COURT OF APPEALS DECISION DATED AND FILED

September 17, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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 Nos. 03-0526
03-0527

Cir. Ct. Nos. 00TR005831
00TR005832

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

COUNTY OF WALWORTH,

PLAINTIFF-RESPONDENT,

V.

DILLIS V. ALLEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed.*

¶1 ANDERSON, P.J.[1] Dillis V. Allen appeals from a judgment of the trial court convicting him for operating while under the influence of an intoxicant, first offense (OWI) and speeding. Allen argues that the trial court erred by (1) allowing into evidence Allen's refusal to submit to a preliminary breath test (PBT), (2) refusing to accept Allen's proposed jury instruction, (3) admitting irrelevant evidence related to the Horizontal Gaze Nystagmus (HGN) test and, (4) failing to admonish the County of Walworth or declare a mistrial following the prosecutor's improper reference to potential penalties during closing arguments. For reasons discussed in the opinion, we affirm the trial court.

¶2 The relevant facts are undisputed. On October 13, 2000, Deputy Keith Mulhollon pulled Allen over because he had clocked Allen's vehicle going seventy-four miles per hour (mph) in a fifty-five mph zone. Mulhollon testified that after having activated his lights and siren behind Allen, Allen did not pull over for approximately one-half mile. He said that when Allen did pull over, he did so onto a sloping hill even though "he could have stopped well before the hill even began to slope." He said that while approaching Allen's vehicle, the trunk of the vehicle popped open.

¶3 Mulhollon asked Allen if he had been drinking. Allen told Mulhollon that he had eaten dinner out with his wife and had consumed two tap beers. While speaking with Allen, Mulhollon noted an odor of intoxicants on Allen's breath and observed bloodshot, glassy eyes. Mulhollon requested backup

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[1] This appeal is decided by one-judge pursuant to WIS. STAT. § 752.31(2)(c) (2001-02). The issues before the court are routine and do not merit consideration by a three-judge panel; therefore, the defendant's motion to have the matter reviewed by a three-judge panel pursuant to WIS. STAT. § 809.41(1) is denied. All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

and Deputy Robert Sharp was dispatched to the scene. Mulhollon then asked Allen to exit his vehicle to perform standard field sobriety tests.

¶4 Mulhollon said that as Allen exited the vehicle, he noticed Allen had trouble maintaining his balance. Because Mulhollon determined that the area was dangerous and that there was not a flat surface to perform the tests, he directed Allen to a nearby driveway where the tests were performed on a flat surface of compacted gravel. The first test Mulhollon asked Allen to perform was the HGN test. Before administering the test, Mulhollon asked Allen if he had any eye problems that would interfere with the accuracy of the test. Allen responded that he did not have any eye problems. Mulhollon administered the test and Allen failed it.

¶5 Mulhollon then had Allen perform the walk-and-turn test, which Allen also failed. Mulhollon gave Allen three attempts to pass the one-leg stand test. After Allen's third attempt, he told Mulhollon that he was unable to complete the test. At this point, Mulhollon advised Allen that he believed him to be intoxicated and was going to place him under arrest for OWI.

¶6 Thereafter, Mulhollon advised Allen that he wanted to administer a PBT. Mulhollon explained that while it was not a completely accurate measure of one's intoxication level, it was a relatively close measure. Allen refused to take the PBT. Allen again refused to take a PBT during the initial booking procedure at the jail.[2]

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[2] Although Allen was issued a Notice of Intent to Revoke Operating Privilege after he refused to submit to a chemical test of his blood, this issue is not before us because it has been previously disposed of. ***State v. Allen***, No. 01-0381-FT, unpublished slip op., ¶2 (WI App Sept. 19, 2001).

(continued)

¶7 Allen argues that "several irregularities" occurred at his jury trial. First, over the objection of Allen's counsel, evidence of his refusal to submit to a PBT was admitted. Second, the court refused to give Allen's proposed instruction informing the jury that even if Allen had submitted to a PBT, any results of a PBT would not have been admissible in court. Third, Allen asserts that the court allowed irrelevant demonstrative evidence, which prejudiced him. Finally, the County made two references to the potential penalties during its closing argument. Allen claims that "the net result of these errors demonstrates that [he] was deprived of a fair trial." We disagree. We will address Allen's arguments in order, adding additional facts as necessary.

