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WISCONSIN COURT OF APPEALS
DISTRICT 2

CITY OF NEW BERLIN

Plaintiff-Respondent,

v.

Appeal No.
2016AP000239

BRYON R. HRIN,

Defendant-Appellant

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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

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STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

Plaintiff-Respondent does not request oral argument in this matter. Plaintiff-Respondent requests publication because this decision will add to the body of law regarding the admissibility of preliminary breath test evidence.

STATEMENT OF FACTS

On September 28, 2014 at 2:38 a.m., Detective Michael Saddy of the City of New Berlin Police Department stopped the vehicle driven by the Defendant-Appellant, Mr. Bryon Hrin (hereinafter referred to as "Mr. Hrin" or "Defendant"). (R. 35, pg. 85). After the stop, Detective Saddy conducted a number of field sobriety tests and eventually placed Mr. Hrin under arrest for operating a vehicle while under the influence of an intoxicant. (R. 35, pg. 87-102). The issue presented in this appeal focuses on the testimony provided by Detective Saddy during trial about the preliminary breath test ("PBT").

On January 26, 2016 a jury trial was held on this matter at the Waukesha County Courthouse. During the direct examination of Detective Saddy, he described the steps he took prior to the traffic stop and arrest of Mr. Hrin. (R. 35, pg. 79-108). Detective Saddy explained he observed Mr.

Hrin drive through two roundabouts. In both situations Mr. Hrin cut the corner and went from the right lane to the left lane without using his turn signal, a traffic violation. (R. 35, pg. 80-83). Mr. Hrin's driving also resulted in Detective Saddy tapping on his brakes to avoid a collision. (R. 35, pg. 80-83). Mr. Hrin continued onto Racine Avenue and went from the right lane to the left turn lane, without a signal, and straddled the left lane and the turn lane prior to making his turn. (R. 35, pg. 81-84). When Detective Saddy pulled Mr. Hrin over he observed his eyes were bloodshot, glassy, there was an odor of intoxicants coming from the vehicle and Mr. Hrin stated he was on his way home from a bar. (R. 35, pg. 86). Once Detective Saddy had Mr. Hrin standing 15-24 inches away from him he noted a strong odor of intoxicants. (R. 35, pg. 91).

Additionally, Detective Saddy also testified regarding the various field sobriety tests, the instructions, and how Mr. Hrin performed during the field sobriety tests. The first test was the HGN test, here Detective Saddy observed a lack of smooth pursuit in the eyes, there was a nystagmus at maximum deviation, and jerkiness in the axes. (R. 35, pg. 92). Next, Mr. Hrin performed the walk and turn test where he started early, stepped out of position, miscounted

his steps, did not complete all of the requested steps, and did not touch his heel to toe.(R. 35, pg. 95-97). The third test performed was the one leg stand test, during this exercise Mr. Hrin did not count out loud, after dropping his foot he began counting from the number one instead of continuing forward, and he moved his arms in different positions instead of leaving them at his side like he was instructed to. (R. 35, pg. 99-100). Mr. Hrin's performance during these tests all led Detective Saddy to believe he was intoxicated. (R. 35, pg. 92-100).

Lastly, Detective Saddy testified that after the field sobriety tests were completed, he administered a preliminary breath test prior to placing Mr. Hrin under arrest. (R. 35, pg. 100). The defendant-Appellant moved for a mistrial on the basis that the court should not have admitted into evidence the fact that Detective Saddy administered a preliminary breath test. (R. 35, pg. 100).

The trial court listened to arguments from both sides regarding the motion for a mistrial and found that a mistrial was not warranted in this situation. (R. 35, pg. 193). The trial court considered the arguments of the parties and concluded a mistrial was inappropriate because Wisconsin Statute Section 343.303 does not prohibit testimony that a preliminary breath test was administered.

(R. 35, pg. 191-193). Furthermore, the court acknowledged that the singular statement did not divulge any information concerning the test result, and there was no further testimony regarding the preliminary breath test. *Id.*

ARGUMENT

I. EVIDENCE THAT A PRELIMINARY BREATH TEST WAS ADMINISTERED IS ADMISSIBLE PER WISCONSIN STATUTE SECTION 343.303

Nothing in Wis. Stat. Sec. 343.303 prohibits testimony at trial concerning the administration of a preliminary breath test, it is the result of the test that is prohibited. The interpretation and application of a statute are questions of law that this Court will review independently, but will benefit from the circuit court's analysis. *Richards v. Badger Mut. Ins. Co.*, 2008 WI 52, ¶14, 309 Wis. 2d 541, 550, 749 N.W.2d 581, 586 (2008). It is assumed the plain language in the statute yields the meaning intended by the legislature, and if there is a clear meaning and understanding, then the statute is applied according to its plain terms. *Id.* at ¶20. There is no need to consult extrinsic sources if the statute is unambiguous. *Id.*

