STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2017AP000833-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs.

DALE R. DELVOYE,
Defendant-Appellant.

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

On Appeal from Brown County Circuit Court,
the Honorable Timothy A. Hinkfuss, presiding
Trial Court Case No. 14CT1419

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

Wisconsin Supreme Court Cases

Wisconsin Court of Appeals Cases

STATUTES CITED

Wisconsin Statutes

ISSUE FOR REVIEW

Whether the trial court properly exercised its discretion in denying a mistrial when the arresting officer fleetingly mentioned that he asked Mr. Delvoye if he would submit to a preliminary breath test.

The Trial Court Answered: Yes. The trial court properly noted that it is the *results* of a preliminary breath test that are excluded during trial testimony, and not testimony that Delvoye was asked to submit to a preliminary breath test.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State of Wisconsin believes this is a one-judge case, in which the arguments can be adequately addressed in briefing and can be decided by straightforward application of law to the facts. Therefore, neither oral argument nor publication is requested. Wis. Stat. § 343.303 is a straightforward statute which clearly dictates that the results of a preliminary breath test during trial are inadmissible, but does not prohibit the mere mention of a preliminary breath test.

STATEMENT OF THE CASE AND FACTS

Dale R. Delvoye was charged with Operating a Motor Vehicle While Under the Influence of an Intoxicant-Second Offense and Operating a Motor Vehicle With a Prohibited Alcohol Concentration-Second Offense in violation of Wis. Stat. §§ 346.63(1)(a) & 346.63(1)(b)[1], for an incident that had occurred on July 9, 2014. (R3). Delvoye entered not guilty pleas to both charges and eventually had his case tried to a jury of his peers on December 21 and 22, 2016, with the Honorable Timothy A. Hinkfuss presiding. (R4; R62; R63).

In that trial, Deputy Nicholas Nerat of the Brown County Sheriff's Department testified that on July 9, 2014 at around 11:20 P.M., he was traveling eastbound on Glendale Avenue in the Village of Howard, Wisconsin when he observed a vehicle traveling northbound on Riverview Drive. (R62: 40-41). As he watched the vehicle turn onto Glendale, he observed the vehicle cross over the double-yellow line with both of its left tires. (R62: 41). Deputy Nerat

[1] All statutes are current unless otherwise cited.

caught up to the vehicle on Lakeview Drive, pulled the vehicle over, and identified Delvoye as the driver of that vehicle. (R62: 44, 47).

Deputy Nerat testified that just prior to stopping Delvoye the Brown County Sherriff's department had received a call of a potentially intoxicated female driver who had driven into a ditch, backed out and left the area. (R62: 52). That call was closed because the driver had left the scene, which was nearby the Shell gas station at Glendale Avenue and Velp Avenue. (R62: 52). Deputy Nerat testified that police had no further information about this incident until he stopped Delvoye. (R62: 52). Deputy Nerat testified that Delvoye, after some hesitation, stated that he had just come from that Shell gas station after meeting his wife's friend there; but after some follow-up questions, Delvoye changed his story and said that he had just met his wife and his wife's friend at the gas station. (R62: 49, 52-53). Deputy Nerat asked Delvoye why he was meeting them at the gas station, but Delvoye just repeated that he was meeting them and was going to go home. (R62: 53, 55). Deputy Nerat ran a record check on Delvoye and verified his address on his driver's license and knew that

if Delvoye was coming from that Shell gas station, it "would not have been even close to the most direct route to his residence if he was, in fact, going home." (R62: 56). Deputy Nerat testified that he questioned Delvoye on this point and Delvoye deflected by talking about where he worked. (R62: 56).

Deputy Nerat testified that while speaking to Delvoye he noticed signs of possible impairment, specifically an odor of intoxicants coming from Delvoye's breath, along with glossy eyes and slurred speech. (R62: 56-57). Deputy Nerat asked Delvoye if he had been drinking and Delvoye said that he had, and said that he had consumed three beers about an hour prior to driving. (R62: 58-59). Deputy Nerat asked Delvoye for his phone number, but Delvoye recited back the wrong phone number. (R62: 59). While Deputy Nerat waited for backup, another vehicle pulled up nearby, and out of the vehicle appeared Delvoye's wife and son, neither of whom Deputy Nerat had called. (R62: 60).

When backup arrived, Deputy Nerat had Delvoye step out of his vehicle and perform some field sobriety tests, specifically the

horizontal (and vertical) gaze nystagmus tests and an alphabet recitation test. (R62: 61, 73). Deputy Nerat did not administer the walk and turn test or the one-leg stand test due to Delvoye's complaint that his balance was compromised by an inner ear issue. (R62: 72-73).