¶8 A trial court's decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has a reasonable basis and was made in accordance with accepted legal standards and in accordance

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This case was previously before us when we granted Allen's Petition for Leave to Appeal Nonfinal Judgment or Order. ***Id.***, ¶4. In addition to refusing to submit to the PBT, Allen would not submit to a chemical test of his blood. ***Id.***, ¶2. The only question on appeal was whether the trial court erroneously exercised its discretion in granting the State a protective order under WIS. STAT. § 804.01(3) limiting discovery. ***Allen***, No. 01-0381-FT, ¶¶2, 6.

We reversed the trial court's decision granting the State a protective order. We held that because the discovery demands Allen made upon the State were not part of the record below, the trial court could not properly have reached such a conclusion without having, at a minimum, reviewed Allen's specific demands. ***Id.***, ¶9. We remanded the case to the trial court to permit it to develop the record necessary for the proper exercise of discretion. We directed that after remand, the parties should be permitted to produce evidence in support of and opposition to the issuance of the protective order. ***Id.***, ¶12. We required that Allen's discovery demands be introduced into the record and that the State show good cause for a protective order to be issued. ***Id.***, ¶¶7, 12 (i.e., the State had the burden of showing that a protective order is necessary to protect it from annoyance, embarrassment, oppression or undue burden or expense). ***Id.***, ¶12.

Thereafter, at the refusal hearing, Allen prevailed on a motion for summary judgment, which then barred the County from introducing any evidence concerning Allen's refusal to submit to the chemical test, leading this court to assume that the County failed to establish good cause for a protective order.

with the facts of record. ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992).

¶9 *PBT Refusal Evidence*. First, Allen argues that the trial court erred in admitting into evidence Allen's refusal to submit to a PBT. We disagree. It is well established that at an OWI proceeding, a driver's refusal to perform field sobriety tests is admissible to show "consciousness of guilt." ***State v. Babbitt***, 188 Wis. 2d 349, 525 N.W.2d 102 (Ct. App. 1994); ***State v. Mallick***, 210 Wis. 2d 427, 565 N.W.2d 245 (Ct. App. 1997). The Fifth Amendment does not bar the admission of such evidence because it is not a testimonial communication. ***Mallick***, 210 Wis. 2d at 434.

¶10 Furthermore, ***Babbitt*** teaches that fairness dictates admission of such evidence because "a person who performs the field sobriety test should not be placed in a worse position by virtue of his or her compliance with an officer's request than a defendant who refuses to cooperate with the police." ***Babbitt***, 188 Wis. 2d at 360.

¶11 Allen claims that a PBT should be treated differently than field sobriety tests. He submits that the plain language of WIS. STAT. § 343.303 dictates different treatment because it states:

> 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). (Emphasis added.)

Allen's argument fails in its attempt to shift our focus. In Allen's case, the *result* of the PBT was not before the trial court. What was before the trial court was whether to admit the evidence of Allen's refusal to submit to a PBT.

¶12 The rest of Allen's arguments on this issue are similarly irrelevant. For example, citing to ***State v. Beaver***, 181 Wis. 2d 959, 970, 512 N.W.2d 254 (Ct. App. 1994), Allen argues that "it is worth noting" that the PBT is not to be afforded the same type of unquestioned reliability as other means of testing for blood alcohol content. We are not taken in by this or any of Allen's off-the-point arguments. We are, however, persuaded by the County's argument. We agree with the County that for purposes of showing consciousness of guilt, the PBT is no different from any of the battery of field sobriety tests administered to a suspected drunk driver. This reasoning garners support from our holding in ***County of Jefferson v. Renz***, 222 Wis. 2d 424, 443 n.17, 588 N.W.2d 267 (Ct. App. 1998), *rev'd on other grounds*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999):

> There is no statutory sanction for refusal to submit to a PBT, but that fact may be considered evidence of consciousness of guilt for purpose of establishing probable cause to arrest. *See* ***State v. Babbitt***, 188 Wis. 2d 349, 359, 525 N.W.2d 102, 105 (Ct. App. 1994) (holding this with respect to a refusal to submit to field sobriety tests). Of course, if an officer has probable cause to arrest for a violation of § 346.63(1)(a), STATS., and the suspect refuses to take a PBT, the officer may nevertheless arrest the person, and then the implied consent statute and the sanctions for refusal to submit to intoxilyzer, blood or urine tests apply. *See* § 343.305, STATS.