The statute at issue is unambiguous and the plain language in the statute yields a clear understanding of the

legislative intent. The language in the statute specifically states, in relevant part, "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)." Wis. Stat. §343.303 (*emphasis added*). Thus, the statute specifically prohibits the admission of a preliminary breath test result, but not the fact that a preliminary breath test was administered. Consequently, the singular statement by Detective Saddy that prior to arresting Mr. Hrin he administered a preliminary breath test is admissible according to the statutory language.

If, however, this Court finds the statutory language is ambiguous, a review of the statute's legislative history supports the conclusion the preliminary breath test testimony is admissible. When a statute is capable of being understood in more than one way, the statute is ambiguous and extrinsic sources, such as legislative history, will be used to understand the statutory meaning. *Richards*, 2008 WI 52 at ¶21. Statutory history includes the previously enacted and repealed provisions of the statute. *Id.* at ¶22. The legislative intent can be easily deciphered by

analyzing the changes made by the legislature over time. *Id.* The legislative history of Sec. 343.303 supports the interpretation that testimony indicating a preliminary breath test was administered is admissible at trial.

Prior to 1981 Wisconsin Act 20, the statute language prohibited the admission into evidence of both the result of a preliminary breath test and the fact that the preliminary breath test was administered. Wis. Stat. §343.305(2)(a) (1979-80). In the relevant part, the statute reads, "*neither the results of the preliminary breath test nor the fact that it was administered* shall be admissible in any action or proceeding in which it is material to prove that the person was under the influence of an intoxicant or a controlled substance." Wis. Stat. §343.305(2)(a) (1979-80) (*emphasis added*). It can be interpreted that the legislative intent surrounding the change in statutory language by 1981 Wisconsin Act 20 was to limit the prohibition placed on preliminary breath test testimony in trial.

It is evident that the legislature intentionally removed the language prohibiting evidence of the administration of a preliminary breath test. Exclusion Detective Saddy's testimony under Sec. 343.303 should not be permitted because the legislature had the discretionary

power to continue to grant exclusion of this particular evidence, but deliberately removed it. See *Crown Castle USA, Inc. v. Orion Const. Group, LLC*, 2012 WI 29, ¶ 37, 339 Wis. 2d 252, 273, 811 N.W.2d 332, 342 (2012) (finding that a non-judgment debtor third party cannot be compelled to testify at a supplemental hearing because that power has been expressly removed from the statute by the legislature). Concluding the current statute provides for the exclusion of this testimony would effectively be writing in the precise language the legislature explicitly removed. *Id.* It is clear the legislature intended to permit testimony that a preliminary breath test was administered.

Thus, given the legislative history of the preliminary breath test statute, it can be understood that the intent of the legislature was to remove the prohibition placed on the admission of testimony that a preliminary breath test was administered.

II. THE TRIAL COURT DID NOT ERRONEOUSLY EXERCISE ITS DISCRETION BY DENYING THE MOTION FOR MISTRIAL

A. Standard of Review

The decision on whether to grant a motion for mistrial is left in the sound discretion of the trial court. *Jensen v. McPherson*, 2004 WI App 145, ¶29, 275 Wis. 2d 604, 621,

685 N.W.2d 603, 611 (Ct. App. 2004). The trial court is burdened with the obligation to look at the proceeding as whole and make a determination on whether the error is sufficiently prejudicial to warrant the granting of a new trial. *Id.* When the trial court denies a motion for mistrial, its denial will only be reversed when there is a clear showing of an erroneous use of discretion by the trial court. *Id.*

The trial court's exercise of discretion will be upheld if the trial court "(1) examined the relevant facts; (2) applied a proper standard of law; and (3) using a demonstrably rational process, reached a conclusion that a reasonable judge could reach." *State ex rel. Robins v. Madden (In re Doe)*, 2009 WI 46, ¶9, 317 Wis.2d 364, 372, 766 N.W.2d 542, 545-46 (2009). It is evident through the trial transcript and statutory language, as described herein, that the trial court's decision was based on the letter of the law, the facts of this particular case, and is rational.

B. The trial court examined the relevant facts

Prior to making a decision on the motion for mistrial, the trial court continued hearing testimony from witnesses and delayed making a decision on the motion until after

testimony was introduced. (R. 35, pg. 101). The court considered the testimony surrounding the statement at issue to determine the context and implication of the statement. (R. 35, pg. 192). The surrounding testimony is crucial to understanding what the testimony was introduced to show. The statement was introduced merely to provide the chronological sequence of events that occurred prior to placing Mr. Hrin under arrest.

