COURT OF APPEALS
DECISION
DATED AND RELEASED

December 10, 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. 96-1973-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID G. ALEXANDER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed*.

FINE, J. David G. Alexander appeals from a judgment entered on a jury verdict convicting him of operating a motor vehicle while under the influence of an intoxicant as a third offense, *see* §§ 346.63(1)(a) & 346.65(2), STATS., and operating a motor vehicle with a prohibited alcohol concentration of .08% or more, *see* §§ 340.01(46m)(b), 346.63(1)(b) & 346.65(2), STATS. He contends that the trial court erred in the following respects: (1) by not suppressing the results of the Intoxilyzer test that was given to him by the police; (2) by not accepting his offer to stipulate to his prior drunk-driving offenses, thereby permitting the jury to learn that he had already been twice

convicted of drunk driving; (3) by refusing to give to the jury his "theory-of-defense" instruction; and (4) by not ruling that his prosecution was barred by the double-jeopardy clause of the Fifth Amendment as a result of the prior administrative suspension of his driver's license. We affirm.

1. *The Intoxilyzer test.*

Following Alexander's arrest for drunk driving, police gave him a breath test using a machine that Alexander contends was not properly certified. Therefore, he argues, the trial court should not have admitted the results of that test.

WIS. ADM. CODE § TRANS. 311.04 provides:

> **Approval of breath alcohol test instruments. (1)** Only instruments and ancillary equipment approved by the chief of the chemical test section may be used for the qualitative or quantitative analysis of alcohol in the breath.
>
> **(2)** (a) All models of breath testing instruments and ancillary equipment used shall be evaluated by the chief of the chemical test section.
>
> (b) The procedure for evaluation shall be determined by the chief of the chemical test section.
>
> **(3)** Each type or category of instrument shall be approved by the chief of the chemical test section prior to use in this state.

The police used an Intoxilyzer 5000 for Alexander's breath test. Prior to this test, however, a new processor board was installed. The new board had a different model number than the one it replaced. At a hearing on Alexander's motion to suppress the breath-test results, George Menart, a senior electronics technician with the Wisconsin State Patrol, testified without

contradiction that there was no difference between the machine with the old processor board and the machine with the new board insofar as "the basic analysis" of a subject's breath was concerned. Therefore, he testified, the Department of Transportation did not evaluate the Intoxilyzer machine with the new processor board because it had already evaluated the machine with the old board.

Alexander moved to suppress the Intoxilyzer results, claiming that WIS. ADM. CODE § TRANS. 311.04 was violated. The trial court denied Alexander's suppression motion, finding that there was "no difference in how the machine operates" with the new replacement board so that the machine with the new processor board was "the same" for breath-test purposes as it was with the old board.

Admissibility of evidence is governed by RULE 901.04, STATS.[1] Both parties tacitly treated the admissibility of the results of Alexander's breath test as one to be decided under RULE 901.04(1), rather than as one of conditional relevancy under RULE 901.04(2); neither side asked the trial court to have the jury make the ultimate determination of whether the machines had passed muster under the regulation. The trial court's finding that there were no material differences between the machine that had gone through the evaluation process required by WIS. ADM. CODE § TRANS. 311.04 and the machine after the new board was installed was based on evidence that was not controverted.

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[1] RULE 901.04, STATS., provides in material part:

Preliminary questions. **(1)** QUESTIONS OF ADMISSIBILITY GENERALLY. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to sub. (2) and ss. 971.31 (11) and 972.11 (2). In making the determination the judge is bound by the rules of evidence only with respect to privileges and as provided in s. 901.05.

(2) RELEVANCY CONDITIONED ON FACT. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Accordingly, its conclusion that § TRANS. 311.04 had been complied with, and its decision to admit the results of the breath test were proper.[2]

2. *Alexander's proffered stipulation*.