Thus, from our analysis in ***Babbitt*** and ***Renz***, it follows that even though the results of a PBT are not admissible on the question of guilt or innocence, evidence of one's refusal to submit to a PBT is admissible because it is relevant to a jury's consideration on the question of "consciousness of guilt."

¶13 *Jury Instruction*. Allen next argues that the trial court erred in refusing to accept the proposed jury instruction. Again, we disagree. It is well established that "[a] trial court has wide discretion in developing the specific language of jury instructions." ***State v. Foster***, 191 Wis. 2d 14, 26, 528 N.W.2d

22 (Ct. App. 1995). Therefore, our review is limited to whether the trial court acted within its discretion and we will reverse only if the instructions, taken as a whole, communicated an incorrect statement of the law or otherwise probably misled the jury. *See* ***State v. Randall***, 222 Wis. 2d 53, 59-60, 586 N.W.2d 318 (Ct. App. 1998).

¶14 In addition, if the instructions of the court adequately cover the law applicable to the facts, this court will not find error in the refusal of special instructions even though the refused instructions themselves would not be erroneous. ***State v. Lenarchick***, 74 Wis. 2d 425, 455, 247 N.W.2d 80 (1976). Our role is to examine the instructions as a whole in determining whether they were appropriate, and, even if instructions were rejected which arguably were appropriate, we will not reverse unless the failure to include the requested instructions would be likely to prejudice the defendant. ***Id.***

¶15 Allen proposed the following jury instruction:

> If Mr. Allen had taken the preliminary breath test, P.B.T., requested by the police officer, the results would not be admissible on the question of his guilt or innocence.

He argues that the trial court improperly refused to instruct the jury on the consequences of refusing a PBT. He asserts that informing the jury of the different consequences for refusing to perform a test under the implied consent statute as opposed to refusing to perform a PBT "is directly tied" into making a determination as to "the question of how much weight to give to the alleged 'consciousness of guilt.'" We are not persuaded by this assertion and Allen offers no authority to support it.

¶16 Additionally, it would not have been relevant to instruct the jury that, in the event Allen had submitted to the PBT, the results would not be admissible on the question of guilt or innocence. A defendant has a right to explain his or her refusal to the jury and offer reasons that might counteract the negative inference of guilt associated with a refusal. *See* ***State v. Bolstad***, 124 Wis. 2d 576, 587-88, 370 N.W.2d 257 (1985). And, after providing the jury with an explanation for the refusal, it becomes the province of the jury to determine the weight the evidence deserves in weighing consciousness of guilt, in light of all the evidence before it.

¶17 At trial, Allen did provide the jury with an explanation for the refusal, stating that he refused because he does not trust the accuracy of hand-held devices and because he was worried his blood pressure medication could influence the test's accuracy. Despite this explanation, one reasonable inference that the jury could have drawn from Allen's refusal to perform the PBT was that he believed that he was too intoxicated to perform the test successfully. Therefore, it was not an error of law or improper in any way for the trial court to refuse to give Allen's proposed jury instruction.

¶18 *Demonstrative Evidence*. Allen's third argument is that the trial court erred by admitting irrelevant evidence related to the HGN test. We disagree. The decision to admit or exclude demonstrative evidence is committed to the trial court's discretion. ***State v. Gribble***, 2001 WI App 227, ¶55, 248 Wis. 2d 409, 636 N.W.2d 488, *review denied*, 2002 WI 2, 249 Wis. 2d 580, 638 N.W.2d 589 (Wis. Dec. 17, 2001) (No. 00-1821-CR). As long as the trial court demonstrates a reasonable basis for its determination, this court must defer to the trial court's ruling. ***Id.*** In exercising its discretion, the trial court must determine whether the demonstrative evidence is relevant, WIS. STAT. §§ 904.01 and 904.02, and

whether its probative value is substantially outweighed by the danger of unfair prejudice. WIS. STAT. § 904.03. ***Gribble***, 248 Wis. 2d 409, ¶55.

