COURT OF APPEALS
DECISION
DATED AND FILED

December 5, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0702

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

CITY OF WHITEWATER,

PLAINTIFF-RESPONDENT,

V.

JEFFREY L. WYCZAWSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Reversed and cause remanded with directions*.

¶1 SNYDER, J.[1] Jeffrey L. Wyczawski appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant (OWI). Wyczawski argues that the results of his blood alcohol test should not have been admitted because (1) there was no evidence that his blood was

[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.

withdrawn by a person authorized under WIS. STAT. § 343.305(5)(b); and (2) there was insufficient evidence to establish a proper chain of custody for his blood sample. Wyczawski also argues that the judgment should be reversed because the trial court erroneously allowed the City of Whitewater's expert witness to answer improper hypothetical questions. We agree that there is no evidence in the record that Wyczawski's blood was drawn by a person authorized to do so under § 343.305(5)(b). We therefore reverse the judgment of conviction and remand for proceedings consistent with this opinion.

FACTS

¶2 On November 1, 1998, Officer Tina Winger observed Wyczawski speeding and deviating from his lane of traffic. Winger stopped Wyczawski and called for assistance. Sergeant Lisa Otterbacher heard the call on her radio and responded. Upon arrival, Otterbacher decided to administer field sobriety tests. After Wyczawski failed these tests, Otterbacher arrested him for OWI and transported him to the Whitewater police department.

¶3 At the police station, Wyczawski requested a blood test. Winger was assigned to transport Wyczawski to Fort Atkinson Memorial Hospital to have his blood drawn. At the hospital, Winger handed the blood analysis kit she brought with her to the nurses in the emergency room, who then prepared the kit, drew Wyczawski's blood, placed the vials in the kit and sealed it. A nurse handed the sealed kit to Winger, who returned to the police department and turned the kit over to Otterbacher.

¶4 On November 5, 1998, Thomas Neuser, a senior chemist in the medical toxicology section of the State Laboratory of Hygiene in Madison, received the blood kit. Before opening the kit, he inspected the package for

anything unusual. Noting nothing unusual, he opened the package, which contained the vials of Wyczawski's blood. He then inspected the blood vials to see if there was anything unusual about them. Again, noting nothing unusual, he tested the blood. The blood sample reported a blood alcohol concentration of 0.132 grams per 100 milliliters.

¶5 A jury trial was held on January 8, 2001. At the trial, the City offered as evidence the results of the blood sample taken from Wyczawski the night he was arrested. Wyczawski objected to the introduction of the blood test results, arguing that the blood draw violated WIS. STAT. § 343.305(5)(b), which allows a blood draw only by a physician, registered nurse, medical technologist, physician assistant or person acting under the direction of a physician.

¶6 Wyczawski argued that there was no evidence that the woman who drew his blood, Mary Anschuetz, was one of these people; therefore, according to Wyczawski, the requirements of WIS. STAT. § 343.305(5)(b) had not been met. On the Blood/Urine Analysis form, Anschuetz, by signing her name under the section "Specimen collected by (Officer, Physician, Technician)," indicated that she had drawn Wyczawski's blood. However, Anschuetz did not circle any of the categories denoting her title and she did not testify at the trial. Furthermore, Winger had testified that she handed the blood analysis kit to the nurses in the emergency room, who then prepared the kit, drew Wyczawski's blood, placed the vials in the kit and sealed it but did not testify that the nurse in question was any of the persons authorized to draw blood pursuant to § 343.305(5)(b).

¶7 Wyczawski also objected to the introduction of the blood test results because of a time gap during which the blood sample could not be accounted for. Wyczawski pointed out that Winger took custody of the blood sample at the

hospital and later turned the sample over to Otterbacher. Otterbacher never testified as to what she did with the sample upon receipt. Thus, Wyczawski argued, evidence was lacking at trial as to what happened to the sample after Otterbacher received it.

¶8 In addition, Wyczawski objected to the City's employment of hypothetical questions with its expert witness. He contended that the hypothetical questions were not based upon facts or evidence in the record. The trial court overruled all three of these objections and Wyczawski was found guilty of OWI.

DISCUSSION

¶9 Wyczawski argues that his conviction should be overturned because there was insufficient evidence to establish a proper chain of custody for his blood sample. We disagree.

¶10 ***B.A.C. v. T.L.G.***, 135 Wis. 2d 280, 400 N.W.2d 48 (Ct. App. 1986), provides the standard to be applied when analyzing a chain of custody of evidence issue: "The degree of proof necessary to establish a chain of custody is a matter within the trial court's discretion. The testimony must be sufficiently complete so as to render it improbable that the original item has been exchanged, contaminated, or tampered with." ***Id.*** at 290 (citations omitted).

