COURT OF APPEALS
DECISION
DATED AND RELEASED

OCTOBER 17, 1995

No. 95-1481-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID G. GRIMM,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Eau Claire County: GREGORY A. PETERSON, Judge. *Affirmed.*

CANE, P.J. David G. Grimm appeals his conviction of operating a motor vehicle while intoxicated, third offense, contrary to § 346.63(1)(a), STATS. On appeal, Grimm contends the evidence supports his claim that he was not driving his car as the arresting officer claimed. Essentially, Grimm is arguing that the trial court erred by believing the State's witnesses and rejecting his testimony. In effect, Grimm is challenging the sufficiency of the evidence.

The standard for reviewing the sufficiency of the evidence to support a criminal conviction is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ***Jackson v. Virginia***,

443 U.S. 307, 319 (1979). In order for the court to reverse, the evidence must be in conflict with "fully established or conceded facts." ***Day v. State***, 92 Wis.2d 392, 400, 284 N.W.2d 666, 671 (1979); *see also* ***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990).

For Grimm, who is appealing without an attorney, this means that findings of fact by the fact finder, the trial court in this instance, will not be upset on appeal unless there is no credible evidence to support those findings. It is for the trial court, not the appellate court, to judge the credibility of witnesses and the weight of their testimony. This court on appeal does not re-decide the facts. ***Fidelity & Deposit Co. v. First Nat'l Bank,*** 98 Wis.2d 474, 484-85, 297 N.W.2d 46, 51 (Ct. App. 1980).

Grimm does not dispute that he was legally intoxicated on the evening in question. His only disagreement with the court's decision is that he claims he was not driving his car on the evening he was arrested. Instead, he continues to argue before this court, as he did before the trial court, that he was simply getting his wallet from his parked car when the officer arrested him.

Because Grimm disputes the trial court's finding that he was driving the car on the evening in question, the only issue before this court is whether the trial court, as a rational trier of fact, could have found beyond a reasonable doubt that Grimm was driving the car, an essential element of the offense. *See* ***Jackson***, 443 U.S. at 319.

This court has read the entire transcript of the trial and concludes that there is sufficient evidence to support the trial court's finding that Grimm was in fact operating his vehicle on the evening of his arrest. The record reflects that deputy Chad Peterson of the Eau Claire County Sheriffs Department observed a car being driven on Highway 12 in the Village of Fall Creek. He stated that he observed this car cross the centerline and became suspicious whether the driver was intoxicated. Peterson followed the vehicle and then approached the vehicle as it was being parked on the street. The motor was still running, and Grimm was behind the steering wheel attempting to park the car. He also observed another person sitting in the front passenger seat. After the deputy detected a strong odor of alcohol coming from the car, he had Grimm perform some field sobriety tests, which he failed. Peterson then transported

him to the hospital where an analysis of Grimm's blood sample determined that he had an alcohol concentration of .151%.

Although Grimm testified that he was simply getting his wallet from the car and had not been driving that evening, another witness, Mike Schmitt, testified that he saw his brother Bobby and Grimm take the car that evening to get some gas. Grimm had other witnesses who testified that Grimm had not driven the car that evening. Consequently, the court was faced with conflicting testimony on the issue whether Grimm was driving. As stated before, it is the province of the trier of fact, not the appellate court, to consider the credibility of witnesses and determine the weight given to their testimony. ***Day***, 92 Wis.2d at 400, 284 N.W.2d at 670.

Here, the trial court believed the arresting officer's testimony that Grimm was driving the car. In reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the State and the prosecution, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***Poellinger***, 153 Wis.2d at 507, 451 N.W.2d at 757-58. Accordingly, because the evidence had probative value and the trial court, acting reasonably, could have found that Grimm was driving the car and was guilty beyond a reasonable doubt, the conviction is affirmed.

Grimm also argues that the trial court should have appointed an attorney to represent him at the trial. However, this court notes that the record shows Grimm was employed, and both the public defender and the trial court found that he was not indigent, meaning that he did not qualify for a court-appointed lawyer. It is also noted that earlier in the proceedings Grimm had a lawyer representing him in this case, but the attorney was allowed to withdraw his representation. This court therefore rejects Grimm's argument that the court erred by failing to appoint an attorney to represent him at trial.

By the Court.—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.