No person who "has 2 or more prior convictions, suspensions or revocations" for drunk driving "as counted under s. 343.307(1)" may drive a motor vehicle in Wisconsin if he or she has "a blood alcohol concentration of 0.08% or more." Sections 340.01(46m)(b) & 346.63(1)(b), STATS. These "prior convictions, suspensions or revocations" constitute "an element of the offense." ***State v. Ludeking***, 195 Wis.2d 132, 136, 536 N.W.2d 392, 396 (Ct. App. 1995). Alexander offered to stipulate to his drunk-driving record, and moved to bar the State from introducing evidence of those prior convictions. The trial court denied the motion. This was error. *See* ***State v. McAllister***, 153 Wis.2d 523, 525, 529, 451 N.W.2d 764, 765, 767 (Ct. App. 1989) (where defendant's prior felony conviction is element of crime, defendant's offer to stipulate to the prior felony makes nature of felony not relevant unless it is being offered for some purpose other than to establish the felony-conviction element). We conclude, however, that the error was harmless. *See* ***id.***, 153 Wis.2d at 530, 451 N.W.2d at 769 (improper admission of evidence in face of defendant's offer to stipulate subject to harmless-error analysis); *see* ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 233 (1985) (reversal of conviction not warranted unless there is reasonable possibility that error contributed to conviction).

Alexander's status as a two-time convicted drunk driver made it illegal for him to drive if his blood-alcohol concentration exceeded .08%. *See* §§ 340.01(46m)(b) and 346.63(1)(b), STATS. The Intoxilyzer test of Alexander's breath indicated a blood-alcohol concentration of .24%—three times the legal limit. Moreover, the trial court instructed the jury that evidence of Alexander's two prior drunk-driving convictions was being received because that evidence "bears upon the second element that the State must prove for the offense of driving with a prohibited alcohol concentration," that the jury was not to use

[2] We do not, therefore, decide whether suppression would have been an appropriate remedy if the Intoxilyzer machine had not passed the evaluation process required by WIS. ADM. CODE § TRANS. 311.04. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

the evidence "for any other purpose," and that the evidence was "not proof of guilt of the offense charged in this case." It is presumed that juries comply with the trial court's instructions. ***State v. Truax***, 151 Wis.2d 354, 362, 444 N.W.2d 432, 436 (Ct. App. 1989).[3] There is no reasonable possibility that the trial court's error in not following ***McAllister*** contributed to Alexander's convictions in this case.

[3] This is a "pragmatic" rule, and is "rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant." ***Richardson v. Marsh***, 481 U.S. 200, 211 (1987).

3. *Theory-of-defense instruction.*

Alexander complains that the trial court did not give a special theory-of-defense instruction. Specifically, he argues that the trial court erred by not telling the jury that Alexander's theory-of-defense was: (1) that he did not drink enough alcohol "to render him incapable of safely driving"; and (2) that the Intoxilyzer did not accurately measure Alexander's blood-alcohol concentration because it might have measured "residual mouth alcohol as opposed to deep lung alcohol," and because the machine's "maintenance history raises serious doubts about its reliability and accuracy."

A "trial court has wide discretion in choosing the language of jury instructions and if the instructions given adequately explain the law applicable to the facts, that is sufficient and there is no error in the trial court's refusal to use the specific language requested by the defendant." ***State v. Herriges***, 155 Wis.2d 297, 300, 455 N.W.2d 635, 637 (Ct. App. 1990). Although a trial court must provide legal framework for a defendant's arguments that are supported by the evidence, it need not iterate for the jury a defendant's contentions. ***State v. Davidson***, 44 Wis.2d 177, 191–192, 170 N.W.2d 755, 763 (1969). Alexander does not claim that he was precluded by the trial court from arguing his contentions to the jury or that the jury was not otherwise accurately instructed on the applicable law. Accordingly, his complaint that the trial court erred is without merit. *See* ***id.***, 44 Wis.2d at 192, 170 N.W.2d at 763.

4. *Double jeopardy*.

Both Alexander and the State recognize that ***State v. McMaster***, 198 Wis.2d 542, 543 N.W.2d 499 (Ct. App. 1995), *review granted*, ___ Wis.2d ___, 546 N.W.2d 468 (1996), which held that an administrative suspension of a driver's operating license did not bar a subsequent criminal prosecution based on the same conduct, is dispositive. Accordingly, no analysis here is required or permitted. *See* ***In re Court of Appeals of Wisconsin***, 82 Wis.2d 369, 371, 263 N.W.2d 149, 149-150 (1978) (*per curiam*) (a published decision by one district of the court of appeals is binding on the court of appeals).

By the Court.—Judgment affirmed.

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