¶11 To establish the chain of custody for Wyczawski's blood sample, the City had both Winger and Neuser testify. Winger testified that she witnessed Wyczawski's blood draw and witnessed the emergency room nurses package, label and seal the blood kit. The nurse then handed the blood kit back to Winger. Winger then testified that she took the blood draw back to the police department and handed the kit to Otterbacher. This occurred on November 1, 1998.

¶12 Neuser testified that he received the blood sample at the lab on November 5, 1998, via the United States mail. Neuser said that when he first receives a package, he examines the package for any external seals or unusual markings. He does this to see if the package appears to have been tampered with. He then opens the package and makes a note on the Blood/Urine Analysis form that he is the person who received the package and opened it.

¶13 Neuser testified that he examines the blood specimen tubes to see if they are labeled and sealed. He stated that the label on the blood sample indicated the subject's name was Jeffrey L. Wyczawski. He then testified that upon inspection of the blood sample, he observed nothing unusual about the sample.

¶14 The gap in the chain of custody is from the time Winger handed the blood kit to Otterbacher to the time that Neuser received the kit. However, just because a portion of the chain of custody of evidence is unaccounted for does not mean that the evidence is rendered inadmissible. ***B.A.C.*** reminds us that what is important is that there is sufficient evidence to render it improbable that the samples were exchanged, contaminated or tampered with.

¶15 Even though Otterbacher did not testify as to what she did with Wyczawski's blood sample upon its receipt from Winger, it is reasonable to infer that she mailed the sample soon after she received it. It is reasonable to infer the prompt mailing because Neuser received the sample on November 5, 1998, just four days after the sample was taken.

¶16 In addition, Winger testified that she witnessed the hospital nurse package, label and seal the blood kit. Neuser testified that the package he received with Wyczawski's blood sample showed no signs of contamination. In fact,

Neuser testified that the standard procedure he uses when he notices something unusual about the package, such as an unsealed kit, is to make a notation on the Blood/Urine Analysis form in the section "Specimen Condition/Seal/Label/Comments." The Blood/Urine Analysis form shows that in this section Neuser noted "both specimens were labeled and sealed."

¶17 The record demonstrates that the ***B.A.C.*** requirements were met. The testimony of these two witnesses is sufficient to render it improbable that the blood sample had been exchanged, contaminated or tampered with.

¶18 Wyczawski further argues that his conviction should be overturned because the trial court erroneously allowed the City's expert witness to answer improper hypothetical questions. We disagree.

¶19 While hypothetical questions are allowed when examining and cross-examining an expert witness in a criminal case, such hypothetical questions must be based on facts that have been offered as evidence. ***State v. Rice***, 38 Wis. 2d 344, 356-58, 156 N.W.2d 409 (1968); ***King v. State***, 75 Wis. 2d 26, 41-42, 248 N.W.2d 458 (1977).

¶20 In reviewing the trial court's decision to allow hypothetical questions, we look first for evidence that the trial court exercised its discretion and then look for a statement as to the basis for that exercise of discretion. ***State v. Ascencio***, 92 Wis. 2d 822, 829, 285 N.W.2d 910 (Ct. App. 1979). We will uphold the trial court unless the ruling resulted in an erroneous exercise of discretion. ***Hampton v. State***, 92 Wis. 2d 450, 458, 285 N.W.2d 868 (1979).

¶21 At trial, there were several different hypothetical questions to which Neuser responded. These questions were regarding the alcohol chart used to estimate the number of drinks that must be consumed to reach a certain level of blood alcohol concentration. Neuser was asked to assume that (1) Wyczawski was 5'10" tall, (2) he was drinking standard-sized drinks, (3) he drank seven drinks in one minute, and (4) he drank seven drinks over a period of three hours.

¶22 These facts were not in evidence when the hypothetical questions were asked. In ***Novitzke v. State***, 92 Wis. 2d 302, 306-07, 284 N.W.2d 904 (1979), the supreme court held that the defect of basing a hypothetical question in part upon matters not in evidence may sometimes be remedied by the admission thereafter of evidence relating to such matters. However, the City provided no evidence that Wyczawski was 5'10" tall, drank seven drinks in one minute, or drank seven drinks in three hours after presenting the hypothetical questions. Given that the City failed to put a factual basis into evidence prior to or after asking the hypothetical questions, the questions were improper.

