COURT OF APPEALS
DECISION
DATED AND FILED

April 16, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2247-CR **Cir. Ct. No. 2006CT609**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ADAM J. WALLOW,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed*.

¶1 NEUBAUER, J.[1] After a two-day trial, a jury found Adam J. Wallow guilty of operating a motor vehicle with a prohibited alcohol content

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

(PAC) of .08 percent or more, third offense. Wallow contends on appeal that his conviction should be reversed because the State failed to prove that his involuntarily given blood sample was drawn in compliance with WIS. STAT. § 343.305(5). Mistakenly believing that a compelled blood draw is not governed by the implied consent law, Wallow also argues that the State did not sufficiently prove the test results and that the court erred when it gave the pattern jury instruction rather than the modified one he requested. All of his challenges fail. We affirm the judgment.

¶2 City of Lake Geneva police officer Seth Keller arrested Wallow for PAC and operating a vehicle while intoxicated (OWI) after Wallow failed a series of field sobriety tests.[2] Keller, on foot patrol, flagged Wallow down just before midnight to issue him a citation for driving with loud music. Wallow parked parallel to the curb in a diagonal parking stall and exhibited a flushed face, red eyes and breath smelling of intoxicants. Wallow told Keller he had two beers earlier and "recently" had a scotch and/or a whiskey. Wallow refused to consent to a blood test, and Keller and fellow officer Brandi Nelson transported him to Lakeland Hospital for a compulsory draw. Wisconsin State Laboratory of Hygiene analyst Thomas Ecker testified that the sample showed a blood alcohol concentration of .084 percent. The court gave the standard OWI/PAC instruction. *See* WIS JI CRIMINAL—2669. The jury acquitted Wallow of operating while intoxicated, but found him guilty of PAC. Wallow appeals. We will supplement the facts as the discussion of each issue requires.

[2] Wallow does not challenge the propriety of the stop.

DISCUSSION

¶3 Wallow raises three issues on appeal. He contends the trial court erred by (1) admitting his blood test result because the State did not prove compliance with WIS. STAT. § 343.305(5), (2) allowing expert testimony about the test result because the State did not provide a written summary of the testimony and because the testimony lacked persuasiveness, and (3) giving the pattern OWI/PAC jury instruction rather than the modified one he requested. Wallow's last two issues are connected by a common thread: that a compelled blood test constitutes "noncompliance" with the implied consent law such that the State loses the test result's presumptive admissibility. We address each issue in turn.

Compliance with WIS. STAT. § 343.305(5)

¶4 Wallow contends that the trial court erroneously admitted the blood test result because he claims the State did not prove that the specimen collection complied with WIS. STAT. § 343.305(5)(b).[3] The statute authorizes specific persons to perform the blood draw and Wallow asserts that the State did not establish that a person authorized to draw the specimen in fact drew it, because the State did not call the lab worker as a witness or question other witnesses as to her credentials. The trial court denied Wallow's motion to suppress because its "common sense" told it that hospitals would not permit just anyone to draw blood.

[3] At trial, Wallow argued that the absence of the lab person's personal testimony raised "a ***Crawford*** issue," rendering the test result inadmissible hearsay. In ***Crawford v. Washington***, 541 U.S. 36, 68 (2004), the Supreme Court held that an out-of-court statement is inadmissible unless the witness is unavailable and the defendant was afforded a prior opportunity for cross-examination because it violates the defendant's Sixth Amendment right to confront witnesses. Wallow abandons the constitutional dimension of his argument on appeal. We therefore do not address it. *See* ***State v. Brown***, 2003 WI App 34, ¶21 n.8, 260 Wis. 2d 125, 659 N.W.2d 110.

¶5 The trial court has wide discretion in determining whether to admit evidence. ***State v. Buck***, 210 Wis. 2d 115, 129, 565 N.W.2d 168 (Ct. App. 1997). Whether the blood draw procedures comported with the statutory requirements involves applying the statute to the facts of record, presenting a question of law we review de novo. *See* ***State v. Penzkofer***, 184 Wis. 2d 262, 264, 516 N.W.2d 774 (Ct. App. 1994). To the extent the trial court's decision involves findings of facts, we uphold those findings unless they are clearly erroneous. ***State v. Ragsdale***, 2004 WI App 178, ¶7, 276 Wis. 2d 52, 687 N.W.2d 785.

