COURT OF APPEALS
DECISION
DATED AND FILED

May 31, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1420-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PATRICIA K. MESSNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County: VIRGINIA A. WOLFE, Judge. *Affirmed.*

¶1 LUNDSTEN, J.[1] Patricia K. Messner appeals her conviction for operating under the influence, second offense, with a minor passenger under the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

age of sixteen in the motor vehicle. She contends that there was no probable cause for her arrest, that the trial court erred in denying her motion to suppress statements she made while detained by police officers, and that the jury instruction used at her trial contained a misstatement of the law. We affirm the trial court's judgment.

FACTS

¶2 On May 17, 1999, at approximately 5:37 p.m., Reedsburg police officer Michael Kopp heard a radio dispatch informing him of a hit-and-run accident and providing a complete vehicle description. At about 6:05 p.m., Officer Kopp located the vehicle parked in front of Messner's trailer lot, where Messner and her husband were sitting on lawn chairs. Officer Kopp approached Messner and asked if she had been driving the vehicle. Messner responded that she had.

¶3 Officer Kopp smelled a strong odor of alcohol on Messner's breath and noted her slurred speech and glassy, bloodshot eyes. When Messner stood and walked toward Officer Kopp, he noticed that her balance was unsteady. When Officer Kopp asked Messner whether she had been drinking, she stated that she had consumed a beer upon arriving home because she was upset about having just hit a tree. Officer Kopp noticed a beer can near Messner's chair that was about two-thirds full and still cold. When Officer Kopp asked Messner whether that was the beer she was referring to, Messner stated that she had consumed three beers since her return home.

¶4 Officer Kopp believed that Messner's condition was not consistent with the number of drinks she admitted to consuming upon returning home.

Officer Kopp then asked Messner to perform a series of field sobriety tests and she refused, becoming "rather agitated." Officer Kopp informed Messner that he would be detaining her until another officer arrived and the matter could be investigated further. After encountering some resistance while escorting Messner to his squad car, and fearing that Messner might attempt to flee, Officer Kopp handcuffed her. He placed her in the back seat of the squad for a few minutes until Deputy Jeffrey Tobin arrived, at which time Officer Kopp brought Messner out of the car and removed the handcuffs.

¶5 Deputy Tobin arrived at approximately 6:10 p.m. He informed Messner that he would be investigating the accident but did not state that she was under arrest. After asking Messner about the accident, Messner replied that she had lost control of her car when she tried to change the radio station and had collided with a tree. When asked whether she had been drinking, Messner responded that she had one and one-half beers when she arrived home after the accident. Messner later told Deputy Tobin that she drank three to four beers. Noting the same indicia of intoxication as Officer Kopp, Deputy Tobin requested that Messner submit to field sobriety tests. Messner immediately stated, "But you didn't catch me driving." Messner ultimately attempted to perform the tests but did not successfully complete them. At the close of the tests, Deputy Tobin placed Messner under arrest for operating a motor vehicle while intoxicated.

DISCUSSION

¶6 Messner raises three issues on appeal, two of which concern the trial court's failure to grant Messner's motion to suppress certain evidence at her trial. First, Messner argues that she was in "custody" for purposes of ***Miranda*** from the time she was handcuffed and placed in the squad car, and continuing throughout

her encounter with the police. She contends this custody constituted an arrest and that there was no probable cause for her arrest. Second, Messner suggests that statements she made to Deputy Tobin should have been suppressed because she was subject to "custodial interrogation" and was not advised of her ***Miranda*** rights. Messner's last argument is that the pattern jury instruction used at her trial does not contain an accurate definition of "under the influence of an intoxicant."

¶7 None of these claims warrant reversal of Messner's conviction.

Suppression Issue

¶8 Messner argues that, at the time she was initially placed in the back seat of Officer Kopp's squad car, she was under arrest in the constitutional sense and, at that point, there was no probable cause to arrest her. Assuming, *arguendo*, that Messner was under arrest at that time, we find that probable cause existed to arrest her for the offense of driving while intoxicated.

¶9 The test for probable cause is a commonsense test:

> Probable cause to arrest exists where the officer, at the time of the arrest, has knowledge of facts and circumstances sufficient to warrant a person of reasonable prudence to believe that the [person arrested] is committing, or has committed, an offense. As the very name implies, it is a test based on probabilities; and, as a result, the facts faced by the officer "need only be sufficient to lead a reasonable officer to believe that guilt is more than a possibility." It is also a commonsense test. The probabilities with which it deals are not technical: "[T]hey are the factual and practical considerations of everyday life on which reasonable and prudent men [and women], not legal technicians, act."