Deputy Nerat testified that after administering the tests, "I felt that (Delvoye's) level of impairment was enough that – that he wasn't able to operate that motor vehicle safely and asked him if he'd submit to a preliminary breath test or PBT as we call it." (R62: 74).

Immediately after Deputy Nerat mentioned the preliminary breath test (hereinafter "PBT"), his testimony was cut off and Delvoye moved for a mistrial. (R62: 74). In arguing for a mistrial Delvoye asserted that the jury had now been told that Delvoye was *administered* a PBT. (R62: 75). The trial court noted that Delvoye was misstating the deputy's testimony by saying that the jury was told that a PBT was administered, and noted that the deputy had merely mentioned that he had asked Delvoye if he would submit to a PBT, and they jury was never told that Delvoye had been given a PBT or

what the result of the PBT was. (R62: 76-78). The trial court also noted that the State's motion *in limine*, to which Delvoye had agreed and the trial court had granted prior to trial, sought to exclude the *result* of the PBT, despite Delvoye's assertion that it sought to exclude any reference to either the administration or results of a PBT. (R62: 84, 74). Furthermore, the trial court noted that Wis. Stat. §343.303 prohibits the admission of only the PBT results, as well. (R62: 80). The trial court therefore denied Delvoye's motion for a mistrial. (R62: 84).

Deputy Nerat then testified that Delvoye was then placed under arrest and taken to St. Mary's Hospital for a blood draw. (R62: 86). Deputy Nerat testified that after being read the Informing the Accused from, Delvoye consented to the blood draw. (R62: 87-88). Deputy Nerat also testified to the process of obtaining Delvoye's blood sample, sealing it, and sending it to the state lab for analysis. (R62: 88-91).

The jury subsequently heard testimony from the lab analyst, and was shown that the lab analysis of Delvoye's blood, which was

drawn on July 10, 2014, at 12:22 A.M., came back with a blood ethanol concentration of 0.130 g/100 mL. (R36: 2).

The jury began its deliberations at approximately 1:39 P.M. (R33: 7). Approximately 31 minutes later, the jury foreperson sent a written question to the trial court asking "WHY WAS A BREATHALIZER [sic] (BREATH TEST ADMINISTRATED [sic]" (R33: 7, 15; R63: 8, 13). Delvoye's counsel again moved for a mistrial on the grounds that the jury had considered the PBT in its deliberations. (R63: 9-10, 11-12). Again, the trial court denied the motion for mistrial, noting that both Wis. Stat. § 343.03 and the motion *in limine* addressed any results of a PBT, and further noting that the deputy never mentioned any result of a PBT. (R63: 19).

After denying Delvoye's request for a mistrial, the trial court issued a curative instruction, specifically sending back an answer to the jury, as drafted by Delvoye's counsel. (R63: 12, 20). At 2:41 P.M., the following answer was sent back to the jury by the court: "You have not heard my [sic] evidence of a breath test result in this case and should not speculate about any breath test evidence. You

should decide this case solely on the evidence that was properly admitted." (R33: 8, 15).

Approximately 42 minutes later, the jury advised the court that they had reached their verdicts. (R33: 8). Delvoye was convicted of Operating a Motor Vehicle With a Prohibited Alcohol Concentration and was acquitted of Operating a Motor Vehicle While Under the Influence of an Intoxicant. (R41).

The circuit court then sentenced Delvoye to 5 days jail, a license revocation of 13 months, ignition interlock for a period of 12 months, and a fine and costs totaling more than $1,300. (R41).

Delvoye now seeks post-conviction relief in this Court. (R40).

STANDARD OF REVIEW

"A motion for mistrial is addressed to the sound discretion of the trial court and the [reviewing court] will not intrude in the absence of abuse of such discretion." *Valiga v. National Food Co.*, 58 Wis.2d 232, 253–54, 206 N.W.2d 377, 389 (1973) (citation omitted). A trial court's denial of a motion for a mistrial should be reversed only upon

a clear showing of an erroneous exercise of that discretion. *State v. Hampton*, 217 Wis.2d 614, 621, 579 N.W.2d 260, 263 (Ct. App. 1998). *See also, State v. Doss*, 2008 WI 93, ¶ 69, 312 Wis.2d 570, 754 N.W.2d 150. *See also* Wis. Stat. § 805.18(2).

ARGUMENT

I. MENTIONING THE MERE FACT THAT THE DEFENDANT WAS ASKED TO SUBMIT TO A PBT TEST WAS NOT ERROR, NOR WAS IT SO PREJUDICIAL THAT THE JURY WOULD HAVE REACHED A DIFFERENT RESULT IF THE TEST WAS NOT MENTIONED.

