

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 5, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2008AP1814-CR

Cir. Ct. No. 2007CM217

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DANIEL J. ODEGARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Vernon County:
MICHAEL J. ROSBOROUGH, Judge. *Affirmed.*

¶1 VERGERONT, J.¹ Daniel Odegard appeals the judgment of conviction, after a jury trial, for operating while under the influence of an intoxicant (OWI), third offense, contrary to WIS. STAT. § 346.63(1)(a). He

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) and (3). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

contends the circuit court erroneously exercised its discretion in denying his request for a mistrial and in permitting specified questions on the preliminary breath (PBT) test he was given. We conclude the court did not erroneously exercise its discretion in either respect. We therefore affirm.

I. Mistrial

¶2 Odegard contends the circuit court erroneously exercised its discretion in denying his request for a mistrial when the arresting officer, in response to a question from defense counsel on cross-examination, referred to a prior conviction for OWI.

¶3 Prior to trial, Odegard had moved that, upon stipulation by him as to the validity of prior convictions for OWI, the State be prohibited from entering evidence on prior OWI convictions. Apparently the circuit court granted the motion.² On direct examination by the State, there was no reference to any prior OWI conviction by Westby Police Officer Bradley Stuber. On cross-examination defense counsel asked Officer Stuber about his marking on the “informing the accused” form that Odegard refused to submit to an evidentiary chemical test of his blood. In that context the officer gave the following answers to defense counsel’s questions:

QUESTION: You have the – were – you could have ordered him to give a blood test even if he didn’t want to, correct?

ANSWER: If he refused I wasn’t going to push the issue.

² We say “apparently” because Odegard does not cite to a ruling on the motion but to the trial transcript at the point where he described the motion he had made and where the discussion among Odegard’s counsel, the prosecutor, and the court implies that the motion was granted. We are unable to locate in the record the court’s ruling on the motion.

QUESTION: You could have, couldn't you?

ANSWER: Not on second offense, no.

QUESTION: What's that?

ANSWER: I said not on a second offense I can't obtain a legal blood draw I don't think.

¶4 At this point defense counsel moved for a mistrial on the ground the officer had mentioned a prior OWI conviction in violation of the court's earlier ruling. The prosecutor informed the court that he had told the officer he could not make any reference to prior OWI convictions. He characterized the officer's answer as a simple statement of the truth—that the department had a policy of not making forcible blood draws on second offenses and at that time the officer believed this was a second offense, not a third offense as it turned out to be. The prosecutor's position was that defense counsel “opened the door” and the prosecutor did not believe the officer could have been expected to respond differently than he did.

¶5 The court acknowledged that, as defense counsel argued, the officer could have answered with a simple yes or no but, the court stated, he was not a professional witness and it was not a “blatantly nonresponsive answer.” In addition, the court stated, it occurred during cross-examination. The court agreed with the prosecutor that defense counsel had opened the door. The court denied the motion for a mistrial and asked defense counsel: “Now, do you want me to do anything else about that?” and defense counsel answered “No, Your Honor.”

¶6 On appeal Odegard contends the court erred in not granting a mistrial. The only argument he makes in support of this position is based on the inapplicability of the curative admissibility doctrine. Under this doctrine, when one party accidentally or purposefully takes advantage of a piece of evidence that

would normally be inadmissible, the court may allow the opposing party to introduce otherwise inadmissible evidence if it is required by the concept of fundamental fairness to prevent unfair prejudice. *State v. Dunlap*, 2002 WI 19, ¶14, 250 Wis. 2d 466, 640 N.W.2d 112. According to Odegard, the curative admissibility doctrine is not applicable here because the court did not find that accurately answering the question would have introduced evidence that created an unfair prejudice for the State.

¶7 Apparently Odegard believes the court was invoking the curative admissibility doctrine because it used the term “opened the door.” However, we do not read the court’s ruling in this way. Rather, it is evident that the court did not believe that Officer Stuber’s answer was an intentional violation of the court’s pretrial ruling and did not believe that his reference to a second OWI, in response to defense counsel’s question, warranted a mistrial.

