COURT OF APPEALS
DECISION
DATED AND FILED

November 21, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-1349-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL P. HART,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: PATRICK C. HAUGHNEY, Judge. *Affirmed*.

¶1 SNYDER, J.[1] Daniel P. Hart appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI), third offense, contrary to WIS. STAT. § 346.63(1)(a). Hart argues that the trial court erred when it refused to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All statutory references are to the 1999-2000 version unless otherwise noted.

allow him to introduce as evidence the results of his brother's preliminary breath test. He further argues that the trial court erred in giving WIS JI—CRIMINAL 520 instruction to the jury after receiving a note from the jury that it was deadlocked. We disagree with both these contentions and affirm the judgment of conviction.

FACTS

¶2 At approximately 12:20 a.m. on May 22, 1997, after drinking approximately five beers and one mixed drink, Hart left the Hunter's Nest tavern; as he drove southbound on Durham Road in Muskego, Wisconsin, he veered off the road to avoid another car in his lane and hit a tree. About ten to fifteen minutes later, City of Muskego Police Officers Craig Simuncak and Jim Murphy were sent to the scene of the accident. Murphy approached Hart, who was standing next to his totaled truck, and noticed Hart weaving as he stood. Murphy detected an odor of intoxicants on Hart's breath. Officer Simuncak administered field sobriety tests to Hart, and based upon his performance on these tests, Hart was arrested for operating a motor vehicle while intoxicated.

¶3 Hart's brother, William, happened upon the scene approximately ten minutes after the accident. William, who had been drinking with Hart at the Hunter's Nest and who is approximately the same height and weight as Hart, had consumed the same amount of alcohol as Hart that evening. Simuncak then asked William to perform field sobriety tests and administered a preliminary breath test (PBT) to William at the scene. William noted that the PBT indicated a blood alcohol concentration of 0.07% and he was not issued a citation for operating a motor vehicle while intoxicated.

¶4 Hart was eventually transported to the Muskego police department where he agreed to submit to a breath test. At 1:54 a.m., the Intoxilyzer indicated Hart's blood alcohol concentration as 0.15%.

¶5 On October 10, 1997, the State filed a criminal complaint alleging that on May 22, 1997, Hart operated a motor vehicle while intoxicated and with a prohibited blood alcohol concentration (PAC). The complaint further alleged that this offense was Hart's third drunk driving offense, Hart having been previously convicted of OWI and PAC on February 6, 1989, and June 1, 1992.

¶6 A jury trial was scheduled for September 22, 1999. On that date, the State provided Hart with certified copies of his prior judgments of conviction. Hart was then granted a continuance to investigate these prior convictions. While the parties again appeared for a jury trial on June 6, 2000, during the voir dire process, the trial court ran out of jurors and the matter was continued until November 7 and 8, 2000.

¶7 On November 7, 2000, a jury trial was again commenced. During the course of the trial, the trial court ruled that Hart could not introduce William's PBT results as evidence. In addition, William was not allowed to testify that he was given a PBT or state the results of the PBT, but would be allowed to testify that he was investigated for drunk driving.

¶8 In the afternoon of the second day of trial, the case was submitted to the jury. Approximately two hours after submission to the jury, the jurors sent a note to the trial court stating: "Three are holding out on a decision. Can we come back into court to say they conceded?" After some discussion with and another

note from the jury, the trial court gave WIS JI—CRIMINAL 520.[2] The jury returned to deliberations and less than ten minutes later returned with guilty verdicts. Hart appeals his judgment of conviction.

DISCUSSION

¶9 Hart argues that the trial court erred when it refused to allow him to present the results of William's preliminary breath test. We disagree.

¶10 In reviewing a trial court's evidentiary rulings, we determine whether the court exercised its discretion according to accepted legal standards and the facts of record. ***State v. Doerr***, 229 Wis. 2d 616, 621, 599 N.W.2d 897 (Ct. App. 1999). Because the admission or exclusion of evidence is a discretionary trial court decision, its ruling will not be overturned on appeal absent an erroneous exercise of discretion. ***Id***.

¶11 WISCONSIN STAT. § 343.303 addresses PBTs and states:

> If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63(1) or (2m) or a local ordinance in conformity therewith, or s. 346.63(2) or (6) or 940.25 or s. 940.09 where the offense involved the use of a vehicle, or if the officer detects any presence of alcohol, a controlled substance, controlled substance analog or other drug, or a combination thereof, on a person driving or operating or on duty time with respect to a commercial motor vehicle or has reason to believe that the person is violating or has violated s. 346.63(7) or a local ordinance in conformity therewith, 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

[2] WISCONSIN JI—CRIMINAL 520 is a supplemental instruction on juror agreement and will be set forth in full later in this decision.

> 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. 346.63(1), (2m), (5) or (7) or a local ordinance in conformity therewith, or s. 346.63(2) or (6), 940.09(1) or 940.25 and whether or not to require or request chemical tests as authorized under s. 343.305(3). *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).* Following the screening test, additional tests may be required or requested of the driver under s. 343.305(3). The general penalty provision under s. 939.61(1) does not apply to a refusal to take a preliminary breath screening test. (Emphasis added.)

¶12 Hart sought to introduce the results of William's PBT to establish that Hart, who is the same height and weight as William and drank exactly the same amount of alcohol that evening, was not intoxicated when he was driving his car. Hart argues that the essence of WIS. STAT. § 343.303 holds that PBT results are barred only during the trial of the person who actually took the PBT. Hart cites no authority for this contention, which is contrary to the plain language of the statute. Section 343.303 specifically states that 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.)

