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

CITY OF NEW BERLIN,

Plaintiff-Respondent,

v.

Court of Appeals case nos.:
2016AP000239

BRYON R. HRIN,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

APPEAL FROM A GUILTY VERDICT IN THE
CIRCUIT COURT FOR WAUKESHA COUNTY, BRANCH 8,
THE HONORABLE MICHAEL P. MAXWELL PRESIDING

Emily Bell, Esq.

State Bar Number: 1065784

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ISSUES PRESENTED

1. Did the trial court err in denying Defendant's motion for a mistrial based on the City's witness testifying regarding a preliminary breath screening test?
 - a. The trial court answered no, and allowed the trial to continue to a jury verdict.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Defendant requests neither oral argument nor publication.

STATEMENT OF THE CASE

Bryon Hrin was charged with operating a motor vehicle while under the influence of an intoxicant (OWI), first offense, contrary to Wis. Stat. §346.63(1)(a), and operating a motor vehicle with a prohibited alcohol concentration (PAC), first offense, contrary to Wis. Stat. §346.63(1)(b).

The case originated in the City of New Berlin municipal court, and was appealed to the Waukesha Circuit court for a trial *de novo*. The case was tried to a jury on January 26, 2016, before the circuit court for Waukesha County, the Honorable Michael Maxwell, presiding. This is an appeal of the circuit court's denial of the defendant's motion for a mistrial based upon testimony regarding the preliminary breath screening test.

Hrin asserts that the holding of the circuit court was erroneous, and that his motion for a mistrial should have been granted. Legal questions, including construction of a statute and its application to undisputed facts, are reviewed *de novo*. In *re Disciplinary Proceedings against Jacobson*, 2005 WI 76, Par. 16, 281 Wis.2d 619, 626, 697 N.W.2d 831, the court of appeals independently analyzes legal issues without deference to the trial court. Here all facts are undisputed. A trial court's decision to deny a motion for a mistrial is reviewed for an erroneous exercise of discretion *State v. Patterson*, 2009 WI App 161, ¶33, 321 Wis. 2d 752, 776 N.W.2d 602.

STATEMENT OF FACTS

On September 28, 2014, Bryon Hrin was arrested and charged with OWI first offense. After the administration of an evidentiary breath test pursuant to Wis. Stat. §343.305 yielded a result of .14, Hrin was also charged with PAC.

At the jury trial *de novo*, Officer Michael Saddy testified on behalf of the City of New Berlin. R. 35, pg. 74-75. Officer Saddy testified that, prior to arresting Hrin, he administered a preliminary breath screening test. R. 35, pg. 100. Counsel for Hrin immediately objected and requested a

sidebar R. 35, pg. 100. During the sidebar, counsel moved for a mistrial on the basis of the officer's statement that he had conducted a PBT on Hrin. P. 35, pg. 100. Counsel for the city objected to the motion. R. 35, pg. 101. Judge Maxwell took the motion under consideration, and allowed testimony of the officer to continue. R. 35, pg. 101-102. At the end of direct examination, the court excused the jury for lunch. R. 35, pg. 108. Outside the presence of the jury, counsel for Hrin continued his objection to testimony related to the PBT, and continued his motion for a mistrial on the basis of that testimony. R. 35, pg. 110-112. Counsel for the city continued to object to the motion, and both parties were given the opportunity to find authority for their positions over the lunch break. R. 35, pg. 110-112. After lunch, counsel for Hrin cross examined officer Saddy, R. 35, pg. 112-142, and counsel for the city elicited redirect testimony, R.. 35, pg. 142-145, followed by a brief recross from Hrin's counsel. R. 35, pg. 145-146. Counsel for the city then called its second witness, who was examined by both parties. R. 35, pg. 146-183. The jury was then excused, and the court took up the issue of the motion for a mistrial outside the presence of the jury. R. 35, pg. 184. The court denied the motion for a mistrial. R. 35, pg. 193. The court stated it would be open to the option of a curative jury

instruction, but noted that sometimes curative jury instructions draw more attention to a matter than a defendant may want. R. 35, pg. 193-194. At the close of evidence, the court held a jury instruction conference with both attorneys. R. 35, pg. 237. Counsel for Hrin declined a curative instruction, noting that it would highlight the issue for the jury, but further, that the defense position was that the error could not be cured. R. 35, pg. 238. Hrin was found guilty of both OWI and PAC, first offenses R. 35, pg. 312.