¶8 The decision whether to grant a mistrial is committed to a circuit court’s discretion. *State v. Adams*, 223 Wis. 2d 60, 83, 588 N.W.2d 336 (Ct. App. 1998). In making its decision the circuit court must determine whether the claimed error is sufficiently prejudicial to warrant a mistrial. *State v. Givens*, 217 Wis. 2d 180, 191, 580 N.W.2d 340 (Ct. App. 1998). Not all errors warrant a mistrial and “the law prefers less drastic alternatives, if available and practical.” *Id.* (citations omitted). We reverse the denial of a mistrial only if there is a “clear showing” that the circuit court erroneously exercised its discretion. *Adams*, 223 Wis. 2d at 83.

¶9 In this case, the circuit court reasonably concluded that the officer’s brief reference to the department policy for second offenses did not warrant a mistrial. In addition, the circuit court gave Odegard the opportunity to request

other remedies, less drastic than the mistrial. Such remedies might have included asking that the officer's answer be stricken and that the jury be instructed to disregard it. However, counsel made no such request. We conclude the circuit court's denial of a mistrial in these circumstances was a proper exercise of the court's discretion.

II. PBT

¶10 Odegard's second assertion of error is that the circuit court erred in permitting the prosecutor to inquire whether Odegard had been given a preliminary breath test (PBT). Odegard had moved pretrial "[t]hat the defense be allowed to refer to issues relating to the absence of a 'breath test' or 'breathalyzer test' without opening the door to testimony that a preliminary breath test was conducted, as the latter is inadmissible and therefore irrelevant. Sec. 343.303 and 904.02, Stats." Apparently the court granted this motion based on an absence of objection from the State. *See* note 2, *supra*.

¶11 Officer Stuber had testified that, after arresting Odegard for OWI, he took him to Vernon Memorial Hospital because Odegard wanted a blood draw. When defense counsel was cross-examining Police Officer Jason Franks, who was also at the scene of the arrest, he asked the following questions and received these answers:

QUESTION: And before Officer Stuber started [the field sobriety tests], Mr. Odegard said stop wasting time, I want a breath test. Correct?

ANSWER: Yes.

QUESTION: And was Officer Stuber present when Mr. Odegard asked for a breath test?

ANSWER: Yes, he was.

QUESTION: So he would have been able to hear that.

ANSWER: Yes.

QUESTION: And that was before you – before you started the field sobriety tests.

ANSWER: I don't recall if Officer Stuber started the walk and turn test at that point or if it was after; it's before or after he started that test.

QUESTION: But it was during that portion.

ANSWER: It was in that time frame.

QUESTION: Okay.

¶12 At this point the prosecutor asked the court to allow him to ask Officer Franks if a field PBT was administered and to allow the officer to answer yes, with no further questions. The prosecutor explained that the jury would be confused about why Officer Stuber had taken Odegard for a blood test when Officer Franks testified that Odegard had requested a breath test. The prosecutor wanted the opportunity to explain that Officer Franks was referring to a PBT at the scene of the arrest and that a PBT had in fact been administered. Defense counsel objected to the prosecutor inquiring about a PBT, stating that his pretrial motion had addressed this issue and precluded it.

¶13 The court granted the prosecutor's request. The court did not view this particular issue as having been raised and decided by the defendant's pretrial motion.³ The court explained that, while the results of a PBT are not admissible,

³ Officer Stuber testified that, after he transported Odegard to a local hospital for a blood draw, upon arriving at the hospital Odegard denied wanting a blood test and so he transported Odegard to the Vernon County Jail for a breath test. However, when it was discovered that the breathalyzer instrument was inoperable, Odegard was transported back to the hospital for a blood draw, which he refused to provide. In discussing the pretrial ruling on the PBT, the prosecutor expressed his view that the intent of the pretrial ruling on the breath test was to permit the defense to inquire into the circumstances of the breathalyzer test not working without opening the door to

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in the circumstances of this case, it was appropriate to allow the State to bring out that there was a PBT given in order to avoid confusing the jury.