County of Dane v. Sharpee, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990) (citations omitted). The quantum of information which constitutes probable

cause to arrest must be measured by the facts of the particular case, ***State v. Wilks***, 117 Wis. 2d 495, 502, 345 N.W.2d 498 (Ct. App. 1984), and, in making that measurement, we look to the totality of the circumstances within the officer's knowledge at the time of the arrest. ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993).

¶10 Based on the totality of the circumstances at the time Messner was first placed into the back of the squad car, we hold there was probable cause for an arrest. Her vehicle matched the description of a vehicle that had been reported in a collision within the previous hour, a light-colored Chevy Blazer or Ford Bronco with Minnesota plates. The vehicle had damage to its exterior consistent with that collision. Messner admitted she had just driven the vehicle into a tree.

¶11 Officer Kopp observed that Messner smelled of alcohol, her speech was slurred, her eyes were bloodshot and glassy, and her balance was poor. Messner admitted she had been drinking since returning home, first claiming she drank only one beer, then claiming she drank three. Officer Kopp encountered Messner just thirty minutes after he was radioed about the accident. Based on his experience, Officer Kopp opined that Messner's state of intoxication was inconsistent with the amount of drinking she claimed to have done since arriving home. Finally, when Officer Kopp asked Messner to perform the field sobriety tests, Messner's tone changed from passive to belligerent, and she refused.

¶12 Accordingly, at the time Officer Kopp initially placed Messner in the squad car pending further investigation of the accident, the information known to him furnished probable cause for her arrest.

¶13 Messner next contends that certain statements she made after being placed in the squad car should have been suppressed by the trial court because she was in custody and had not been given ***Miranda*** warnings. We assume, without deciding, that Messner was in custody for purposes of ***Miranda*** when she was handcuffed and placed in the squad car. Even under this assumption, however, she is not entitled to a new trial.

¶14 A reversal or new trial is required only if the improper admission of evidence has affected the substantial rights of the party seeking relief. ***State v. Doerr***, 229 Wis. 2d 616, 626, 599 N.W.2d 897 (Ct. App. 1999). Under this test, we will reverse only where there is "a reasonable possibility that the error contributed to the guilty verdict." ***Id.*** In making this determination, we weigh the effect of the inadmissible evidence against the totality of the credible evidence supporting the verdict. ***Id.***

¶15 Messner does not specify exactly which statements she believes were improperly admitted at her trial. Rather, she contends only that *any* verbal responses she made to Deputy Tobin's request to perform field sobriety tests, such as refusals or protestations, should have been suppressed.[2] Specifically, she argues that it was foreseeable that Deputy Tobin's request would elicit an

[2] Although Messner argued prior to trial that the results of her field sobriety testing should be suppressed as well, it is not clear from her brief whether she intended to extend that argument to her appeal. Assuming she did, the argument is without merit. Generally, the Fifth Amendment's protection against self-incrimination offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to stand, to assume a stance, to walk, or to make a particular gesture. ***State v. Haefer***, 110 Wis. 2d 381, 384, 328 N.W.2d 894 (Ct. App. 1982). Field sobriety tests do not implicate the Fifth Amendment because they are not testimonial in nature as the suspect does not intend to convey a statement as to his or her state of sobriety by performing the test. ***State v. Babbitt***, 188 Wis. 2d 349, 361-62, 525 N.W.2d 102 (Ct. App. 1994).

incriminating response. Messner also argues that her responses to a series of express questions posed by Deputy Tobin should have been suppressed as well.

¶16 In clarifying ***Miranda***, the Supreme Court stated that interrogation includes not only express questioning of a suspect in custody, but also conduct or words which are the "functional equivalent" of express questioning. ***Rhode Island v. Innis***, 446 U.S. 291, 300-01 (1980). But, because the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions by police officers that the officers should have known were reasonably likely to elicit an incriminating response. ***State v. Cunningham***, 144 Wis. 2d 272, 277-78, 423 N.W.2d 862 (1988).

¶17 Deputy Tobin testified that after he asked Messner to perform the field sobriety tests, she immediately stated, "But you didn't catch me driving." He testified that, "under protest,"[3] Messner ultimately agreed to perform the field sobriety tests. Messner was unable to complete the tests due to her intoxicated condition.

