

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

June 20, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0492-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

VERNON C. KUKES,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Crawford County: MICHAEL KIRCHMAN, Judge. *Affirmed.*

Before Gartzke, P.J., Dykman and Vergeront, JJ.

PER CURIAM. Vernon Kukes appeals from a judgment of conviction for recklessly causing bodily harm to a child and disorderly conduct, contrary to §§ 948.03(3)(b) and 947.01, STATS., and from an order denying his postconviction motion. Kukes raises three issues on appeal: (1) whether the trial court erred in refusing to admit the results of a preliminary breath test administered to a prosecution witness; (2) whether the trial court erred in

permitting a defense witness to testify during the jury trial by telephone; and (3) whether he was denied effective assistance of counsel when his attorney waived his right to individually poll the jury without informing him of that right and without advising him that it was his personal decision to make. We resolve each issue against Kukes, and affirm.

BACKGROUND

Kukes was charged with disorderly conduct and recklessly causing bodily harm to his girlfriend's four-year-old daughter, Heidi. Kukes' girlfriend, Patricia Miller, reported the incident giving rise to the charges to the police. After Miller reported the incident, a police officer asked her to perform a preliminary breath test (PBT). The result was .169.

Before trial, Kukes asked for a continuance because a defense witness, Eugene Kumbera, who had observed the incident, was in the hospital. The motion requested that, if the continuance was not granted, the court allow the witness to testify by telephone during the jury trial. The trial court denied the request for a continuance, but permitted Kumbera to testify by telephone.

At trial, Miller testified against Kukes. Kukes sought to impeach Miller with the results of the PBT. Kukes argued that the PBT result would establish that Miller was intoxicated at the time of the incident and that the accuracy and credibility of her testimony about the incident could be questioned. The trial court ruled that the PBT result was inadmissible under § 343.303, STATS.¹

¹ Section 343.303, STATS., provides in relevant part:

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).

When the jury returned its verdict, Kukes' trial counsel declined an opportunity to individually poll the jury.

PRELIMINARY BREATH TEST RESULT

Kukes contends the trial court erred by refusing to allow evidence of Miller's PBT test. The trial court relied on § 343.303, STATS., which generally bars the evidentiary use of PBT results. The State concedes that, under *State v. Beaver*, 181 Wis.2d 959, 512 N.W.2d 254 (Ct. App. 1994), the trial court's reliance on § 343.303 was incorrect. In *Beaver*, we held that § 343.303 bars the use of PBT evidence only in proceedings relating to arrests for the offenses contemplated under that statute, which include operating a motor vehicle while intoxicated, injury by intoxicated use of a motor vehicle, and homicide by intoxicated use of a vehicle. *Id.* at 970 n.5, 512 N.W.2d at 258.

Although the trial court incorrectly relied on § 343.303, STATS., we nonetheless sustain the trial court's ruling to exclude the evidence. We may sustain a trial court's evidentiary ruling on a legal theory that was not considered or articulated by the trial court. *Beaver*, 181 Wis.2d at 970, 512 N.W.2d at 258. If the trial court's legal reasoning was flawed, we may independently review the record to determine if the evidence supports the trial court's ruling. *State v. Shillcutt*, 116 Wis.2d 227, 235-36, 341 N.W.2d 716, 719-20 (Ct. App. 1983), *aff'd*, 119 Wis.2d 788, 350 N.W.2d 686 (1984).

The results of a PBT, standing alone, contribute nothing on the question of whether a person's statement given at a certain alcohol concentration level is trustworthy. *Beaver*, 181 Wis.2d at 971, 512 N.W.2d at 258. Of equal importance, Kukes did not offer any testimony in conjunction with the PBT result to explain the degree of Miller's intoxication. If admitted, the result of Miller's PBT would not have aided the jury's analysis of the trustworthiness of Miller's statement or the reliability of her testimony.²

² In light of our conclusion that the result of a PBT, standing alone, contributes nothing to the question of whether a person's statement given at a certain alcohol concentration level is trustworthy, we also reject Kukes' single-sentence argument that the trial court's

TESTIMONY BY TELEPHONE

Kukes contends that the trial court erred in ruling that Eugene Kumbera, who observed the incident, would have to testify by telephone or not at all. Citing § 967.08, STATS., Kukes argues that there is no statutory authority for taking the testimony of a witness by telephone in a jury trial. He takes the position that he had a statutory and constitutional right to present Kumbera's testimony "live."

We conclude that by asking the court for permission to present the testimony of Kumbera by telephone if his motion for a continuance was denied, Kukes waived his right to argue on appeal that the telephone testimony was error because it was without statutory authority. If a defendant selects a course of action, he or she will not be heard later to allege error or defects precipitated by such action; such an election constitutes a waiver or abandonment of the right to complain. *State v. Robles*, 157 Wis.2d 55, 60, 458 N.W.2d 818, 820 (Ct. App. 1990), *aff'd*, 162 Wis.2d 883, 470 N.W.2d 900 (1991). Kukes does not argue on appeal that the trial court erroneously exercised its discretion in denying his motion for a continuance.

JURY POLLING

Kukes contends that he was denied effective assistance of counsel when his trial counsel waived his right to individually poll the jury without informing him of that right and without advising him that it was his personal decision to make.

After a postconviction hearing, the trial court found that Kukes was not advised of his right to poll the jury. However, the trial court denied Kukes' motion for a new trial on the ground that the decision whether to poll the jury belongs to counsel, not the defendant.

(. . . continued)
ruling violated his constitutional right to confrontation.

In *State v. Yang*, No. 95-0583-CR, slip op. (Wis. Ct. App. April 18, 1996, ordered published May 28, 1996), we held that the decision whether to request an individual polling is one delegated to counsel, and that counsel's failure to inform his or her client of the right to an individual polling is not, in itself, deficient performance. Kukes does not contend on appeal that his counsel's decision not to poll the jury was deficient. We therefore reject Kukes' ineffective assistance of counsel claim.

By the Court. – Judgment and order affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.