¶6 WISCONSIN STAT. § 343.305(5)(b) provides, in relevant part:

> *Blood may be withdrawn* from the person arrested for violation of s. 346.63 (1) … to determine the presence or quantity of alcohol … in the blood *only by a* physician, *registered nurse*, medical technologist, physician assistant *or person acting under the direction of a physician*. (Emphasis added.)

While the statute authorizes specific persons to draw blood, it does not address the manner of establishing the person's qualifications. We therefore look to the evidence. At the point that the trial court denied the suppression motion, it had before it the following evidence: both police officers transported Wallow to the hospital and were present during the blood draw; Nelson testified that the person from the hospital laboratory who drew the blood filled out the relevant portion of the "State of Wisconsin Blood/Urine Analysis" form; the signature on the form identifies the laboratory person as "Lisa Loepke, R.N."; Keller observed "[t]he nurse … pack[] [the specimen] up into a little box" and hand it to Nelson, who handled it per the police department's standard procedure.

¶7 The reasonable inferences from this evidence are that: Loepke worked at the hospital; she is a registered nurse, a designation that complies with

the statute; it was within her job description to draw blood; and, in doing her job, she was under the hospital's general supervision. We may take judicial notice that Lakeland Hospital is a reputable community hospital, and hospital employees with medical responsibilities such as the invasive taking of bodily fluids are under the general direction of at least one physician. *See* WIS. STAT. RULES 902.01(2)(a) and (6) (at any stage of the proceeding, courts may take judicial notice of any fact "not subject to reasonable dispute" because it is "generally known within the territorial jurisdiction of the trial court"). ***Penzkofer*** teaches that the term "direction," as used in WIS. STAT. § 343.305(5)(b), need not be over-the-shoulder supervision. *See* ***Penzkofer***, 184 Wis. 2d at 265-66. We also observe that hospital laboratories are subject to detailed, stringent standards in almost every aspect of their facilities and services and that hospitals must comply with all applicable state laws to maintain their certificate of approval. *See* WIS. ADMIN. CODE §§ HFS 124.03 and 124.17 (Dec. 2004); *see also* ***Penzkofer***, 184 Wis. 2d at 266.

¶8 In addition, the admission of evidence of Wallow's blood test result is supported by case law. When a chemical test result is challenged on the basis of noncompliance with underlying procedures, the result nonetheless carries a "prima facie presumption of accuracy" and is admissible. *See* ***City of New Berlin v. Wertz***, 105 Wis. 2d 670, 674, 314 N.W.2d 911 (Ct. App. 1981). Wallow's challenge, therefore, more aptly goes to the weight of the blood alcohol evidence, not to its admissibility. *See* ***id.*** at 675 n.6. Whether called inferences or "common sense," this court must accept the reasonable inferences the trial court draws from the credible evidence. *See* ***State v. Searcy***, 2006 WI App 8, ¶35, 288 Wis. 2d 804, 709 N.W.2d 497, *review denied* (Wis. July 17, 2007) (No. 2004AP2827-CR).

Compelled Blood Test as "Noncompliance" with Implied Consent Law

¶9 Wallow next asserts that his refusal to provide a blood sample constitutes noncompliance with the implied consent law. He posits that under ***State v. Zielke***, 137 Wis. 2d 39, 403 N.W.2d 427 (1987), noncompliance results in the State losing its right to rely on the statute's automatic admissibility provisions and the prima facie effect of WIS. STAT. § 885.235(1g)(c), and the State must prove the results by expert testimony.

