COURT OF APPEALS
DECISION
DATED AND FILED

April 22, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1463-CR **Cir. Ct. No. 2008CT116**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID R. KNAPP,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Affirmed*.

¶1 HIGGINBOTHAM, J.[1] David Knapp appeals a judgment of conviction for operating while intoxicated, third offense, entered upon a jury

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.21(2)(d) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

verdict, and an order denying his motion for mistrial. Knapp moved for a mistrial after the jury heard inadmissible testimony suggestive of a prior conviction. Knapp argues that the trial court misused its discretion in denying his motion for a mistrial because it applied the wrong legal standard in deciding the motion, and because the underlying defect in the proceedings was prejudicial to him. Knapp is correct that the trial court failed to apply the proper standard to the mistrial motion. Nonetheless, we conclude that the court did not err in denying his motion for a mistrial because the inadmissible testimony suggesting Knapp had a prior conviction was not sufficiently prejudicial to warrant a new trial. We therefore affirm.

¶2 The following undisputed facts are taken from the trial transcript in this case. Before trial, the court granted a motion to exclude evidence of Knapp's prior OWI adjudications. During opening statements, the defense stated that Knapp would testify. The second witness called by the State, Chief of Police Brent McDonald, testified that, upon Knapp's arrest at his home, "[Knapp] stated that he wanted to go in and let his girlfriend Rita know that he was going to jail again," and that "[Knapp] walked over towards the bedroom and stuck his head in the door and commented to Rita that he was going to jail again." Knapp moved for a mistrial on grounds that the officer's references to Knapp "going to jail again" was evidence of a prior conviction. The court denied the motion, concluding that there was no manifest necessity for a new trial.

¶3 The trial continued after the judge denied Knapp's motion for a mistrial. Knapp took the stand during his case in chief. On cross-examination, Knapp testified to having one prior criminal conviction. No evidence was presented regarding the nature of the prior offense for which Knapp was convicted. Ultimately, the jury found Knapp guilty of operating a motor vehicle

while intoxicated and operating a motor vehicle with a prohibited alcohol concentration. A judgment of conviction was entered for operating a motor vehicle while intoxicated, third offense.

¶4 A trial court addressing a motion for a mistrial "must decide, in light of the entire facts and circumstances, whether the defendant can receive a fair trial" despite the claimed error. ***State v. Ford***, 2007 WI 138, ¶29, 306 Wis. 2d 1, 742 N.W.2d 61. The court must grant the motion if it determines that the claimed error is sufficiently prejudicial to warrant a mistrial. *See* ***id.*** We review a trial court's decision to deny a motion for a mistrial for an erroneous exercise of discretion. *See* ***State v. Patterson***, 2009 WI App 161, ¶33, 321 Wis. 2d 752, 776 N.W.2d 602.

¶5 Knapp argues that the trial court erroneously exercised its discretion in denying his motion for a mistrial by deciding it under the "manifest necessity" standard. Knapp is correct that the court erred in considering whether a manifest necessity existed for a mistrial, the standard applicable when the State moves for a mistrial over the defendant's objection, ***State v. Seefeldt***, 2003 WI 47, ¶19, 261 Wis. 2d 383, 661 N.W.2d 822, or when the basis for a defendant's mistrial motion is alleged laxness or overreaching by the State. ***State v. Bunch***, 191 Wis. 2d 501, 507, 529 N.W.2d 923 (Ct. App. 1995). In addressing Knapp's motion, the court should have determined whether alleged error was sufficiently prejudicial to warrant a mistrial. ***Ford***, 306 Wis. 2d 1, ¶29.

¶6 Despite a court's failure to use the correct legal standard, we may nonetheless affirm "if we can independently conclude that the facts of record applied to the proper legal standards support the court's decision." ***Rogers v. Rogers***, 2007 WI App 50, ¶7, 300 Wis. 2d 532, 731 N.W.2d 347. Applying the

trial record in Knapp's case to the correct standard, we conclude that the court reached the appropriate result because the defect in the proceedings was not sufficiently prejudicial to warrant a mistrial.

¶7 The officer's testimony about Knapp's references to "going to jail again" support an obvious inference that Knapp had a prior criminal conviction. However, Knapp himself testified that he had a prior conviction. Had the jury heard testimony that this prior conviction was for operating a motor vehicle while intoxicated, such evidence might well have tainted the jury's deliberations in this case. But nothing in the officer's testimony about Knapp's statements that he was "going to jail again" suggests that Knapp's prior conviction was for intoxicated operation of a motor vehicle. Knapp provides no further argument explaining how this testimony materially prejudiced his case. Thus, we conclude that the claimed defect in the proceedings was not sufficiently prejudicial to Knapp to warrant a mistrial.[2] We therefore affirm the trial court's denial of Knapp's motion for a mistrial.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)(4).

[2] Any hint of prejudice resulting from the officer's testimony could have been mitigated by a remedial instruction to the jury. No such instruction was requested in this case, and none was given by the court.