A motion for a mistrial is directed to the discretion of the trial court. *Oseman v. State*, 32 Wis.2d 523, 528, 145 N.W.2d 766, 770 (1966). In deciding whether to grant a new trial, the "trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial." *State v. Pankow*, 144 Wis.2d 23, 47, 422 N.W.2d 913, 921 (Ct. App. 1988) (citation omitted). A new trial is warranted where a different result probably would have been reached absent the error. *State v. Albright*, 98

Wis.2d 663, 677, 298 N.W.2d 196, 204 (Ct. App. 1980). "Not all errors warrant a mistrial; 'the law prefers less drastic alternatives, if available and practical.'" *State v. Collier*, 220 Wis.2d 825, 837, 584 N.W.2d 689, 694 (Ct. App. 1998), quoting *State v. Bunch*, 191 Wis.2d 501, 512, 529 N.W.2d 923, 927 (Ct. App. 1995). Even assuming that an error during trial occurs, prejudice is presumptively erased when a curative instruction is given. *Collier*, 220 Wis.2d at 694.

Mere mention by the deputy during trial that he had asked Delvoye to submit to a PBT was not a *de facto* error in this case. Nor is there anything other than speculation that it played any role in jury deliberations for determining whether Delvoye was driving with a prohibited alcohol concentration in violation of Wis. Stat. § 346.63(1)(b). The jury was tasked to decide two questions: (1) whether Delvoye was driving under the influence of an intoxicant, and (2) whether Delvoye was driving with a prohibited alcohol concentration.

Given the context of what Deputy Nerat was talking about when he mentioned asking Delvoye to do a PBT it appears that the

jury was considering the PBT as evidence whether Delvoye was driving under the influence of an intoxicant. Nerat's testimony was: "After administering the two field sobriety tests I felt that his level of impairment was enough that – that he wasn't able to operate that motor vehicle safely and asked him if he'd submit to a preliminary breath test or PBT as we call it." (R62: 74). Nerat was discussing his belief that Delvoye was impaired—not that he believed Delvoye to be at or above a particular BAC level. This is supported by the wording of the question—the jury asked "why" the test was given, not what the results were—and *why* the test was given is more relevant to answering whether Officer Nerat thought he was intoxicated or impaired.

However, the jury subsequently returned a verdict of "Not Guilty" on the operating while impaired count, so there is no way Delvoye can argue that he was prejudiced by the jury's consideration of that evidence, at least for that count. Delvoye's argument therefore hinges on whether the testimony that he was asked to submit to a PBT

influenced the jury's verdict on the second count, i.e., the operating with a prohibited alcohol concentration ("PAC") count.

As to the PAC count, there is no reason to suspect that the jury found Delvoye guilty of driving with a prohibited alcohol concentration based on the idea that he might have been given a PBT. The jury's question was *why* the PBT was administered, not what was the *result* of the PBT. While the jury clearly discussed the PBT in their deliberations given the question they submitted to the court, that is not the relevant query for the court. The relevant question is whether the evidence unduly influenced their guilty verdict as to the PAC count, and it is very doubtful that it did.

Delvoye essentially argues that because the jury heard evidence that he was asked to submit to a PBT, that they must have assumed that the PBT came at a number higher than the statutorily prohibited amount. There are two reasons why that is patently wrong. First, a curative instruction was given that the jury had never heard any evidence of a breath test *result*, and they were not to speculate about any breath test evidence. (R63: 12, 20; R33). Second, the jury had

overwhelming evidence that the Delvoye was in fact driving with a prohibited alcohol concentration, namely the lab results showing Delvoye had a blood ethanol concentration of 0.130 g/100 mL—which is 62.5% over the legal limit of 0.08—about one hour after he was stopped by Deputy Nerat. (R36:2).

The trial court followed the law and gave the jury a curative instruction, which was drafted by Delvoye's counsel, to cure any potential prejudice, so it did not have to declare a mistrial. This is what a court is encouraged to do under the law in the State of Wisconsin. See *Collier*, 220 Wis.2d at 837. That curative instruction, which presumptively cured the prejudice Delvoye is alleging, along with evidence that included the lab results showing Delvoye's blood ethanol concentration to be more than 60% *above* the legal limit of 0.08, indicate that Delvoye could not have been prejudiced as it relates to the PAC count. At the very least, Delvoye was not prejudiced in such a way that would warrant a mistrial.

II. THE PLAIN TEXT AND THE STATUTORY HISTORY OF WIS. STAT. § 343.303 INDICATE THAT IT IS ONLY THE RESULTS OF THE PBT THAT ARE EXCLUDED FROM THE JURY'S CONSIDERATION.