¶10 As our courts have explained on numerous occasions, the Wisconsin legislature enacted the implied consent statute to combat drunk driving. *See, e.g.*, ***State v. Reitter***, 227 Wis. 2d 213, 223, 595 N.W.2d 646 (1999). An accused intoxicated driver has no choice in respect to granting his or her consent. ***State v. Neitzel***, 95 Wis. 2d 191, 201, 289 N.W.2d 828 (1980); ***State v. VanLaarhoven***, 2001 WI App 275, ¶7, 248 Wis. 2d 881, 637 N.W.2d 411. By applying for a license, a driver waives any right he or she otherwise may have had to refuse to submit to chemical testing. ***Neitzel***, 95 Wis. 2d at 201. A driver applying for a license is deemed to be fully cognizant of his or her rights and to know that, in the event of a later arrest for drunken driving, he or she already consented to chemical testing under the circumstances envisaged by the statute. ***Id.***

¶11 Wallow reads ***Zielke*** to say that any noncompliance with the statute, whether by a state actor or the accused driver, results in the State losing its right to rely on the statute's automatic admissibility provisions and the prima facie effect of WIS. STAT. § 885.235(1g)(c). He argues that due to his own "noncompliance," the State now must prove the accuracy of the results by expert testimony.

¶12 Wallow misreads ***Zielke***. There, the supreme court held that *law enforcement's* noncompliance with the procedures set forth in WIS. STAT.

§ 343.305 causes the State to lose its right to rely on the law's automatic admissibility provisions. ***Zielke***, 137 Wis. 2d at 49. ***Zielke*** does not say that an arrestee's refusal also constitutes noncompliance. To the contrary, the very reason the implied consent law provides penalties for those who unlawfully revoke their consent is to fulfill its purpose of facilitating evidence collection to keep drunk drivers off the roads, ***id.*** at 41, not to enhance their rights. ***Reitter***, 227 Wis. 2d at 224. Wallows' claim that an accused's refusal removes the action from the aegis of the implied consent law runs counter to the statute's oft-stated intent. "Neither the law, its history [n]or common sense allows this court to countenance its use as a shield by the defense to prevent constitutionally obtained evidence from being admitted at trial." ***Zielke***, 137 Wis. 2d at 56.

¶13 The implied consent law "does not limit the right of a law enforcement officer to obtain evidence by any other lawful means." WIS. STAT. § 343.305(3)(c). After arresting Wallow, Keller read him the Informing the Accused form and, upon Wallow's refusal to consent to a blood test, completed the Notice of Intent to Revoke. *See* § 343.305(9)(a). This was proper. *See* ***State v. Marshall***, 2002 WI App 73, ¶12, 251 Wis. 2d 408, 642 N.W.2d 571. Wallow does not challenge the stop or the arrest and offers no argument that the blood test was performed in an unreasonable manner. Given the officer's compliance with the implied consent law, we conclude the implied consent law governs Wallow's involuntary blood draw.

¶14 We therefore easily meet Wallow's contention that the test result is not entitled to the WIS. STAT. § 885.235 presumption. Test results under the implied consent law "shall be given the effect required under s. 885.235." WIS. STAT. § 343.305(5)(d). Section 885.235 states in relevant part:

> **(1g)** In any action or proceeding in which it is material to prove that a person was under the influence of an intoxicant or had a prohibited alcohol concentration … while operating or driving a motor vehicle … evidence of the amount of alcohol in the person's blood at the time in question, as shown by chemical analysis of a sample of the person's blood … is admissible on the issue of whether he or she was under the influence of an intoxicant or had a prohibited alcohol concentration … if the sample was taken within 3 hours after the event to be proved. The chemical analysis shall be given effect as follows without requiring any expert testimony as to its effect:
>
> ....
>
> (c) The fact that the analysis shows that the person had an alcohol concentration of 0.08 or more is prima facie evidence that he or she was under the influence of an intoxicant and is prima facie evidence that he or she had an alcohol concentration of 0.08 or more.

¶15 WISCONSIN STAT. § 885.235 makes no distinctions between test results from voluntary tests and those following a refusal. We affirm the trial court's admission of the blood draw result which reflected a BAC of .084 percent.

