

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

June 23, 1998

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**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 § 808.10 and RULE 809.62, STATS.

No. 97-3702

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT III

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CITY OF SHAWANO,

PLAINTIFF-RESPONDENT,

v.

DENNIS D. HOFFMAN,

DEFENDANT-APPELLANT.

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APPEAL from a judgment of the circuit court for Shawano County:  
THOMAS G. GROVER, Judge. *Affirmed.*

CANE, P.J. Dennis Hoffman appeals his conviction after a jury trial for operating a motor vehicle while intoxicated, first offense, in violation of § 346.63(1)(a), STATS. The sole issue on appeal is whether the trial court erred when it refused to grant a mistrial after the arresting officer testified that Hoffman complained his arrest would lead to a revocation of his parole and return to prison.

Because the trial court reasonably exercised its discretion when denying the motion for a mistrial, the conviction is affirmed.

The relevant facts pertaining to the appeal are undisputed. While on patrol at approximately 1:30 a.m., Jeffrey Heffernon, a Shawano police officer, observed a red Ford Thunderbird drive into a closed business area. As Heffernon drove toward the parked Thunderbird, he observed Hoffman reach over the console and shake the female in the front passenger seat. The engine of the Thunderbird was still running, and Hoffman was seated behind the steering wheel. Heffernon then walked up to the car and inquired as to what was going on. Hoffman responded that he had pulled over because his passenger was sick. The female passenger was unconscious. While Heffernon was engaged in a conversation with Hoffman, an odor of intoxicants came from the car. When asked who had been driving the car, Hoffman at first denied driving the car. After the officer said, "I saw you, you know. I know that you were driving the vehicle," Hoffman looked down at the ground and replied, "Yeah, you know. Yeah, I saw you behind me." The officer then had Hoffman perform a series of sobriety tests, which he failed. Hoffman was placed under arrest and taken to the police station where his alcohol concentration tested at .14 on the Intoxilyzer device.

At the jury trial, the city prosecutor asked the following question and Heffernon gave the following answer:

- Q. Did he give you any indication of how much he had been drinking or what he had been drinking?
- A. At the scene he told me that he had, he had too much and that he used an expletive and then he said that this was going to mess up his parole and that he was going to end up back in the joint.

At that point, outside the presence of the jury, Hoffman's counsel moved for a mistrial, which the trial court denied. Upon return to the courtroom, the trial court promptly instructed the jury:

Ladies and gentlemen, there was reference to the defendant being on parole. You should disregard that statement completely. It has absolutely nothing to do with this case and you should put that out of your minds.

No further reference was made to this statement during the remainder of the trial. At the conclusion of the trial, Hoffman again argued for a mistrial and the court responded that it believed the jurors would follow its instructions to ignore the statement. The jury returned a guilty verdict. Hoffman's sole contention on appeal is that the trial court erred when denying his motion for mistrial.

The decision as to whether to grant a mistrial is within the sound discretion of the trial court. *See State v. Pankow*, 144 Wis.2d 23, 47, 422 N.W.2d 913, 921 (Ct. App. 1988). The trial court must determine, in light of the whole proceeding, whether the claimed error is sufficiently prejudicial to warrant a new trial. *Id.* The denial of a motion for mistrial will be reversed only upon a showing of an erroneous exercise of discretion. *Id.* Because the grant of a mistrial is a drastic sanction, less drastic alternatives are to be taken if available and practical. *See State v. Bunch*, 191 Wis.2d 501, 512, 529 N.W.2d 923, 927 (Ct. App. 1995). A trial court's instruction to disregard testimony cures any prejudicial effect of the testimony, *see Pankow*, 144 Wis.2d at 47, 422 N.W.2d at 921-22, and we presume that the jury follows such instructions, *see State v. Truax*, 151 Wis.2d 354, 362, 444 N.W.2d 432, 436 (Ct. App. 1989).

The City contends the evidence of Hoffman's parole status was admissible under § 904.04(2), STATS., as other acts evidence. However, the trial

court concluded that the evidence was not admissible and promptly instructed the jury to disregard the testimony. The trial court was correct. The only question is whether it erred by failing to grant a mistrial. After reviewing the record, this court is satisfied that the officer's statement, while in error, was not sufficient to require the trial court in its discretion to grant a mistrial.

The reference to parole and prison was a minor portion of the entire case against Hoffman. His primary defense was that he was not driving, although he also argued to the jury that the alcohol concentration test results were unreliable. Viewed in its entirety, the evidence is overwhelming that the City had demonstrated Hoffman had been driving the car while under the influence of an intoxicant. The officer stopped to investigate why the Thunderbird had driven into a closed business area at 1:30 a.m. He observed a female unconscious in the front passenger seat and Hoffman sitting behind the steering wheel attempting to awaken her. The car's engine was still running. When asked what was happening, Hoffman replied that he had pulled over because his passenger was sick. After initially denying that he was driving, Hoffman then admitted the officer knew he was driving. When the officer used the alcohol influence report to ask Hoffman a series of questions, the first question asked was, "Were you operating a motor vehicle?" Hoffman's response was "yes." Additionally, there was overwhelming evidence of Hoffman's intoxication. He failed all the field sobriety tests, had an alcohol concentration of .14, had slurred speech, failed to recite the alphabet after trying three times and admitted to having five to six drinks of whiskey.

Based upon the substantial evidence showing that Hoffman was driving the car while in an intoxicated state and with a prohibited alcohol concentration, along with the trial court's cautionary instructions for the jury to disregard the statement, the jury could not have been influenced by the very brief

and isolated reference about Hoffman's parole and prison exposure. Thus, this court is satisfied that the trial court reasonably exercised its discretion by denying the mistrial motion.

*By the Court.*—Judgment affirmed.

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

