

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

OCTOBER 8, 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(1), 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. 96-1093-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KENNETH J. TRAEDER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed.*

CANE, P.J. Kenneth Traeder appeals his conviction for operating a motor vehicle while under the influence of an intoxicant, second offense. The sole issue on appeal is whether the trial court erred by rejecting Traeder's reference to a book entitled MUSHROOMS: WILD AND EDIBLE by Vincent Marteka, as a learned treatise relating to the effect of mushroom toxins on the blood alcohol curve. The judgment is affirmed.

The facts are undisputed. The State originally charged Traeder with OWI and operating a motor vehicle with a prohibited alcohol concentration in excess of the legal limit. The jury returned a guilty verdict on both charges. At the jury trial, the State's expert, Kim Ricksecker, a chemist at

the State Laboratory of Hygiene, testified about tests performed on Traeder's blood sample. Essentially, Ricksecker explained Traeder's blood sample showed a blood alcohol level of .278% and the method used to obtain this reported level.

When on cross-examination Ricksecker was unwilling to concede that mushroom toxins could have an appreciable effect on a person's blood alcohol level, Traeder attempted to refer to the book in formulating his hypothetical question. The State objected, contending the reference to the book was inadmissible hearsay. The record reflects a bench conference off the record, and the trial court then sustaining the objection precluding further reference to the book. At a later offer of proof, Traeder contended that the book includes a chapter about mixes, mushrooms and alcohol. Essentially, it indicates that certain mushrooms produce a toxin called coprine, which interrupts the process in which the liver metabolizes alcohol. The chapter would contradict the State's expert, who denied that the mushrooms affect the liver, metabolism of alcohol and hence the blood-alcohol level.

Unfortunately, the record reveals only the defense exhibit showing the book's title and four photographs of mushrooms. However, both sides attached copies of certain pages of the book in their appendix attached to the briefs.¹ The State makes a persuasive argument that the chapter Traeder referred to in the book refers only to a very specific type of mushroom, *coprinus atramentarius*, and its effect on metabolism of alcohol, and that Traeder made no claim of eating this type of mushroom. Therefore, the State reasons the evidence is not relevant.

In any event, the rules of evidence require an appropriate procedure to establish the text as a learned treatise. Specifically, before a learned treatise is received into evidence, the court must take judicial notice of the material, or an expert in the subject must testify that the writer of the

¹ For future reference, both sides should understand that the appendix should only contain parts of the record they want to highlight in their argument. However, if the material was not made a part of the record by being marked as an exhibit and offered as an exhibit, this court must ignore such references outside the record. See *Howard v. Duerstein*, 81 Wis.2d 301, 307, 260 N.W.2d 274, 277 (1977).

material is recognized in the writer's profession or calling as an expert in the subject. *See* § 908.03(18), Stats.²

Here, Traeder did neither. The trial court was not asked to take judicial notice, nor did it do so on its own. The defense made no effort to have the court take judicial notice of the book as a learned treatise and probably for good reason. A treatise is written primarily and impartially for professionals, subject to scrutiny and exposure for inaccuracy, with the writer's reputation at stake. *See* 6 WIGMORE, EVIDENCE § 1692 (Chadbourn rev. ed. 1976). If the State

² Section 908.03(18), STATS., provides:

- (18) Learned treatises. A published treatise, periodical or pamphlet on a subject of history, science or art is admissible as tending to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the writer of the statement in the treatise, periodical or pamphlet is recognized in the writer's profession or calling as an expert in the subject.
- (a) No published treatise, periodical or pamphlet constituting a reliable authority on a subject of history, science or art may be received in evidence, except for impeachment on cross-examination, unless the party proposing to offer such document in evidence serves notice in writing upon opposing counsel at least 40 days before trial. The notice shall fully describe the document which the party proposes to offer, giving the name of such document, the name of the author, the date of publication, the name of the publisher, and specifically designating the portion thereof to be offered. The offering party shall deliver with the notice a copy of the document or of the portion thereof to be offered.
- (b) No rebutting published treatise, periodical or pamphlet constituting a reliable authority on a subject of history, science or art shall be received in evidence unless the party proposing to offer the same shall, not later than 20 days after service of the notice described in par. (a), serve notice similar to that provided in par. (a) upon counsel who has served the original notice. The party shall deliver with the notice a copy of the document or of the portion thereof to be offered.
- (c) The court may, for cause shown prior to or at the trial, relieve the party from the requirements of this section in order to prevent a manifest injustice.

is correct in describing the book, the book was designed as a field guide for amateur mushroom hunters, not as resource material for mycologists. Thus, the book would not qualify as a learned treatise. Additionally, Ricksecker, the only expert, testified that she was not familiar with the book or with the specialized field of mushroom toxicology. Thus, the book fails to qualify as a learned treatise under either procedure.

Therefore, this court affirms the trial court's ruling denying Traeder's reference to the book as a learned treatise during cross-examination of the State's expert. The judgment of conviction is affirmed.

By the Court. – Judgment affirmed.

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