¶13 Hart also argues that the rationale expressed in ***State v. Beaver***, 181 Wis. 2d 959, 969-70, 512 N.W.2d 254 (Ct. App. 1994), demonstrates that "this Court has not taken a literal reading of section 343.303, Stats." and PBT results are admissible depending upon the facts and circumstances of each case.

¶14 However, ***Beaver*** does not stand for the proposition that PBT results are occasionally admissible in OWI trials. WISCONSIN STAT. § 343.303 is contained in the motor vehicle code and we concluded that "the legislature intended the statutory bar against PBT evidence to apply only in proceedings relating to arrests for the offenses contemplated under that statute." ***Beaver***, 181 Wis. 2d at 969-70. While we did hold that PBT results are not inadmissible in all proceedings, we ultimately concluded that PBT results were always inadmissible in motor vehicle proceedings. *See* ***id***. As we noted in ***Doerr***, ***Beaver*** concluded that the § 343.303 bar on the evidentiary use of PBT results applies to all motor vehicle violations. ***Doerr***, 229 Wis. 2d at 622. The matter at hand was a motor vehicle proceeding and the § 343.303 bar on admissibility applies. The trial court's refusal to permit evidence of William's PBT results at Hart's trial was not an erroneous exercise of discretion.

¶15 Hart also argues that the trial court erred when it gave WIS JI—CRIMINAL 520 to the jury after receiving a note acknowledging that three jurors were thinking about "conceding." We disagree.

¶16 First, an argument could be made that Hart waived the right to raise this argument. The jury retired to deliberate at 2:24 p.m. At approximately 4:20 p.m., the court received a note from the jury: "Three are holding out on a decision. Can we come back into court to say they conceded?" The trial court decided to bring the jury back in for clarification. The trial court informed the jury that it did not understand its communication, and sent the jury back into the jury room "to write out what the exact question is." The trial court informed the jury that if it could not articulate the question on paper, then it would be brought back into the courtroom and the foreperson would "speak for the others to tell me exactly what this means." The jury left the courtroom at 4:24 p.m.

¶17 While the jury was out of the courtroom, the trial court proposed giving WIS JI—CRIMINAL 520. At that point, Hart's counsel stated that he felt that WIS JI—CRIMINAL 520 could only be given if the jury announced that it was deadlocked or hung. At approximately 4:34 p.m., the court received another note from the jury: "We have three people that have reasonable doubt. Please advise us what to do." Based upon this note, the court decided to give WIS JI—CRIMINAL 520. Hart moved for dismissal of the charges or, in the alternative, a mistrial. The court asked if there was anything else, to which Hart's counsel replied, "That's all."

¶18 Hart argued that WIS JI—CRIMINAL 520 could only be given if the jury was deadlocked. The jury indicated that it was deadlocked and the trial court gave the instruction. At the point that the trial court announced it was giving WIS JI—CRIMINAL 520, Hart did not object. Failure to timely object to a jury instruction is a waiver of any alleged defects in that instruction. ***State v. Shears***, 68 Wis. 2d 217, 242, 229 N.W.2d 103 (1975). 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).

¶19 Although objections which have been waived are not reviewable as a matter of right, this court may consider such objections if it chooses. ***Id***. We so choose.

¶20 Hart argues that there are reasonable grounds to believe that WIS JI—CRIMINAL 520 exerted an undue influence over the jurors because the deadlocked jury took less than ten minutes to reach a verdict after receiving this instruction. A trial court may exercise wide discretion in issuing jury instructions

based upon the facts and circumstances of a particular case. ***State v. Vick***, 104 Wis. 2d 678, 690, 312 N.W.2d 489 (1981). It is presumed that a jury follows a properly given admonitory instruction unless it is otherwise demonstrated. ***State v. Knight***, 143 Wis. 2d 408, 414, 421 N.W.2d 847 (1988).

¶21 After the jury returned to the courtroom, the trial court instructed it as follows:

> Ladies and gentlemen of the jury, I would like to instruct you as follows. You jurors are as competent to decide the disputed issues of fact in this case as the next jury that may be called to determine such issues.
>
> You are not going to be made to agree, nor are you going to be kept out until you do agree. It is your duty to make an honest and sincere attempt to arrive at a verdict. Jurors should not be obstinate; they should be open-minded; they should listen to the arguments of others, and talk matters over freely and fairly and make an honest effort to come to a conclusion of all the issues presented to them.
>
> You will please retire again to the jury room.

¶22 WISCONSIN JI—CRIMINAL 520, utilized here verbatim by the court, is sometimes used where the jury indicates that it is deadlocked. As the comment to the pattern jury instruction explains, the text of the instruction is consistent with the *ABA Standards for Criminal Justice (Trial by Jury)* (2d ed. 1978), and this standard is emerging as the preferred response to deadlocked jury problems. Our supreme court has consistently ruled that this supplemental instruction is not coercive on its face. ***Quarles v. State***, 70 Wis. 2d 87, 89, 233 N.W.2d 401 (1975).

¶23 The record demonstrates that after several hours of deliberation, the jury was unable to reach a verdict regarding the OWI charge. After receiving two notes from the jury regarding its deadlocked status, the trial court read WIS JI—

CRIMINAL 520. There is no indication that the jury remained confused by the court's supplemental instructions. Jurors are free to reconsider a verdict, even though they have reached agreement with regard to a particular charge, so long as the verdict has not been accepted by the court. ***Knight***, 143 Wis. 2d at 416. We are satisfied that the court acted within its broad discretion in instructing the jury.

CONCLUSION

¶24 The trial court acted within its discretion when it refused to allow Hart to introduce as evidence the results of his brother's PBT and when it read WIS JI—CRIMINAL 520 to the deadlocked jury. We therefore affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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