COURT OF APPEALS
DECISION
DATED AND FILED

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Cornelia G. Clark
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* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-3236-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BRUCE H. MALLOW,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County: DANIEL W. KLOSSNER, Judge. *Affirmed*.

¶1 DEININGER, J.[1] Bruce Mallow appeals a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant (OMVWI). He presents two issues for review: whether the trial court erred when it did not

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

permit Mallow to use a field sobriety manual in cross-examination, and when it excluded a blood test kit instruction sheet which Mallow offered into evidence. We conclude that the trial court did not erroneously exercise its discretion in these evidentiary rulings. Thus, we affirm the judgment of conviction.

BACKGROUND

¶2 Mallow was arrested for OMVWI and the matter was tried to a jury. During cross-examination of the arresting officer at trial, Mallow attempted to introduce a field sobriety training manual entitled "March 1987 DWI Detection and Divided Attention Field Sobriety Testing—A Self-Instructional Training Program for Law Enforcement Officers." The officer testified that he did not know if the manual was used in his training. The State objected on relevancy and foundation grounds. Mallow argued that the manual was a learned treatise. The trial court granted the objection based on lack of foundation regarding who wrote the manual, what expertise the author possessed, and what level of acceptance the manual had by the law enforcement community for officer training. The trial court permitted Mallow, without the use of the manual, to question the officer regarding the usefulness of the one-legged stand and walk-and-turn tests for persons who are more than fifty pounds overweight.

¶3 Later in the trial, the medical technologist who drew Mallow's blood testified that she followed the instructions in the blood kit, and she described some of the tasks she performed. On cross-examination, Mallow asked the medical technologist if she had performed certain tasks with regard to the taking of his blood samples, including confirming that she ultimately provided the samples to the officer. Then Mallow asked her: "That's it?" The medical technologist responded: "That's it." Next, the state chemist who analyzed the blood testified.

When Mallow showed her a sample blood kit instruction sheet, the chemist stated that it was outdated, and that a similar sheet with "minor" changes would have been in Mallow's kit.[2]

¶4 After testimony in the trial had been completed, Mallow offered the instruction sheet into evidence to show that the drawing technologist is told to mix an additive together with the blood. The trial court excluded the instruction sheet on relevancy grounds because (1) Mallow had failed to specifically ask the medical technologist whether she had mixed the required additive into the blood, and (2) the instruction sheet was not the one that would have been in Mallow's blood test kit.

¶5 The jury found Mallow guilty of OMVWI. Mallow appeals the judgment of conviction.

ANALYSIS

¶6 Mallow contends that the trial court erred in two evidentiary rulings. In reviewing evidentiary issues, we recognize that "[t]he decision to admit or exclude evidence lies within the discretion of the trial court." *See* ***Hennig v. Ahearn***, 230 Wis. 2d 149, 178, 601 N.W.2d 14 (Ct. App. 1999), *review denied*, 604 N.W.2d 571 (Wis. Oct. 26, 1999). "The question on appeal is not whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in, but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of

[2] The "minor changes" that the chemist noticed "right off the bat" were that the newer forms required only two blood vials to be collected instead of three, and there was no mention of using alcohol in drawing the blood.

record." ***State v. Wollman***, 86 Wis. 2d 459, 464, 273 N.W.2d 225 (1979). Our inquiry is limited to asking "whether appropriate discretion was in fact exercised," and we will uphold a trial court's discretionary determination if we find that there was a reasonable basis for it. *See* ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983).

¶7 First, Mallow claims error in the trial court's refusal to allow Mallow to use a field sobriety test training manual during his cross-examination of the arresting officer.[3] The officer testified regarding how the results of the field sobriety tests indicated that Mallow was intoxicated at the time of the arrest. Mallow attempted to cross-examine the officer regarding the reliability of the field sobriety tests involving the walk-and-turn and the one-legged stand tests when the person performing the tests is more than fifty pounds overweight. He argued that the manual was admissible as a learned treatise. The trial court precluded Mallow from using the proffered field sobriety manual in this line of questioning, however, because Mallow failed to show any foundation for the manual. Mallow asserts that this was error because, as a government-authored publication, the manual should have been admissible as a learned treatise.