ARGUMENT

Evidence of Preliminary Breath Screening Tests is Inadmissible in Jury Trials

Wis. Stat. §343.303 prohibits admission of the result of a preliminary breath screening test in any proceeding other than a probable cause hearing or refusal hearing:

“The result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest, if the arrest is challenged, or to prove that a chemical test was properly required or requested of a person under s. 343.305 (3).”

The trial court noted that the statute prohibits evidence of the result of the preliminary breath test, but does not explicitly forbid admission of evidence of the administration of the test. The trial court erred, however; as

the evidence of the administration of a pre-arrest preliminary breath test, in the absence of the result of the test, implied that Hrin ‘failed” the breath test, and that was the basis for his arrest. The jury was invited to speculate and draw this impermissible conclusion.

Evidence of the administration of a pre-arrest preliminary breath screening test is utterly irrelevant; but such evidence entails unfair prejudice, confusion of the issues, and misleading of the jury. The only way a jury could look at such evidence is that it implies that the test result proved Hrin’s guilt, or at least justified his arrest. Thus evidence of a preliminary breath test should have been excluded under Wis. Stats. §343.303, §904.01, §904.02, and §904.03. The present version of Wis. Stat. §343.303 was enacted in 1981AB 66. In the last thirty-five years, not a single published, nor citable, authority has held that evidence of the administration of a preliminary breath screening test is admissible at trial.

This evidence was presented during the government’s direct examination of the arresting officer. The government, however, has an affirmative duty to prevent inadmissible testimony from its witnesses, and it was error to admit the testimony.

The Trial Court Should Have Granted Defense Counsel's Motion for a Mistrial

The standard of review of an appeal of a denial of a motion for a mistrial is whether the circuit court "exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record, [and] whether appropriate discretion was in fact exercised." *State v. Shomberg*, 2006 WI 9, ¶ 11, 288 Wis.2d 1, 709 N.W.2d 370.

A defendant need only show that the alleged error was sufficiently prejudicial to warrant a mistrial; but a defendant need not prove manifest necessity for the mistrial, the standard when the prosecution requests a mistrial over the objection of the defendant. *State v. Knapp*, No. 2009AP1463-CR (Wis. App. 4/22/2010) (Wis. App., 2010). There are no published, nor even citable cases interpreting Wis. Stat. §343.303, or offering guidance regarding granting mistrials when the statute is violated. While the violation in this case was simply one statement, it was a statement that was fraught with meaning and full of prejudice. This instance of testimony disclosing the preliminary breath test, was sufficiently prejudicial to require a mistrial.

The preliminary breath screening test was designed to serve a different function than an evidentiary test, and lacks the reliability of evidentiary breath test. The jury, however, was given no information as to the lack of reliability of a PBT. Instead, the jury was left to speculate that the result was over the legal limit. This speculation was prejudicial, as it foreclosed a number of possible defenses, including a defense that the Hrin's breath alcohol content may have been at the time of driving than it was at the time of an evidentiary breath test. This was the defense Hrin asserted. Thus, the prejudice was apparent and could not be cured. The mistrial should have been granted.

CONCLUSION

The defendant-appellant respectfully prays that the matter be reversed and remanded for actions consistent with such reversal.

Signed and dated this 15th day of June, 2016.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

_____/s/_____
BY: Emily Bell
Attorney for the Defendant
State Bar No.: 1065784

CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stats. §809.19(3)(b) and (c), for a brief produced with a proportional serif font. The length of this brief is 1,365 words.

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stats. §809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a

notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Additionally, I certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Signed and dated this 15th day of June 2016.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

_____/s/_____
BY: Emily Bell
Attorney for the Defendant
State Bar No.: 1065784

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. §809.19 (2) (a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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Respectfully submitted,
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