¶14 After the court's ruling the prosecutor asked Officer Franks the following questions and received these answers:

QUESTION: Now, out on the street, there was a point where Mr. Odegard said he wanted a breath test, is that right?

ANSWER: Yes.

QUESTION: Was there a preliminary breath test given on the street?

ANSWER: Yes, there was.

QUESTION: After that breath test, did Mr. Odegard make the request that he be taken for a blood test?

ANSWER: Yes.

¶15 Odegard contends that the court erred in allowing these questions because it was not relevant whether Odegard had asked for a breath test since under WIS. STAT. § 343.305(2)⁴ the law enforcement officer has the authority to

testimony on the PBT, and the circuit court's comments indicated it agreed that was the intent of the ruling.

⁴ WISCONSIN STAT. § 343.305(2) provides:

(2) Implied consent. Any person who is on duty time with respect to a commercial motor vehicle or drives or operates a motor vehicle upon the public highways of this state, or in those areas enumerated in s. 346.61, is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol, controlled substances, controlled substance analogs or other drugs, or any combination of alcohol, controlled substances, controlled substance analogs and other drugs, when requested to do so by a law enforcement officer under sub. (3) (a) or (am) or when required to do so under sub. (3) (ar) or (b). Any such tests shall be administered upon the

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determine whether the primary chemical test is a blood, breath, or urine sample. According to Odegard, any confusion could have been cleared up by establishing through the officer's testimony that this is the law or by instructing the jury on this law. In Odegard's view the course the court took was unnecessary; it was also prejudicial because, Odegard asserts, it allowed the jury to infer that the PBT results were accurate, reliable, and "over the legal limit."

¶16 Generally the decision whether to admit evidence is committed to the circuit court's discretion and we affirm if the circuit court considered the relevant facts, applied a proper legal standard, and, demonstrating a rational process, reached a reasonable conclusion. *State v. Schutte*, 2006 WI App 135, ¶45, 295 Wis. 2d 256, 720 N.W.2d 469.

¶17 WISCONSIN STAT. § 343.303 provides that an officer may, in certain circumstances, "request the person to provide a sample of his or her breath for a [PBT] using a device approved ... for that purpose," and the result "may be used by the law enforcement officer for the purpose of deciding whether or not the person shall be arrested for [OWI]." However, "[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, 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)." *Id.* (emphasis added). We agree with the State that the statute addresses the

request of a law enforcement officer. The law enforcement agency by which the officer is employed shall be prepared to administer, either at its agency or any other agency or facility, 2 of the 3 tests under sub. (3) (a), (am), or (ar), and may designate which of the tests shall be administered first.

inadmissibility of the *result* of a PBT, not the fact that one was requested by the person detained or the fact that one was given.

¶18 The court's assessment that the inquiry it permitted was relevant and would be helpful to avoid the jury's confusion was a reasonable one. Although Odegard now contends that there were alternative approaches that would have been less damaging to him, he did not propose these to the court. In addition, Odegard did not object before the circuit court on the ground of prejudice, *see* WIS. STAT. § 904.03, but rather on the ground that the pretrial ruling had addressed this issue. The court reasonably concluded that the pretrial ruling did not anticipate the confusion that had arisen based on the two officers' testimony and was not intended to preclude limited reference to the PBT in this context.

CONCLUSION

¶19 We conclude the circuit court did not erroneously exercise its discretion in denying Odegard's request for a mistrial or in permitting a limited inquiry to bring out the fact that Odegard requested a PBT and that one was given. Accordingly, we affirm the judgment of conviction for OWI.

By the Court.—Judgment affirmed.

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