¶8 We are unable to reach the merits of this issue because Mallow failed to make an offer of proof in the trial court. There is nothing in the record from which we can determine whether a foundation for use of the manual could have been established. All that is in the record is the title of the document and the inference that it may be a government document. This is insufficient for us to

[3] Only one page of the manual is in the record. This page does not reflect the manual's title or its authorship. The manual provides, in relevant part, that "[t]he Walk and Turn test may not be as reliable when given to persons ... more than 50 pounds overweight."

make a determination on the issue. Thus, Mallow has waived the alleged error. *See* WIS. STAT. § 901.03(1)(b) (error may not be predicated upon a ruling excluding evidence unless the substance of the evidence was made known to the judge by offer or was apparent from the context within which the questions were asked); ***State v. Hoffman***, 106 Wis. 2d 185, 217-18, 316 N.W.2d 143 (Ct. App. 1982) (failure to make an offer of proof results in waiver). We conclude that Mallow has not met his burden as an appellant of ensuring that all matters necessary to sustain the claims of error raised on appeal are contained in the record presented to this court for review. *See* ***State v. Smith***, 55 Wis. 2d 451, 459, 198 N.W.2d 588 (1972).[4]

¶9 Mallow also argues that the trial court's refusal to allow him to use the manual violated his right to present a defense and notions of "fair play." As we have discussed, without an offer of proof including more specific information regarding the manual, we cannot review this issue on appeal. We note, however, that the trial court permitted Mallow to ask several other questions which elicited testimony calling into question the officer's use of the field sobriety tests on people who are more than fifty pounds overweight. Thus, it does not appear that the trial court's decision to limit Mallow's cross-examination with respect to the manual prevented him from challenging the officer's use of the field sobriety test.

¶10 Mallow's second claim is that the trial court erred in determining that the blood kit instruction sheet he offered at trial was not relevant.[5] Evidence

[4] Mallow also contends that the trial court refused to permit him to use the manual because he had not submitted it to the court "ahead of time." The State concedes that it was not necessary to provide advance notice because Mallow attempted to use the manual on cross-examination. *See* WIS. STAT. § 908.03(18).

[5] The instruction sheet introduced at trial was not included in the record for our review.

is relevant if it has "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." WIS. STAT. § 904.01. The threshold for establishing relevance in Wisconsin is low. *See* ***State v. Richardson***, 210 Wis. 2d 694, 707, 563 N.W.2d 899 (1997). Nonetheless, "[t]he issue of relevancy 'must be determined by the trial judge in view of his or her experience, judgment and knowledge of human motivation and conduct.'" ***Pharr***, 115 Wis. 2d at 344 (citation omitted). We conclude that the trial court did not erroneously exercise its discretion in determining that the instruction sheet was not relevant to Mallow's defense.

¶11 The trial court decided to exclude the instruction sheet after concluding that the sheet had no bearing on the issue of the validity of the blood testing performed on Mallow. Mallow asserts that the instruction sheet was relevant because it tended to show that the blood was never properly mixed. From this, Mallow argues that the instruction sheet tends to make it more probable that the blood test result was invalid. We agree with the trial court, however, that the instruction sheet was irrelevant to the case as tried because the medical technologist testified that she followed the instructions included in the kit, and Mallow failed to ask her specifically whether she mixed the blood with the additive. He also failed to elicit from the crime lab chemist that the mixing requirement set forth on the outdated form was also contained in the instructions for the kit that was used in his case. Without asking these questions, Mallow did not establish the relevance of the instruction sheet he proffered to any facts at issue in the case.

¶12 Mallow also argues that the trial court's exclusion of the instruction sheet violated his right to present a defense. We disagree. The right to present a

defense does not include the right to present irrelevant evidence. *See* ***State v. Cardenas-Hernandez***, 219 Wis. 2d 516, 536, 579 N.W.2d 678 (1998).

CONCLUSION

¶13 For the reasons discussed above, we affirm the judgment of the trial court.

By the Court.—Judgment affirmed.

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