Moreover, the trial court afforded each party time to review relevant statutory law and case law in order to supplement their position. (R. 35, pg. 112). Each party was given the opportunity to express the relevant facts, applicable law, and arguments crucial to their position. The court also took into consideration the fact that the statement as slight, was unintentional, and the fact that the preliminary breath test was never mentioned again.

After the introduction of testimony from Detective Saddy and Officer Thayer the trial court, with the evidence and arguments fresh in the judge's mind, made a decision that a mistrial is inappropriate given the facts and circumstances in this case.

C. The trial court applied the proper standard of law

The relevant statute, Wis. Stat. 343.303 states that the "result of a preliminary breath test" is inadmissible in trial unless it falls under one of the exceptions provided. All published opinions interpreting the admission of preliminary breath test evidence interpret the repealed version of the statute and, due to the vast change in the language, they are not helpful in making a decision on the present case. The defense focused their argument in support of a mistrial on a case that is irrelevant because it interprets the old version of the law, which did specifically prohibit the testimony at issue. (R. 35, pg. 185). Thus, although the case was directly on point, it is not reliable authority.

The trial court weighed the facts presented in the case, the statutory language, and persuasive case law. Ultimately, the trial court concluded the "very slight testimony" regarding the preliminary breath test is not precluded by Wis. Stat. Sec. 343.303. (R. 35, pg. 193). Further, the court noted that the preliminary breath test was not further discussed, and the statement did not near the point of providing the results of the test. *Id.*

Therefore, the trial court reviewed and interpreted the language presented in Wis. Stat. Sec. 343.303, took into

consideration persuasive case law, and ultimately found that the testimony is admissible.

D. The trial court reached a conclusion that a reasonable judge could reach

The denial of the motion for mistrial by the trial court was rational because the jury would have reached the same conclusion if the evidence concerning the preliminary breath test was not presented. The statement that a preliminary breath test was administered to Mr. Hrin is not the overpowering evidence of guilt in this case. The failed sobriety tests, odor of intoxicant, statement that he was coming home from a bar at 2:38 a.m., the chemical breath test result of .14, and the traffic violations provide sufficient evidence for the jury to reach a decision that Mr. Hrin was driving while under the influence of an intoxicant on September 28, 2014 at 2:38 a.m. and has a prohibited alcohol concentration at the time of driving. In fact, all the elements to satisfy the prohibited alcohol concentration charge are not disputed nor involve the preliminary breath test testimony.

Furthermore, Mr. Hrin had the opportunity to impose a curative jury instruction regarding the preliminary breath test evidence, but chose not to do so. During examination,

Detective Saddy was asked multiple times why he arrested Mr. Hrin and his reasons rested on the traffic violations, his observations, and Mr. Hrin's performance on the field sobriety tests. (R. 35, pg. 108). The reference to the preliminary breath test was made simply to state the chronological sequence of events prior to arresting Mr. Hrin. (R. 35, pg. 100). As the record reflects, prior to the preliminary breath test statement, Detective Saddy stated that after conducting the field sobriety tests he already believed Mr. Hrin was impaired; this was prior to administering the preliminary breath test. *Id.*

Thus, the trial court correctly considered the facts of the case, applied the correct rule of law, and made a rational decision by denying the motion for mistrial.

III. A NEW TRIAL SHOULD NOT BE GRANTED BECAUSE THE TESTIMONY DID NOT AFFECT MR. HRINS SUBSTANTIAL RIGHTS AND IT IS NOT UNFAIRLY PREJUDICIAL

If the singular statement that a preliminary breath test was administered to Mr. Hrin is found to be inadmissible, its admission is harmless and thus does not warrant a new trial.

A court will disregard any error, including the admission of inadmissible evidence, if the error does not affect the substantial rights of the adverse party. Wis.