Admission of Expert Testimony

¶16 Wallow's blood was drawn about two hours and forty-five minutes after driving. Wallow challenges the admission of testimony offered by Thomas Ecker, the state lab analyst who tested Wallow's blood sample. Ecker, an advanced chemist, testified that Wallow's blood sample showed a BAC of .084 percent at the time of testing, a result he believed accurate to a reasonable degree of scientific certainty. He also testified about general alcohol absorption and elimination rates and, using retrograde extrapolation, opined that the total amount of alcohol in Wallow's body could have been equivalent to .12 percent at the time of driving. He did not have enough information to state that conclusion to the requisite level of certainty, however.

¶17 Wallow's attack on Ecker's testimony hails back to his premise that a forcible blood draw test result does not enjoy the automatic admissibility the implied consent law provides. Therefore, he contends, the result can be received into evidence only if its probative value is shown, which he asserts was "way below the threshold level of being persuasive." He also contends Ecker's testimony should not have been allowed because the State failed to provide a WIS. STAT. § 971.23(1)(e) summary of it. These arguments go nowhere.

1. Persuasiveness

¶18 We already have explained that an arrestee's refusal does not render the implied consent law inapplicable. Therefore, the blood test result "shall be given the effect required under [WIS. STAT. §] 885.235." WIS. STAT. § 343.305(5)(d). Accordingly, the .084 percent result from the specimen drawn within three hours of Wallow's driving is prima facie evidence that he had an alcohol concentration of 0.08 percent or more. *See* § 885.235(1g)(c).

¶19 Wallow argues that Ecker's testimony was not persuasive and appears to criticize the reliability of Ecker's alcohol absorption and elimination conclusions. Gauging the persuasiveness of testimony is a matter peculiarly within the province of the trier of fact. *See* ***Kleinstick v. Daleiden***, 71 Wis. 2d 432, 442, 238 N.W.2d 714 (1976). In Wisconsin, however, the admissibility of expert testimony is not conditioned upon its reliability, but on whether it is relevant and assists the jury in determining an issue of fact. ***Ricco v. Riva***, 2003 WI App 182, ¶20, 266 Wis. 2d 696, 669 N.W.2d 193. Wisconsin relies on liberal cross-examination to test an expert witness' reliability. *See* ***State v. Walstad***, 119 Wis. 2d 483, 519, 351 N.W.2d 469 (1984). Whether relevant expert testimony is

to be believed is a question of credibility for the finder of fact, but it clearly is admissible. ***Id.***

¶20 Ecker testified about his thirty years of experience with the state lab, how he performs BAC tests and verifies their accuracy, and about alcohol absorption and elimination rates. Also, using retrograde extrapolation, he estimated a range of possible values for Wallow's BAC at the time of driving. Ecker testified that the absorption and elimination rate depends upon many factors, including the person's size, drinking history and food consumption. Ecker stated that due to insufficient information about those factors, he "tried to make perfectly clear" that he could not state with requisite certainty that Wallow's BAC was .12 percent at the time of driving.

¶21 Wallow extensively challenged Ecker's use of retrograde extrapolation during cross-examination. Thus, the jury heard Ecker's analysis of the information he did have, his acknowledgement that he did not have complete information, and the lack of certainty he expressed as to some of his conclusions. It is for the jury, and not this court, to weigh expert testimony. *See* ***Schorer v. Schorer***, 177 Wis. 2d 387, 396, 501 N.W.2d 916 (Ct. App. 1993). Assessing witness credibility, weighing the evidence, and resolving inconsistencies within a witness' testimony all are for the jury. ***State v. Hahn***, 221 Wis. 2d 670, 683, 586 N.W.2d 5 (Ct. App. 1998).

2. Alleged WIS. STAT. § 971.23(1)(e) Discovery Violation

¶22 We also do not see a violation of WIS. STAT. § 971.23(1)(e). The criminal discovery statute requires, upon the defendant's demand, a written summary of the expert's findings or the subject matter of his or her testimony "if [the] expert does not prepare a report." ***Id.*** Tracking the statute, Wallow

demanded "a written summary of the witness' findings or the subject matter or his/her testimony if the witness has not prepared a report or statement." Ecker did prepare a report showing Wallow's .084 BAC, and the State furnished it to Wallow. The defendant's demand triggers what is produced; Wallow received what he requested.

