

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 21, 2008

David R. Schanker
Clerk of Court of Appeals

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.

Appeal No. 2008AP529

Cir. Ct. Nos. 2007TR2107
2007TR2198

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WAYNE N. McCARTY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Polk County:
ROBERT RASMUSSEN, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ Wayne McCarty appeals a judgment of conviction for operating while intoxicated, first offense. McCarty contends the trial court

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

improperly abandoned its neutrality when questioning a witness outside the presence of the jury. We disagree and affirm the judgment.

BACKGROUND

¶2 During trial, defense counsel requested preliminary questioning of Christine Drewieck outside the presence of the jury. Drewieck, who was testifying by telephone, was the chemist who analyzed McCarty's blood sample. The defense asked Drewieck what materials she had available as she was testifying. Among other things, she stated she had a copy of the run report, which showed all individual sample results and quality control results analyzed on the testing instrument on the day McCarty's sample was run. Defense counsel then confirmed with Drewieck that the run record indicated the instrument was working properly.

¶3 After both parties stated they had no further questions of Drewieck, the court asked defense counsel if he wanted to see the report. He did, but a copy was not available in the courtroom. The defense then replied affirmatively when asked if it would object to the rendering of Drewieck's opinion that the instrument was working properly. The court ruled Drewieck could not use her review of the run record as part of the basis for her opinion.

¶4 After further discussion, the court stated:

She can on other bases render an opinion as to whether the [instrument] – that isn't the sole basis, I expect, although I wouldn't know that without questioning her, on which she would base an opinion that the [instrument] was in proper working order.

Defense counsel then stated to the court, "maybe this would be the time to ask her if she has anything else to base her opinion the machine was operating correctly ...

and I guess I defer to the Court to ask her the question in that fashion.” The court then proceeded to question Drewieck on the matter and asked numerous specific clarifying questions.

¶5 The court then asked the parties if they had further questions of Drewieck. The State² declined, but the defense asked about the acceptable numeric range of quality control results. Again, the court asked several questions to clarify Drewieck’s response. Drewieck then testified before the jury, which returned a guilty verdict.

DISCUSSION

¶6 McCarty claims he was denied a fair trial because the court completely took over the foundational questioning, as an aide to the State. McCarty emphasizes that the State did not question the witness at all during the foundational phase. Additionally, McCarty contends it was improper for the court to request a sidebar after Drewieck’s testimony before the jury and ask if the State wanted her to remain available for later questioning. On this basis, McCarty contends he is entitled to a new trial.

¶7 McCarty generally cites three cases in support of his argument, not providing a pinpoint citation to any of them. He relies on *Haugen v. Haugen*, 82 Wis. 2d 411, 262 N.W.2d 769 (1978); *State v. Nutley*, 24 Wis. 2d 527, 129 N.W.2d 155 (1964); and *Reuling v. Chicago Railway Company*, 257 Wis. 485, 44 N.W.2d 253 (1950). McCarty asserts these cases hold, respectively, that a court

² We refer to the State by name, despite its peculiar, repeated reference to itself as “the public interest” in its brief.

may examine witnesses in its discretion; that the court's authority is generally limited to asking clarifying questions; and that if a court's comments and questioning of a witness give the appearance of an advocate, a new trial is required.

¶8 McCarty raises the judicial neutrality issue for the first time on appeal. His failure to raise a timely objection at trial constituted a waiver of any objection for purposes of appeal. *See Allen v. Allen*, 78 Wis. 2d 263, 270, 254 N.W.2d 244 (1977). Moreover, McCarty did not merely fail to object to the court's questioning, he specifically asked the court to question Drewieck. We will not review invited error. *Shawn B.N. v. State*, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992) .

¶9 Independent of his waiver, McCarty's argument would fail on the merits. Because the court questioned Drewieck outside the presence of the jury, there was no danger of giving jurors the impression the court favored the State's position. A court's questioning of witnesses is typically only of concern when it occurs before the jury. *See State v. Amundson*, 69 Wis. 2d 554, 565-66, 230 N.W.2d 775 (1975); *State v. Herrington*, 41 Wis. 2d 757, 767, 165 N.W.2d 120 (1969); *State v. Driscoll*, 263 Wis. 230, 237-38, 56 N.W.2d 788 (1953). The case before us is readily distinguished from *Reuling*, where a new trial was ordered in the interest of justice because the trial court completely took over the questioning of the plaintiff's witnesses, asking leading questions and commenting on the answers. *Reuling*, 257 Wis. at 492-94.

¶10 Further, here, it was the court that raised the foundation issue for the defense in the first place. And when Drewieck testified before the jury, the court sustained McCarty's objection when Drewieck referred to the run report as a basis

for her opinion. That the objection was sustained and the jury was directed to disregard the testimony provides further indication the court proceeded in an unbiased manner. Additionally, the court instructed the jurors that if they had an impression of the court's opinion on McCarty's guilt or innocence, they should disregard that impression entirely. We presume jurors follow the trial court's instructions. *State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989).

¶11 Regarding the sidebar conference, the court's question, again, was not heard by the jury. If anything, the court's sidebar indicated a deliberate concern for neutrality by avoiding the possibility jurors might think the court was favoring the State's position. It cannot be viewed as improper to ask counsel whether a telephonic witness can be released. A trial court must be free to ensure the proceedings run efficiently. Indeed, "the trial court is not required to stand idly by, acting as a mere moderator of the proceedings, so long as [it] does not overtly take a partisan stance in the eyes of the jury." *Amundson*, 69 Wis. 2d at 566 (citations omitted).

By the Court.—Judgment affirmed.

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