Stat. §805.18(1) (2013-14). Further, a judgment will not be set aside or reversed for the improper admission of evidence unless the court to which the application is made believes the error affected the substantial rights of the adverse party. Wis. Stat. § 805.18(2). An error affects the substantial rights of a party when there is a reasonable possibility that the alleged error contributed to the outcome of the case. *Evelyn C.R. v. Tykila S. (in Re Jayton S.)*, 2001 WI 110, ¶28, 246 Wis. 2d 1, 19, 629 N.W.2d 768, 777 (2001). The error is harmless if it is insufficient to undermine the court's confidence in the outcome of the case. *Id.*

Furthermore, an error is harmless if it is clear beyond a reasonable doubt that the jury would have found the defendant guilty without the error. *State v. Jackson*, 2014 WI 4, ¶86, 352 Wis. 2d 249, 289, 841 N.W. 2d 791, 810 (2014). Accordingly, in order to support reversal of the trial courts order, the Court must find, that but for the admission of inadmissible evidence, the result of the proceeding would be different. *Id.*

Moreover, under the same line of reasoning, the testimony that a preliminary breath test was administered does not cause unfair prejudice under Sec. 904.03 (2013-14). In determining whether evidence constitutes unfair

prejudice, the question at issue is not whether the evidence is harmful to the opposing party, but whether it influences the case through improper means. *State v. Johnson*, 184 Wis. 2d 324, 340, 516 N.W.2d 463, 468 (Ct. App. 1994). Unfair prejudice occurs when the evidence admitted has the tendency to influence the outcome of the case through improper means and otherwise results in the jury making a decision based on something other than the established propositions in the case. *State v. Sullivan*, 216 Wis. 2d 768, 789-90, 576 N.W.2d 30, 40 (1998).

In the present case, the admission into evidence that Mr. Hrin was administered a preliminary breath test is harmless and is not unfairly prejudicial because there is substantial evidence proving guilt. The jury would have reached the same conclusion even if the error was not made. Detective Saddy testified that he observed Mr. Hrin drive through two roundabout's where, without using a turn signal, Mr. Hrin failed to stay in his lane. (R. 35, pg. 82-84). Mr. Hrin then continued on to make a left turn and straddled the left lane and the turn lane. (R. 35, pg. 82, 84).

Additionally, Detective Saddy testified that Mr. Hrin's eyes were bloodshot and glassy, there was a moderate odor of intoxicants coming from the vehicle, and Mr. Hrin

stated he was on his way home from a bar at 2:38 a.m. (R. 35, pg. 86). Detective Saddy explained the various field sobriety tests he administered and further described the several ways Mr. Hrin was unsuccessful in completing the field sobriety tests. (R. 35, pg. 92-100). Lastly, Officer Thayer testified that the chemical breath test, using the Intoximeter II, resulted in a blood alcohol concentration of 0.14, which is undisputed. (R. 35, pg. 298). All of these elements, considered as a whole, led the jury to reasonably believe Mr. Hrin was intoxicated at the time he was pulled over and is therefore guilty of driving while under the influence of an intoxicant and prohibited alcohol concentration. The prohibited alcohol concentration ("PAC") charge in no way involves the preliminary breath test. The PAC charge simply asks whether an individual's blood alcohol concentration at the time of driving was above a legal limit. The testimony and evidence in this regard is uncontested. Mr. Hrin was driving and his blood alcohol concentration was above the legal limit.

Even if the singular assertion by Detective Saddy stating he administered a preliminary breath test is found to be inadmissible, the admission is a harmless error, is not unfairly prejudicial, and the decision of the trial court denying the motion for a mistrial must be affirmed.

CONCLUSION

Testimony that a preliminary breath test was administered is admissible under Sec. 343.303. Finding otherwise would be contrary to legislative intent and result in writing into the statute the language the legislature explicitly removed. Moreover, the trial court did not erroneously exercise its discretion in reviewing the available evidence, applying the proper standard of law and reaching a rational determination that a mistrial was inappropriate. The trial court noted the slight preliminary breath test testimony was insufficient to sway the jury, and the available evidence was enough for a reasonable jury to find Mr. Hrin guilty of driving with a prohibited alcohol concentration.

Lastly, the preliminary breath test testimony was harmless and was not unfairly prejudicial. The evidence available to the jury concerning Mr. Hrin's traffic violations, odor of intoxicants, inability to complete field sobriety tests correctly, and the chemical breath test results provided the jury with sufficient evidence to make a determination that he was driving with a prohibited alcohol concentration on September 28, 2014 at 2:38 a.m.

For the foregoing reasons, the Plaintiff-Respondent, City of New Berlin, respectfully requests that this Court

uphold the decision in Case No. 15-CV1647 in the Circuit Court for Waukesha County.

Dated this 14th day of July, 2016.

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CERTIFICATION

I certify that this Brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief produced with font; 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margin on the other 3 sides. The length of this brief is 20 pages.

Dated this 14th day of July, 2016.

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**CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19 (12)**

I hereby certify that:

I have submitted an electronic copy of this Brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic Brief is identical in content and format to the printed form of the Brief as filed as of this date.

A copy of this Certificate has been served with the paper copies of this Brief filed with the Court and served on all opposing parties.

Dated this 14th day of July, 2016.

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