¶23 The intent behind the discovery statutes is that the opposition not be faced with surprise witnesses, ***State v. Anderson***, 2005 WI App 238, ¶25, 288 Wis. 2d 83, 707 N.W.2d 159, *rev'd on other grounds*, 2006 WI 77, 291 Wis. 2d 673, 717 N.W.2d 74, and to enable defendants to prepare for trial. *See* ***State v. Schroeder***, 2000 WI App 128, ¶9, 237 Wis. 2d 575, 613 N.W.2d 911. Wallow does not claim the State failed to inform him that Ecker would testify or that he did not receive the lab report. Testimony about alcohol absorption and elimination rates is standard fare in drunk driving cases. Indeed, Wallow hardly can claim the testimony surprised him when he himself produced as an exhibit a blood-alcohol curve chart with which he cross-examined Eckert at length. We conclude that neither Wallow's demand nor the statute obligated the State further.

¶24 Even were we to find a discovery violation, however, our review is subject to a harmless error analysis. *See* ***State v. Nielsen***, 2001 WI App 192, ¶19, 247 Wis. 2d 466, 634 N.W.2d 325. A conviction should be overturned as a result of noncompliance with the statute only if it appears that the result probably would have been more favorable to the defendant had the evidence been excluded. ***State v. Koopmans***, 202 Wis. 2d 385, 396, 550 N.W.2d 715 (Ct. App. 1996). Since this is an implied consent case, the .084 test result enjoys automatic admissibility and is prima facie evidence that his BAC was at least .08 percent. WIS. STAT. §§ 343.305(5)(d), 885.235(1g)(c). Some of Ecker's testimony was equivocal and

cut in favor of Wallow. We cannot say that excluding Ecker's testimony would have been more favorable to Wallow. Error, if any, was harmless.

Jury Instruction

¶25 Keller testified that Wallow said he had a drink of hard liquor shortly before Keller stopped him. A part of Wallow's defense was that, due to a rising blood alcohol curve, the recently consumed alcohol caused his BAC to be higher at the time of testing than at the time of driving. He argues that the trial court erred in giving WIS JI CRIMINAL—2669, the standard OWI/PAC instruction, instead of the modified "blood-alcohol curve" instruction he requested.

¶26 WISCONSIN JI CRIMINAL—2669 provides in part:

> If you are satisfied beyond a reasonable doubt that there was .08 grams or more of alcohol in 100 milliliters of the defendant's blood … at the time the test was taken, you *may find* from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged driving … or that the defendant had a prohibited alcohol concentration at the time of the alleged driving … or both, *but you are not required to do so*. You the jury are here to decide these questions on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged driving … or that the defendant had a prohibited alcohol concentration at the time of the alleged driving … or both, unless you are satisfied of that fact beyond a reasonable doubt. (Emphasis added.)

Wallow's proposed instruction provided in part:

> Evidence has been received that, within three hours after Adam J. Wallow's alleged driving of a motor vehicle, a sample of his blood was taken. An analysis of the sample has also been received. This is relevant evidence that he had a prohibited alcohol concentration at the time of the alleged driving. Evidence has also been received as to how the body absorbs and eliminates alcohol. You may consider the evidence regarding the analysis of the blood sample and the evidence of how the body absorbs and

> eliminates alcohol along with all of the other evidence in the case giving it just such weight as you determine it is entitled to receive.

Wallow contends the pattern instruction was error because it provides for the prima facie presumption.

¶27 The decision to give or not to give a requested jury instruction lies within the trial court's discretion. ***State v. Miller***, 231 Wis. 2d 447, 464, 605 N.W.2d 567 (Ct. App. 1999). We will not reverse such a determination unless the instructions, taken as a whole, communicated an incorrect statement of the law or otherwise probably misled the jury. *See* ***State v. Randall***, 222 Wis. 2d 53, 59-60, 586 N.W.2d 318 (Ct. App. 1998). If the trial court's instructions adequately cover the law, there is no erroneous exercise of discretion when the court refuses to give a requested instruction even if the proposed instruction is correct. ***Nelson v. Taff***, 175 Wis. 2d 178, 186, 499 N.W.2d 685 (Ct. App. 1993).