¶23 Although we recognize that the admission of the hypothetical questions was error, we conclude that the error was harmless. Courts "must affirm a judgment in spite of procedural error unless the error 'has affected the substantial rights of the party seeking to reverse or set aside the judgment ....'" ***City of LaCrosse v. Jiracek Cos.***, 108 Wis. 2d 684, 690, 324 N.W.2d 440 (Ct. App. 1982) (citing WIS. STAT. § 805.18(2)). "The test of harmless error is not whether some harm has resulted, but, rather, whether the appellate court in its independent determination can conclude there is sufficient evidence [absent the inadmissible evidence], which would convict the defendant beyond a reasonable doubt." ***Wold v. State***, 57 Wis. 2d 344, 356, 204 N.W.2d 482 (1973).

¶24 The evidence supports the conclusion that under any test the error committed at Wyczawski's trial was harmless. Evidence of Wyczawski's intoxication included his driving, the testimony of two City of Whitewater police officers that Wyczawski was intoxicated, and that the sample of blood given by Wyczawski had an alcohol content of 0.132 grams of alcohol per 100 milliliters of blood.

¶25 We conclude that there is sufficient evidence to convict Wyczawski of OWI beyond a reasonable doubt. Therefore, the admission of hypothetical questions at trial was harmless error.

¶26 Finally, Wyczawski argues that the blood test results should have been suppressed because no evidence was presented that the blood withdrawal was completed by a person authorized to do so under WIS. STAT. § 343.305(5)(b). We agree with this assertion.

¶27 The admissibility of the evidence lies within the sound discretion of the trial court. ***State v. Pepin***, 110 Wis. 2d 431, 435, 328 N.W.2d 898 (Ct. App. 1982). When reviewing a discretionary decision of the trial court, the appellate court is to examine the record to determine if the trial court logically interpreted the facts and applied the proper legal standard. ***State v. Rogers***, 196 Wis. 2d 817, 829, 539 N.W.2d 897 (Ct. App. 1995). We will not disturb a trial court's discretionary determination as long as the trial court considered the facts of record under the proper legal standard and reasoned its way to a rational conclusion. ***Burkes v. Hales***, 165 Wis. 2d 585, 590, 478 N.W.2d 37 (Ct. App. 1991).

¶28 WISCONSIN STAT. § 343.305 addresses the procedure to be used when blood is withdrawn from someone in custody for driving while under the

influence of an intoxicant. Section 343.305(5)(b) requires that the blood be drawn by specified individuals:

> Blood may be withdrawn from the person arrested for violation of s. 346.63(1), (2), (2m), (5), or (6) or 940.25, or s. 940.09 where the offense involved the use of a vehicle, or a local ordinance in conformity with s. 346.63(1), (2m) or (5), or as provided in sub. (3)(am) or (b) to determine the presence or quantity of alcohol, a controlled substance, a controlled substance analog or any other drug, or any combination of alcohol, controlled substance, controlled substance analog and any other drug in the blood *only by a physician, registered nurse, medical technologist, physician assistant or person acting under the direction of a physician.* (Emphasis added.)

¶29 The Blood/Urine Analysis form introduced as evidence indicates that Anschuetz collected the blood specimen. Anschuetz did not testify at trial, but the Blood/Urine Analysis form shows that she signed her name on the form under the section "Specimen collected by (Officer, Physician, Technologist)." However, Anschuetz did not circle any of the available options and did not indicate her position with the hospital.

¶30 Winger merely testified that she saw one of the emergency room nurses draw the blood. The State argues that is sufficient to establish that Anschuetz met the statutory requirements of WIS. STAT. § 343.305(5)(b). We disagree. Section 343.305(5)(b) mandates that the blood be taken "only by a physician, registered nurse, medical technologist, physician assistant or person acting under the direction of a physician." No evidence was presented that Anschuetz met the qualifications of § 343.305(5)(b) as a physician, registered nurse, medical technologist, physician assistant or person acting under the direction of a physician. Therefore, the evidence is insufficient to meet the statutory requirements. The blood test results must be suppressed unless the State

can establish that the withdrawal did in fact comply with this statutory requirement.

¶31 The State argues that this statutory violation constitutes harmless error and that "it cannot be reasonably contended that the result might probably have been more favorable to the defendant if the blood test and hypothetical questions were not allowed into the record." If that is the case, the State should have no trouble securing a conviction if it fails to establish that Anschuetz met the requirements of WIS. STAT. § 343.305(5)(b).

CONCLUSION

¶32 There is sufficient evidence demonstrating a proper chain of custody for the blood sample. In addition, while the admission of hypothetical questions at trial was error, it was harmless error. However, we agree that no evidence was presented that the blood withdrawal was completed by a person authorized to so under WIS. STAT. § 343.305(5)(b). We therefore reverse the judgment of conviction and remand this matter to the trial court to give the State an opportunity to establish that the requirements of § 343.305(5)(b) were met. If compliance cannot be shown, Wyczawski is entitled to a new trial where the results of the blood test must be suppressed.

By the Court.—Judgment reversed and cause remanded with directions.

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