 292 Wis. 2d 656, 715 N.W.2d 669. In those situations, “the defendant is exercising control over the mistrial decision or in effect choosing to be tried by another tribunal.” *Id.* An exception to this general rule exists “when a defendant moves for and obtains a mistrial due to prosecutorial overreaching.” *State v. Hill*, 2000 WI App 259, ¶11, 240 Wis. 2d 1, 622 N.W.2d 34.

¶8 To constitute prosecutorial overreaching in this context, the conduct which induces the defendant to move for a mistrial must satisfy the following two elements:

- (1) The prosecutor’s action must be intentional in the sense of a culpable state of mind in the nature of an awareness that his [or her] activity would be prejudicial to the defendant; and (2) the prosecutor’s

action was designed either to create another chance to convict, that is, to provoke a mistrial in order to get another “kick at the cat” because the first trial is going badly, or to prejudice the defendant’s rights to successfully complete the criminal confrontation at the first trial, i.e., to harass him [or her] by successive prosecutions.

State v. Copenig, 100 Wis. 2d 700, 714-15, 303 N.W.2d 821 (1981).

¶9 The State contends that the circuit court erred in determining that the prosecutor’s conduct constituted overreaching. The State asserts that any reference by the prosecutor to the 0.02 BAC standard during opening statements was appropriate. The State further argues that even if the reference was not appropriate, the evidence fails to establish that the prosecutor’s reference was intended to induce a mistrial. The State asserts that the record fails to show that the State’s case was weak when the mistrial was declared or that the State’s case would have improved at a second trial. The State further asserts that its objection to a mistrial “is strong evidence that the prosecutor did not intend to induce a mistrial.”

¶10 Wall, in response, argues that the prosecution was aware that reference to the 0.02 BAC would be prejudicial to her. Wall argues that prior to trial, the prosecution filed a motion in limine requesting permission to introduce necessary evidence to prove the elements of the PAC charge unless Wall admitted those facts. Wall argues that the prosecution essentially “acknowledged the whole point of a stipulation in his motion in limine,” which was that the State would be relieved from proving facts to the jury if Wall stipulated to those facts. Wall further argues that the prosecution was aware from another case, which concerned a different defendant and circuit court judge but involved the same defense counsel, that reference to the defendant’s BAC during opening statements would

be inappropriate where the defendant has stipulated that he or she had a prohibited BAC.

¶11 Although our review of the record provides support for the circuit court's view that the prosecutor knew or should have known that his reference to the 0.02 BAC standard during opening statements was inappropriate, we need not resolve that issue. Even assuming an intentional violation by the prosecutor, the record does not support dismissal with prejudice because the record does not support a finding that "the prosecutor acted with intent to gain another chance to convict or to harass the defendant with multiple prosecutions." See *Hill*, 240 Wis. 2d 1, ¶12. We have observed that the advancement by a prosecutor of an erroneous view, even in spite of an admonition by the circuit court, is not alone sufficient to establish an intent to cause a mistrial. See *id.* See also *Copening*, 100 Wis. 2d at 713-14.

¶12 Prior to the circuit court granting Wall's motion for a mistrial, the prosecutor engaged in a lengthy discussion with the court about the appropriateness of his reference to the 0.02 BAC standard. The prosecutor argued against the motion for mistrial, which we have stated is an indication that a prosecutor did not intend to provoke the defendant to request a new trial. See *Hill*, 240 Wis. 2d 1, ¶¶17-18; *State v. Quinn*, 169 Wis. 2d 620, 626, 486 N.W.2d 542 (Ct. App. 1992). The prosecutor also suggested that a curative instruction could be given to the jury, which has been determined to be evidence that a prosecutor does not intend to provoke a mistrial. See *Quinn*, 169 Wis. 2d at 626. Furthermore, the reference to the 0.02 BAC was made during the prosecutor's opening statements, before the prosecutor would have had an opportunity to gauge how well or poorly the trial was proceeding. In addition, shortly before trial, Wall sought permission from the court to call an additional witness at trial. Upon

objection by the prosecutor, the circuit court denied Wall's request on the basis that Wall did not provide the prosecution sufficient notice. It would have been reasonable for the prosecutor to infer that in the event of a retrial, any issues concerning notice to the prosecution of Wall's intent to call this particular witness would not be present and that as a result of the witness's testimony, the State would be in a less favorable position during a second trial.

¶13 We further note that none of the circuit court's findings or comments appear to support the view that the prosecutor was attempting to provoke a mistrial for the purpose of stopping the trial in progress and trying the case at a future date.

¶14 We conclude that the record does not support a finding that the prosecutor intended to provoke a mistrial by his reference to the 0.02 BAC standard. Accordingly, we reverse the judgment of the circuit court dismissing with prejudice all counts against Wall.²

CONCLUSION

¶15 For the reasons discussed above, we reverse the judgment of dismissal and remand for further proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.

² Because we reverse the judgment of dismissal on the basis that the record is insufficient to support the court's finding that the prosecutor intended to provoke a mistrial, we do not reach other arguments raised by the State in its briefs pertaining to whether the stipulation prevented any reference to the 0.02 BAC standard and whether Wall waived her right to a jury trial. When a decision on one issue is dispositive, we need not reach other issues raised. See *Turner v. Taylor*, 2003 WI App 256, ¶1 n. 1, 268 Wis. 2d 628, 673 N.W.2d 716.

