COURT OF APPEALS
DECISION
DATED AND FILED

August 10, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1005-CR-LV

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGORY PFAFF,

DEFENDANT-PETITIONER.

APPEAL from an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed.*

WEDEMEYER, P.J.[1] Gregory Pfaff appeals from an order denying his motion to dismiss, following a court ordered mistrial. He claims that the trial court erred in denying the motion because prosecution of the charges against him

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

would violate his constitutional right against double jeopardy. Because Pfaff failed to sufficiently object to the mistrial, this court affirms.

BACKGROUND

On August 31, 1997, the police were summoned to the scene of a two-car accident. The accident involved a parked car and Pfaff's vehicle. The officers administered field sobriety tests, which Pfaff could not pass. Thereafter, he was arrested and transported to the police station, where an intoxilyzer test registered Pfaff's breath alcohol concentration at .26%.

Subsequently, a complaint was issued charging Pfaff with operating a motor vehicle while under the influence of an intoxicant, contrary to §§ 346.63(1)(a) and 346.65(2), STATS. He was also charged with operating a motor vehicle while having a breath alcohol concentration of 0.1% or more, contrary to §§ 346.63(1)(b) and 346.65(2), STATS.

The case was set for a jury trial. Pfaff filed a motion *in limine* requesting that the jury not be informed of his five prior OWI convictions. The transcript reflects the following:

> [Defense Counsel]: Your Honor ... I have … a written motion in limine ….
>
> ….
>
> [I] would like to address the issue of my client has [sic] numerous previous convictions for OWI, he would like to keep that information from the jury.

The trial court then ordered that if Pfaff took the stand, he could only be asked whether he had been convicted of a crime and how many times.

Trial commenced. During cross-examination of the State's second witness, who was one of the arresting officers, Pfaff's counsel asked: "You don't

recall that when you ran Mr. Pfaff's record, you saw that he had previous OWI's, and you said, well, that's it?" The officer responded: "Nope." The trial court excused the jury and questioned defense counsel about why it sought *in limine* to preclude the jury from hearing this prejudicial evidence and then elicited it in cross-examination. The trial court declared a mistrial because it believed that the jury had been tainted by the information brought out in violation of the pre-trial order.

In response to the trial court's determination that the jury had been tainted and, therefore, it needed to declare a mistrial, defense counsel simply responded: "I don't think so, Your Honor."

The jury was dismissed and a new trial was scheduled. Pfaff then filed his motion to dismiss on the basis that double jeopardy barred the prosecution. The trial court denied the motion. Pfaff now appeals.

DISCUSSION

Pfaff claims that there was no manifest necessity present in this case which would require the trial court to *sua sponte* declare a mistrial. Accordingly, he argues that, because the trial court did so, any further prosecution of him would violate his constitutional right against double jeopardy. This court rejects his argument.

When a defendant's first trial is terminated, the circumstances of the termination govern whether the double jeopardy clause bars retrial. *See* ***State v. Lettice***, 221 Wis.2d 69, 80, 585 N.W.2d 171, 177 (Ct. App. 1998). "If the trial is terminated over the defendant's objection and without his or her consent, such as upon the government's motion for mistrial or the court's sua sponte decision, then

retrial is barred unless the proceedings were terminated because of manifest necessity." ***Id.***

The key to this standard, however, involves whether the defendant objected or consented to the mistrial. Here, Pfaff argues that his comment "I don't think so" in response to the trial court's declaration that the jury was tainted and a mistrial was required to protect Pfaff's rights, was sufficient objection. He also points to the clerk's docket entry that says a mistrial was granted "over defense counsel's objection."

After reviewing the record, this court concludes that Pfaff did not sufficiently object to the *sua sponte* granting of the mistrial and, in fact, consented to it. Thus, this court need not address whether the facts and circumstances present constituted a manifest injustice.

A party must state the specific ground for an objection in order to preserve the objection for appeal. *See* ***Vollmer v. Luety***, 156 Wis.2d 1, 10, 456 N.W.2d 797, 801 (1990). Defense counsel did not do so here. He did not say: "Your Honor, I object to a mistrial, there is no manifest injustice created by the question I asked." He did not even come close to saying anything similar. The only thing defense counsel said was "I don't think so," and it is not even clear from the record whether this referred to the trial court's belief that the jury was tainted, or the trial court's statement that it had to declare a mistrial.[2] Counsel then

[2] Although there is some indication in the record that defense counsel was repeatedly interrupted by the trial court, this is insufficient to constitute a specific objection. No matter how many times an attorney may be cut off by a trial court, it is counsel's duty to insist on placing a formal objection on the record to preserve issues on appeal. Further, the interruptions do not appear to be at a point where counsel was about to say, "I object to a mistrial." Rather, the transcript indicates that defense counsel was contemplating trial strategy for the re-trial.

went on to discuss his plan regarding introducing prior OWI evidence at the new trial. This part of the transcript seems to imply counsel consented to the granting of the mistrial.

What is clear from the transcript, however, is that the trial court was truly concerned about Pfaff's ability to get a fair trial, and its absolute confusion as to why defense counsel would argue for exclusion of this prejudicial evidence before trial and then present it to the jury anyway. The trial court's comments indicate that it was also concerned how defense counsel's "opening the door" would affect the additional evidence that would undoubtedly follow, how it felt it would be unfair to hold the State to the pre-trial exclusion order, and that a cautionary instruction would never be able to correct the "incorrigible taint" of the jury.

Under these circumstances, this court agrees with the Supreme Court's rationale in ***Arizona v. Washington***, 434 U.S. 497 (1978):

> In a strict, literal sense, the mistrial was not "necessary." Nevertheless, the overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment.

Id. at 511. The trial court is in a much better position than this court to weigh the jury's reaction to a possible prejudicial event. *See* ***Rodriguez v. Slattery***, 54 Wis.2d 165, 170, 194 N.W.2d 817, 820 (1972).

By the Court.—Order affirmed.

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