¶18 Messner cites no authority for her proposition that it is foreseeable that asking a driver to perform field sobriety tests is likely to elicit an incriminating response, necessitating a prior ***Miranda*** warning. We decline Messner's invitation to extend ***Miranda*** to this situation because we conclude that the only response an officer could reasonably anticipate eliciting from a driver

[3] Though it is not clear from the record how Messner protested Deputy Tobin's request that she submit to field sobriety tests other than by her aforementioned statement that she had not been caught driving, we note our holding in ***State v. Mallick***, 210 Wis. 2d 427, 435, 565 N.W.2d 245 (Ct. App. 1997), that neither the Fifth Amendment nor Article I, § 8 of the Wisconsin Constitution bars admission into evidence at trial of a refusal to submit to field sobriety testing.

when asked whether she will perform field sobriety tests is "yes" or "no." Messner's statement, on the other hand, was wholly spontaneous and non-responsive.

¶19 In ***State v. Mitchell***, 167 Wis. 2d 672, 687, 482 N.W.2d 364 (1992), the court noted that the admission of non-responsive testimonial evidence is not novel. For instance, in ***United States v. Castro***, 723 F.2d 1527, 1529 (11th Cir. 1984), a police officer observed the odor of marijuana outside an apartment. When the defendant descended from the second story stairs, the officer asked, "What in the world is going on here?" The defendant replied, "You want money? We got money." Although the federal court of appeals specifically held that the defendant was the subject of a custodial interrogation, the court found the statement admissible because it was totally unresponsive to the officer's question and was not improperly compelled by that question but, instead, was spontaneously volunteered by the defendant. ***Id.*** at 1530-32. *See also* ***United States v. McDaniel***, 463 F.2d 129, 136 (5th Cir. 1972) (defendant's statement that sacks he was carrying contained marijuana, in response to border patrol officer's question whether defendant declared sacks at border, was admissible because it was voluntary and non-responsive to the question asked).

¶20 Consequently, we conclude that Deputy Tobin's request that Messner submit to field sobriety testing was not the functional equivalent of an interrogation and Messner's voluntary, non-responsive statement was properly admitted.

¶21 We next address the admissibility of Messner's responses to what she describes as Deputy Tobin's "series of express questions." Deputy Tobin testified that he asked Messner about the accident, and she replied that she lost

control of her vehicle when she tried to change the radio station and collided with a tree. When asked whether she had been drinking, Messner responded that she had one and one-half beers when she arrived home after the accident though she later told Deputy Tobin that she drank three to four beers. Finally, Deputy Tobin testified that he asked Messner about the route she had driven home after the accident and whether she had any medical problems she was taking medication for.

¶22 We are persuaded by the State's argument that the statements Messner alleges were erroneously admitted into evidence were either self-serving and therefore not prejudicial to Messner, duplicative of earlier statements she had made to Officer Kopp, or both. Her admissions that she had collided with a tree, and that she drank anywhere from one to four beers upon returning home, were essentially identical statements made to both officers. Additionally, her own statements about the accident were supported by two eyewitnesses who saw her driving the damaged vehicle. After viewing the totality of the evidence supporting Messner's conviction, independent of the statements at issue, we conclude that any error in admitting those statements was harmless and does not warrant reversal.

Jury Instruction Issue

¶23 Finally, Messner challenges the use in her case of the pattern jury instruction for Operating a Motor Vehicle While Under the Influence of an Intoxicant, WIS JI—CRIMINAL 2663. She argues that the definition of "under the influence" of alcohol in the jury instruction is inconsistent with WIS. STAT. § 346.63(1)(a) and inconsistent with ***State v. Waalen***, 130 Wis. 2d 18, 386 N.W.2d 47 (1986). We conclude that Messner's argument lacks merit.

¶24 The pattern jury instruction used in this case defines the term "under the influence" as follows:

> "Under the influence" of an intoxicant means that the defendant's ability to operate a vehicle was impaired because of consumption of an alcoholic beverage.
>
> Not every person who has consumed an alcoholic beverage is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

WIS JI—CRIMINAL 2663 (footnote omitted).

¶25 The instruction given in this case is virtually identical to the one approved of in ***Waalen*** and is an accurate statement of the law. *See* ***Waalen***, 130 Wis. 2d at 22. The instruction requires that the defendant's ability to operate a motor vehicle is impaired and that the defendant's ability to control the car has been diminished. It states that not every person who has consumed an alcoholic beverage is "under the influence" as that term is used in the instruction.

¶26 This language clearly explains to the jury that a person who has consumed alcohol may not be so affected as to impair his or her ability to drive. Rather, a driver violates the law only when his or her ability to operate a vehicle has been impaired because of consumption of an alcoholic beverage in that the person is less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

By the Court.—Judgment affirmed.

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