¶19 In ***State v. Peterson***, we approvingly noted that other jurisdictions have suggested that the following factors are appropriate for trial courts to consider when determining the admissibility of demonstrative evidence: the degree of accuracy in the recreation of the actual prior conditions, the complexity and duration of the demonstration, other available means of proving the same facts, the risk that the demonstration may impact on the fairness of the trial, and whether the exhibit will aid the jury or confuse it. ***State v. Peterson***, 222 Wis. 2d 449, 454-55, 588 N.W.2d 84 (Ct. App. 1998).

¶20 During trial, and over the objection of counsel, the trial court allowed the County to have Mulhollon demonstrate the HGN test to the jury by administering the test to Allen. WISCONSIN STAT. § 904.01 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

¶21 Allen argues that without the conditions of the test being the same as the night they were given, the evidence fails to make any fact more or less probable. However, not every difference in condition warrants exclusion of demonstrative evidence. "If enough of the obviously important factors in the case are duplicated in the experiment, and if the failure to control other possibly relevant variables are explained, and if the jury is aided, the court should let the evidence in." ***Peterson***, 222 Wis. 2d at 458-59 (citation omitted).

¶22 Here, Mulhollon specifically testified that the nystagmus is an involuntary eye jerkiness enhanced by alcohol, which a person cannot control. He

further testified that the lighting in the courtroom would not affect the validity of the test as compared to the lighting conditions and the validity of the test on October 13, 2000. In addition, Allen agreed that the manner in which Mulhollon conducted the HGN test with him in the courtroom was similar to how Mulhollon conducted the test on October 13, 2000. Thus, for the purposes in which the HGN test was admitted into evidence, the demonstration was an adequately similar representation of the actual conditions on the night of October 13, 2000.

¶23 However, most important to our approval of the trial court's decision to admit this demonstrative evidence is the fact that Allen himself opened the door to its introduction. Allen claimed that he had an eye impairment (one crossed-eye) that affects his ability to perform an HGN test and that this impairment calls into question the validity of the HGN result. Allen cannot raise doubt as to the validity of the HGN test because of his eye impairment and then complain when the County seeks to prove the validity of the test.

¶24 It was not error for the trial court to allow the County to use Allen as the test subject before the jury. As noted already, demonstrative evidence must be as close to possible as to what it is attempting to duplicate. What is more, if the trial court had permitted another subject to be used, Allen could have objected on the grounds that it was unknown if the subject had the same type and degree of crossed-eye that he had. Thus, the HGN evidence was an important and relevant factor for the jurors to consider in assessing Allen's claim that his eye impairment affected the validity of the test.

¶25 *Prosecutorial Misconduct*. Finally, Allen argues that the County improperly referred to the potential penalties during closing arguments thereby causing reversible error.

¶26 Allen did not contemporaneously object to the County's alleged penalty references. It was not until after the County had completed its closing argument that Allen asked for a sidebar conference. Additionally, the sidebar discussion was held off the record.

¶27 It is fundamental to sound trial practice that objections must be made promptly and "in terms which apprise the court of the exact grounds upon which the objection is based." ***State v. Wedgeworth***, 100 Wis. 2d 514, 528, 302 N.W.2d 810 (1981) (citation omitted). On appeal, we do not know what happened in this case; the record does not disclose what transpired at the sidebar conference. "Counsel who rely on unrecorded sidebar conferences do so at their own peril." ***Id.*** On the basis of this record, we conclude that counsel's objection failed to state any grounds with particularity and that such failure amounted to a waiver of the objection. *See* ***id.***; *see also* ***State v. Guzman***, 2001 WI App 54, ¶25, 241 Wis. 2d 310, 624 N.W.2d 717 (When a timely objection is not made challenging the closing remarks of the prosecutor, a defendant waives his or her right to a review on that issue.).

By the Court.—Judgment affirmed.

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