COURT OF APPEALS
DECISION
DATED AND FILED

DECEMBER 16, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1972-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KAREN ELAINE GILLIGAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oconto County: LARRY JESKE, Judge. *Affirmed.*

CANE, P.J. Karen Elaine Gilligan appeals from her conviction for operating a motor vehicle while under the influence of an intoxicant, third offense. Gilligan argues that her conviction at the nonjury trial was "unjust" because it was based on "hearsay evidence without consideration of the weather and road conditions that contributed to the motor vehicle going into the ditch." Because

there is sufficient credible evidence in the record to support the trial court's findings, the conviction is affirmed.

The police were called to the scene of an accident where they found Gilligan's Jeep stuck in a ditch. The Jeep had crossed the centerline into a ditch where Gilligan repeatedly attempted to back out, but was stuck. This one-vehicle accident had occurred in the late evening hours of December 23 or early morning hours of December 24, 1996. Witnesses testified that they found Gilligan's vehicle in the ditch and notified the police. The witnesses removed from Gilligan's Jeep two young children who were uninjured. The testimony is undisputed that Gilligan was driving the Jeep when it went into the ditch.

Gilligan's challenge on appeal goes to the issue whether the evidence is sufficient to support the trial court's conclusion that she was under the influence of an intoxicant at the time of the accident. 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 conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn the verdict. ***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990).

It is for the fact finder, which in this case is the trial court, not the appellate court, to resolve conflicts in the testimony. *See* ***Fuller v. Riedel***, 159 Wis.2d 323, 332, 464 N.W.2d 97, 101 (Ct. App. 1990). It is not within the province of an appellate court to choose not to accept an inference drawn by a

factfinder when the inference drawn is reasonable. *See* ***Onalaska Elec. Heating, Inc. v. Schaller***, 94 Wis.2d 493, 501, 288 N.W.2d 829, 833 (1980). Appellate courts search the record for evidence to support the findings that the trial court made, not for findings that the trial court could have but did not make. ***In re Estate of Becker***, 76 Wis.2d 336, 347, 251 N.W.2d 431, 435 (1977). The fact finder is the arbiter of the credibility of witnesses, and its findings will not be overturned on appeal unless they are inherently or patently incredible, or in conflict with the uniform course of nature or with fully established or conceded facts. ***Chapman v. State***, 69 Wis.2d 581, 583, 230 N.W.2d 824, 825 (1975).

Before a defendant can be convicted of violating § 346.63(1)(a), STATS., which prohibits driving while under the influence of alcohol, the State must prove that the defendant was operating a motor vehicle and that the defendant was under the influence of an intoxicant at the time he or she was operating a motor vehicle. ***State v. Gaudesi,*** 112 Wis.2d 213, 220, 332 N.W.2d 302, 305 (1983). Although erratic driving may be evidence that the defendant was under the influence of an intoxicant, the statute proscribing driving while under the influence of alcohol does not require proof of an appreciable interference in the management of a motor vehicle. ***Id.*** at 221, 332 N.W.2d at 305. Nothing more than conduct of operating a motor vehicle while under the influence of an intoxicant need be proven to sustain judgment of conviction against a motorist under the statute proscribing such an offense. ***State v. McAllister,*** 107 Wis.2d 532, 535, 319 N.W.2d 865, 867 (1982).

Here, the evidence overwhelmingly supports the trial court's finding that Gilligan was under the influence of an intoxicant at the time she drove her Jeep into the ditch. Some of the witnesses who observed Gilligan outside her vehicle testified that she appeared unbalanced and was leaning on another

individual. Officer Chail Franks observed Gilligan and could smell the odor of alcohol on her breath, and Gilligan appeared tipsy as if having a hard time standing up. He also described her as uncooperative and angry. Gilligan also attempted to get away from him. Furthermore, at the Oconto County Sheriff's Department, Gilligan refused to submit to the requested Breathalyzer test. As the State correctly notes, a reasonable inference from a refusal to take a mandatory Breathalyzer test is consciousness of guilt. ***State v. Albright***, 98 Wis.2d 663, 668, 298 N.W.2d 196, 200 (Ct. App. 1980). Finally, after Gilligan refused to take a Breathalyzer test, she admitted to Franks that she had consumed six cans of beer earlier that evening and had nothing to drink after the accident.

Because the evidence is sufficient to support the trial court's finding that Gilligan was operating a motor vehicle while under the influence of an intoxicant, this court will not disturb that finding. Therefore, the conviction is affirmed.

By the Court.—Judgment affirmed.

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