The plain text of Wis. Stat § 343.303 indicates that it is only the *results* of a PBT that are not admissible at trial. The relevant language reads: "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…." Wis. Stat. § 343.303. This language is unambiguous—it is only the *results* of the PBT that are precluded from trial. Where the language is unambiguous, there is generally no need to consult extrinsic sources of interpretation. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 46, 271 Wis.2d 633, 663, 681 N.W.2d 110, 124. The inquiry should stop here. *Id*.

However, this language is apparently ambiguous to Delvoye. The bulk of his argument is that the mention of PBT in any way in a trial is a *per se* mistrial because such a mention ultimately leads to speculation about the results. Therefore, to Delvoye, "results of the

preliminary breath test" means much more than just the result. Insofar as this language may be ambiguous (it is not), it would be relevant to consult extrinsic evidence of legislative intent. *Id.*

The context of Wis. Stat. § 343.303, namely its statutory history, is highly relevant to determining the meaning of the relevant portion of the statute. Interestingly, the statute used to prohibit both the results *and* the fact that a PBT was administered. The predecessor statute read:

> 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). However, in 1981 the Wisconsin legislature repealed this language, and the current language of Wis. Stat. §343.303, prohibiting only the results of a PBT at trial, was enacted. 1981 Acts, Chapter 20; Wis. Stats. §343.303 (1981-82).

Wis. Stat. § 343.303 is unambiguous in that it only refers to the results of a PBT. Even if this Court does not agree that it is unambiguous, it can comfortably find that the State's interpretation is correct that not all mention of a PBT is barred during trial because the statutory history supports that conclusion.

III. DELVOYE HAS NOT DEMONSTRATED THAT HE WAS PREJUDICED, MUCH LESS THAT HE WAS PREJUDICED SO SUFFIENTLY AS TO WARRANT A MISTRIAL.

Assuming that the mention of the PBT test was an error, there is no way that it had a prejudicial effect on the jury so sufficiently as to warrant a mistrial. Whether a court should have granted a mistrial requires an appellate court to look primarily at the facts and the evidence that was introduced in the case. *Oseman*, 32 Wis.2d at 528. If the evidence rightfully admitted to the jury was strong notwithstanding the evidence admitted in error, then it is more likely that a mistrial should not be declared. *See Oseman*, at 529 (noting that the "if the evidence presented in a case [is] extremely weak and

the . . . error occur[s], it could justifiably be deemed grounds for a mistrial."). There is no such thing as a "slam-dunk" case, but Delvoye's case was very solid as to the PAC count, irrespective of the deputy's mentioning that he asked Delvoye to submit to a PBT.

Other than the first element regarding operating or driving a motor vehicle, the evidence required to prove someone was driving with a prohibited alcohol concentration and the evidence required to prove a someone was driving under the influence of an intoxicant to a degree that renders them incapable of driving safely is quite different. *See* Wis. Stat. §§ 346.63(1)(a) & 346.63(1)(b). Surely a jury can, and they sometimes do, believe that a defendant was capable of driving a motor vehicle safely but was, nonetheless, operating with a prohibited alcohol concentration. Just because the evidence of one charge is not enough to satisfy a jury beyond a reasonable doubt of the defendant's guilt does not mean that other evidence to as to another charge is "weak." Suggesting that an acquittal on a separate count is evidence that the State's case on a different count is weak is absurd.

Certainly the jury heard some evidence that supported the allegation that Delvoye had been operating a motor vehicle while impaired. They heard that the deputy observed Delvoye swerve over a yellow line while making a turn. (R62: 41). They also heard that Delvoye appeared to be fabricating his story as to where he was coming from and who he was with; and that he was coming from an area where an incident probably involving alcohol had taken place; or at least having difficulty with explaining where he was coming from. (R62: 52-55). They also heard evidence that Delvoye exhibited some clues of possible intoxication, which Deputy Nerat characterized as signs of "impairment"—the odor of intoxicants coming from Delvoye's breath, glossy eyes, and slightly slurred speech. (R62:56-57). However these are clues that a trained law enforcement officer looks for; they don't necessarily indicate "impairment" to lay persons. Furthermore, the jury only heard evidence that Delvoye failed one standardized field sobriety test—the horizontal gaze nystagmus (HGN) test. (R62: 61-67, 68-70). And while Deputy Nerat explained what the HGN test means to a trained law enforcement officer, the

HGN test doesn't necessarily mean to a lay persons that the subject is impaired. The jury also heard that Deputy Nerat was not able to administer the two other standardized field sobriety tests (the walk-and-turn and one-leg stand tests) due to Delvoye's claimed medical condition. (R62: 72-73). The jury also heard that Delvoye was able to recite the alphabet, which was administered by Nerat as an alternative test. (R62: 73).

