COURT OF APPEALS
DECISION
DATED AND FILED

November 11, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0985-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER A. KITTI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Portage County: FREDERIC W. FLEISHAUER, Judge. *Affirmed*.

¶1 DEININGER, J.[1] Christopher Kitti appeals a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant (OMVWI), entered after a jury found him guilty of the offense. He claims the trial court erred in denying his motion for a mistrial after the arresting deputy testified

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

that, before arresting Kitti for OMVWI, the deputy had administered "another test … the breath test." Kitti argues that this testimony violated the prohibition under § 343.303, STATS.,[2] that "[t]he result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest…." We disagree with Kitti's contention and affirm the judgment.

BACKGROUND

¶2 The deputy who arrested Kitti testified at trial. Kitti's counsel cross-examined him regarding the reliability of the field sobriety tests that the deputy had administered prior to the arrest. The line of questioning culminated with the following exchange:

> Q: You decided to place him under arrest after the performance of the last test?
>
> A: Correct. I also performed another test after that, the breath test.

Kitti's counsel requested an immediate side-bar. The jury was excused, and Kitti moved for a mistrial, asserting that the deputy's testimony had violated § 343.303, STATS., which provides as follows:

> If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63(1) … the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test using a device approved by the department for this purpose. The result of this preliminary breath screening test may be used by the law enforcement officer for the purpose of deciding whether or not the person shall be arrested for a violation of s.

[2] All statutory references in this opinion are to Wisconsin Statutes, 1997-98, unless otherwise indicated.

> 346.63(1) …. *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.)

¶3 The trial court concluded that the statute had not been violated because "the result of the preliminary breath screening test" had not been admitted into evidence, and the court therefore denied the mistrial motion. At Kitti's request, however, the court instructed the jury as follows:

> Members of the jury, there was some reference in the testimony as to a subsequent or a different test. That particular test is a test that the Statutes say are not to be considered at a trial and you're not to give it any consideration or weight nor are you to speculate as to what the results of it are or to consider it in any way in reaching your verdict in this case.

The jury found Kitti guilty of OMVWI, and the court entered a judgment of conviction. Kitti appeals the judgment.

ANALYSIS

¶4 Whether to grant a mistrial is a matter for the trial court's discretion, and we accord great deference to a trial court's decision on a motion for mistrial. *See* ***State v. Foy***, 206 Wis.2d 629, 644, 557 N.W.2d 494, 499 (Ct. App. 1996). We review discretionary decisions to determine whether the trial court examined the relevant facts, applied the appropriate standard of law and engaged in a rational decision-making process. *See* ***id.*** We conclude that the trial court did each of these things, and thus, it did not err in denying Kitti's motion for a mistrial.

¶5 Kitti asserts that "any reference at trial to a preliminary breath test [PBT] is improper," citing ***State v. Albright***, 98 Wis.2d 663, 675, 298 N.W.2d 196, 203 (Ct. App. 1980). He argues that the deputy "ignored the legislative directive that PBTs not be used at trial." Kitti goes on to assert that he was placed in "an untenable position" because once jurors were aware that a PBT had been given, "they would want to know the result." Thus, in Kitti's view, he was forced into choosing between the curative instruction, which made it appear to the jury that he was hiding something from them, or he would be forced to "attack BOTH the PBT and the Intoxilyzer test results." Finally, Kitti contends that the curative instruction did not diminish the prejudice to his defense because jurors are instructed, under § 885.235, STATS., that they may find from the breath test alone that a defendant is guilty of OMVWI.[3]

¶6 The persuasive force of Kitti's argument that the trial court erred in not granting a mistrial is greatly undermined by the fact that the sole authority upon which he relies, ***State v. Albright***, dealt with a statute that was worded quite differently from § 343.303, STATS. We concluded in ***Albright*** that "the reference to a preliminary breath test [by the prosecutor in his opening statement] was improper." ***Albright***, 98 Wis.2d at 675, 298 N.W.2d at 203, citing § 343.305(2)(a), STATS., 1979-80, which read, in relevant part, as follows:

[3] After the court informed Kitti that his mistrial motion was denied, his counsel told the court: "Then I will withdraw my prior objection. I will ask, in the alternative, that a curative instruction be given to the jury that they're to disregard any mention of a preliminary breath test or to speculate what the result may have been." The court granted the alternative motion for a curative instruction. The State does not argue that Kitti should be judicially estopped from claiming error in the denial of his mistrial motion, or that he waived his right to do so, because he "withdrew" the mistrial motion and obtained the alternative relief he requested. Accordingly, we do not address these issues.

> 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.

(Emphasis added.) We concluded that the prosecutor's opening statement had thus "ignored the legislature's direction." ***Albright***, 98 Wis.2d at 675, 298 N.W.2d at 203. Although we did *not* conclude that the reference to the PBT "in isolation" was necessarily sufficient to justify a new trial, the cumulative effect of that reference, together with several other arguably prejudicial errors, prompted us to conclude that the jury might have reached a different result absent the errors. *See* ***id.*** at 677-78, 298 N.W.2d at 204.

¶7 The legislature, however, repealed § 343.305(2)(a), STATS., 1979-80, and in its place created § 343.303, STATS., 1981-82, in which the relevant language is identical to the present statute. *See* Laws of 1981, ch. 20, § 1568 b and d. The trial court correctly read the present statute to preclude only the admission at trial of "[t]he *result* of the preliminary breath screening test," which the deputy's testimony did not divulge. *See* § 343.303, STATS., 1997-98 (emphasis added). Moreover, the court's instruction that jurors were not to consider the testimony referring to the PBT, nor to speculate as to its result, cured any potential prejudice which may have resulted from the jury's learning that a breath test was administered prior to Kitti's arrest.[4] *See, e.g.,* ***State v. Adams***, 221 Wis.2d 1, 17-18, 584 N.W.2d 695, 702 (Ct. App. 1998) ("[T]he court's admonitory instruction that any remarks by the attorneys implying the existence of certain facts not in

[4] We agree with the State that it is not clear that, absent Kitti's objection and the subsequent curative instruction, the jury would have interpreted the deputy's reference to "another test … a breath test" as being to other than the Intoxilyzer test that both the State and Kitti's counsel had discussed in their opening statements to the jury.

evidence were to be disregarded is … presumed to have eliminated any prejudice.").

¶8 Finally, we agree with Kitti that, because the results of a PBT are not admissible at trial, the State should avoid any reference to the administration of the PBT prior to an OMVWI defendant's arrest. In the present case, however, the State did not present the allegedly improper testimony to the jury—Kitti did. The deputy's reference to a "breath test" prior to Kitti's arrest was in response to a question from Kitti's counsel on cross-examination. In the sequence of questions that led up to the reference to the breath test, Kitti's counsel had sought to undermine the reliability of the field sobriety tests in determining that a person is under the influence of an intoxicant. The question he posed, ("You decided to place him under arrest after the performance of the last test?") called upon the deputy to testify truthfully that his ultimate decision to arrest Kitti for OMVWI did not occur until after "another test … a breath test" was also administered. A defendant cannot solicit the introduction of allegedly prejudicial evidence and then argue that a mistrial should be granted because of that prejudicial evidence. *Cf.* ***In the Interest of Shawn B.N.***, 173 Wis.2d 343, 372, 497 N.W.2d 141, 152 (Ct. App. 1992) ("If error occurred, [appellant's] counsel invited it. We will not review invited error.").

CONCLUSION

¶9 For the reasons discussed above, we conclude that the trial court did not erroneously exercise its discretion in denying Kitti's motion for a mistrial.

By the Court.—Judgment affirmed.

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