¶28 Wallow asserts that he "has shown sufficient information to justify a conclusion that there was a rising blood alcohol curve," and cites ***State v. Vick***, 104 Wis. 2d 678, 312 N.W.2d 489 (1981). Wallow's unelaborated-upon reference to ***Vick*** is, frankly, puzzling.[4] The defendant in ***Vick*** was arrested for OWI and showed a .13 BAC thirty-six minutes later. ***Id.*** at 682-83. As here, an expert testified about alcohol absorption and elimination rates, and Vick argued that his

[4] Wallow cites ***State v. Vick***, 104 Wis. 2d 678, 312 N.W.2d 489 (1981), without pinpoint or explanation. We observe that throughout his appellate brief he is inconsistent in his use of pinpoint citations for the case law he invokes. WISCONSIN STAT. RULE 809.19(1)(e) requires an appellant to support its contentions with citations conforming to the Uniform System of Citation and SCR 80.02. Citations to specific legal principles from case law must include a reference to the page number or, if a public domain citation is available, to the paragraph number where the legal principle may be found. SCR 80.02(3). The rules of appellate practice are designed in part to facilitate the work of the court; such intermittent compliance with the rules improperly burdens it. ***State v. Kliss***, 2007 WI App 13, ¶6 n.4, 298 Wis. 2d 275, 728 N.W.2d 9.

BAC at the time of testing was higher than at the time of driving because he had consumed alcohol shortly before his arrest. ***Id.*** at 683-84. The supreme court found no error with the instruction's permissive inference directing the jury that "you may, on [Vick's BAC] alone, find that he was under the influence of an intoxicant. But, you should so find only if you are satisfied beyond a reasonable doubt from all the evidence in this case." ***Id.*** at 692, 694.

¶29 We conclude that here, too, WIS JI CRIMINAL—2669 creates a permissive presumption. A permissive presumption or permissive inference allows, but does not require, the trier of fact to find an elemental fact if the prosecution proves a basic fact. ***Vick***, 104 Wis. 2d at. 693. A permissive inference is invalid only where no rational connection existed between the proven facts and the inferred facts. *See* ***id.*** at 694-95. The test is whether it can be said with substantial assurance that the inferred fact more likely than not flowed from the proven fact. *See* ***State v. Schleusner***, 154 Wis. 2d 821, 826, 454 N.W.2d 51 (Ct. App. 1990). A jury may find a presumed fact based upon the rational inferences from basic facts that themselves must be proved beyond a reasonable doubt. ***Id.***

¶30 The connection between the proven fact (Wallow's BAC) and the inferred fact (PAC) was rational. Also, the instruction did not require the jury to reach any specific result. Instead, it told the jury it "may find" but was "not required to," and that its finding must be premised on its being convinced beyond a reasonable doubt after considering all of the evidence in the case. *See* WIS JI CRIMINAL—2669. The jury heard Keller testify that Wallow said he had consumed two beers earlier in the evening and a scotch or whiskey "recently"; that recently consumed alcohol may or may not immediately be absorbed; that Wallow parked improperly; and that he exhibited several classic physical signs of alcohol

consumption and failed several field sobriety tests. It also heard state lab analyst Ecker testify that, without more information, he could not precisely state Wallow's BAC at the time of driving, but he could say to the required level of certainty that Wallow's BAC two-and-one-half hours later was .084 percent. Based on all the evidence, the trial court reasonably could conclude that the presumed fact of PAC at the time of driving more likely than not flowed from the proven fact of his BAC at the time of testing. We hold that the pattern instruction neither misstated the law, nor probably misled the jury, and that the court did not erroneously exercise its discretion in issuing the standard jury instruction.

By the Court.—Judgment affirmed.

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