In retrospect, given the relative lack of evidence involving additional observations of impaired driving (e.g., repeated incidents of swerving), and no evidence of him staggering or stumbling while trying to do a walk-and-turn test or a one-leg stand test (or at least "failing" these standardized tests), it probably shouldn't be surprising that the jury acquitted Delvoye of the operating a motor vehicle while intoxicated count.

However, the jury also heard evidence that Delvoye admitted to having "three beers" about an hour prior to driving. (R62: 59).

Therefore the jury had every reason to believe that a blood test would reveal some level of alcohol.

More important, though, is the fact that the jury *did* hear that Delvoye's blood was subsequently drawn and tested, and it revealed a blood ethanol concentration much higher than the legal limit, through *irrefutable* evidence. They heard how Delvoye was taken to St. Mary's hospital for a blood draw. (R62: 86, 89). They heard how the Delvoye's blood sample was obtained, how it was then sealed and sent to the Wisconsin State Lab of Hygiene. (R62: 88-91). And they then heard that the blood was tested and came back at 0.130 g/100 mL and even saw the lab result document itself. (R36: 2). The evidence against Delvoye on the PAC count was hardly weak. In fact, it was quite the opposite.

The jury here was told not to consider or speculate as to any PBT evidence in rendering its verdict. "Potential prejudice is presumptively erased when admonitory instructions are given by a trial court." *Collier* , 220 Wis.2d at 837. It is therefore presumed that

after the jury asked about the PBT and the answer was given, telling them that they did not hear any evidence of a breath test result and instructing them not to speculate about any breath test evidence, that the jury did not speculate further as to why the PBT was given and what its results might have been. It is reasonable to believe that the jury must have rendered their verdict relying primarily on the overwhelming evidence of the 0.130 BAC.

The mention of the PBT can hardly be said to have aided the jury in reaching its verdict on the PAC count, for the deputy never said whether the PBT was even administered, much less what the result was. The jury certainly did not need to even guess what the result of the PBT was, because they had the result of the actual testing of Delvoye's blood sample, and they heard testimony about how those results were obtained.

There is no support for the conclusion that any reference to a PBT is sufficient to warrant a mistrial. Even when the applicable statute specifically prohibited both the results of the PBT as well as "*the fact that it was administered,"* prior to 1981, evidence that a

PBT was administered would not have automatically warranted a mistrial. *See, State v. Albright*, 98 Wis.2d at 677; Wis. Stat. § 343.305(2)(a), (1979-80). In *Albright*, this Court did declare a mistrial where a reference to a preliminary blood test was made in conjunction with various other errors. However, a mistrial was deemed the only remedy by the Court of Appeals because the statute at the time prohibited even a reference to the fact that the PBT was administered, *and* because various other errors were made during the trial in that case. *Id.* at 676, 677. Notably, this Court stated that "the prejudice created by each error in isolation may not be sufficient to justify a new trial" but that "the cumulative effect of these errors were of substantial prejudice." *Id.* at 677.

As discussed above, the law no longer precludes the mere mention of a PBT, but rather only the results of the PBT that are barred from trial. Wis. Stat. § 343.303. The *Albright* Court was skeptical, even with the complete prohibition, that such an error alone would warrant a mistrial. *Id.* at 677. Now, where there was not even a violation of the statute prohibiting PBT results, the Court ought to

be very reluctant to grant a mistrial, particularly where such a discretionary decision is directed to the trial court. *Valiga*, 58 Wis.2d at 253–54.

It is clear that the jury was unaffected by mention of the PBT because a curative instruction was given to the jury and they had other strong evidence of Delvoye's guilt as to the PAC count.

CONCLUSION

The jury did not rely on the PBT results when it found Delvoye guilty of operating a motor vehicle with a prohibited alcohol concentration. A curative instruction was given that presumptively erased any potential for undue prejudice and the law prefers such an instruction to declaring a mistrial. The jury's verdict was not undermined or compromised in any way, and was supported by the overwhelming evidence of Delvoye's guilt. The State respectfully requests that this court uphold the circuit court's Judgement of Conviction.

Respectfully submitted this _____ day of January, 2018.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: Times New Roman proportional serif font, minimum printing resolution of 200 dots per inch, 14 point body text, 12 point for footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 4275 words, including footnotes.

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 Rule 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; and (4) 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.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copes of this brief filed with the court and served on all opposing parties.

Dated this _____ day of January, 2018.

Signed:

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