COURT OF APPEALS
DECISION
DATED AND FILED

January 30, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1669 **Cir. Ct. No. 02-CV-476**

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

CITY OF SUN PRAIRIE,

PLAINTIFF-RESPONDENT,

V.

LANCE A. RODENKIRCH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: GERALD C. NICHOL, Judge. *Affirmed.*

¶1 LUNDSTEN, J.[1] Lance A. Rodenkirch appeals an order of the circuit court convicting him of operating a motor vehicle while under the influence

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

of intoxicants, in violation of a City of Sun Prairie ordinance adopting WIS. STAT. § 346.63(1)(a). Rodenkirch argues that (1) the evidence was insufficient to sustain his conviction and (2) expert testimony expressing the opinion that persons with a blood or breath alcohol content (BAC) greater than .08 are unfit to drive was erroneously admitted. We disagree and affirm.

Background

¶2 On the evening of July 13, 2001, James Perkins heard car tires screeching outside his house. Perkins looked out his bedroom window and observed a car go through a stop sign without stopping, proceed through the intersection into a ditch, and come to rest in a cornfield. Rodenkirch was the driver of the car. Perkins went outside and observed substantial front-end damage to the car, including leaking fluids. Perkins advised Rodenkirch not to drive, but Rodenkirch appeared anxious and he drove away.

¶3 Two officers responded to a report of the accident. En route to the scene, the officers observed Rodenkirch pushing his car off the side of the road. When the officers pulled up behind Rodenkirch's car, Rodenkirch reentered the driver's seat. One of the officers asked Rodenkirch to step out of his car. Rodenkirch complied and walked to the back of the car. One of the officers observed that Rodenkirch had an unsteady gait. In addition, as Rodenkirch walked alongside the vehicle, he placed his hand on the vehicle. When he arrived at the back of the car, Rodenkirch leaned against the back of the car while talking with the officer. Rodenkirch's speech was slurred and his eyes were bloodshot and

watery. One officer detected an odor of intoxicants on Rodenkirch's breath, and Rodenkirch admitted he had been drinking beer earlier.[2]

¶4 One of the officers administered three field sobriety tests to Rodenkirch. Rodenkirch's performance on the horizontal gaze nystagmus test suggested that he was intoxicated. Next, Rodenkirch counted to ten, but paused for about two seconds between the numbers six and seven. In addition, Rodenkirch recited the alphabet, but skipped the letters J and N. Rodenkirch refused to perform two other field sobriety tests, the one-leg-stand test and the walk-and-turn test, stating that he was physically unable to perform them due to a back surgery he had several years earlier. The officers arrested Rodenkirch for driving while under the influence of intoxicants. The parties stipulated that Rodenkirch had a BAC of .09%.

¶5 At a bench trial, a prosecution expert testified that, to a reasonable degree of scientific certainty, "persons that have blood or breath alcohol concentrations exceeding .08 are unfit and unable to safely operate a motor vehicle." Rodenkirch's fiancée and one of his friends, both of whom had seen him on the night of the accident, testified that Rodenkirch was not drunk. In addition, Rodenkirch's friend testified that the intersection at the scene of the accident was confusing, and Rodenkirch's fiancée testified that Rodenkirch was unfamiliar with that intersection. The parties stipulated that Rodenkirch was speeding prior to failing to stop at the stop sign. The trial court convicted Rodenkirch of driving while under the influence of an intoxicant.

[2] The other officer did not smell an odor of intoxicants on Rodenkirch until Rodenkirch was brought to the police department.

Discussion

Sufficiency of the Evidence

¶6 In order to convict Rodenkirch, the City had to present evidence that Rodenkirch was driving while under the influence of an intoxicant. "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 2668. Rodenkirch argues that the evidence presented to the trial court was insufficient to prove his guilt. "Our task as a reviewing court is limited to determining whether the evidence presented could have convinced a trier of fact, acting reasonably, that the appropriate burden of proof had been met." ***City of Milwaukee v. Wilson***, 96 Wis. 2d 11, 21, 291 N.W.2d 452 (1980). Municipal ordinance cases, such as this one, "involving acts which are also made criminal by statute must be proved by clear, satisfactory and convincing evidence." ***Id***. at 22 (footnote omitted). Moreover, "[w]hen more than one inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact." ***Mentzel v. City of Oshkosh***, 146 Wis. 2d 804, 808, 432 N.W.2d 609 (Ct. App. 1988).

¶7 Rodenkirch argues that the City did not present evidence of his driving conduct, and that his conviction cannot stand because the City did not present specific evidence of his state of impairment. However, the record refutes Rodenkirch's argument. Rodenkirch was involved in a one-car accident in which his speeding automobile failed to stop at a stop sign and slid through the intersection into a cornfield. Two officers observed that Rodenkirch exhibited slurred speech, bloodshot and watery eyes, had difficulty maintaining his balance,

and emitted an odor of intoxicants. Rodenkirch failed the horizontal gaze nystagmus test, and committed significant errors on both of the other sobriety tests administered to him. Expert testimony suggested that Rodenkirch's .09 BAC level demonstrated his impaired ability to drive. Thus, there was evidence regarding Rodenkirch's driving conduct and his level of impairment. This evidence amounts to clear, satisfactory, and convincing evidence that Rodenkirch consumed a sufficient amount of alcohol to cause him "to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle."

¶8 Rodenkirch attacks the evidence supporting his guilt, explaining that he leaned against the car because of his back condition, that the accident occurred at a confusing and unfamiliar intersection, and that two witnesses did not consider him intoxicated.[3] However, there was sufficient evidence to support Rodenkirch's conviction apart from the fact that he leaned against the back of his car. The trial court observed that the stop sign at the intersection was unobstructed, and aptly stated that Rodenkirch's unfamiliarity with the intersection should have made him more vigilant. Moreover, the trial court was free to weigh the credibility of the witnesses and the police officers, and consider their testimony. Nothing about Rodenkirch's contrary evidence demonstrated that his conviction was not supported by clear, satisfactory, and convincing evidence.

[3] Rodenkirch also argues that he presented testimony that he had a speech impediment. However, the record does not support this claim. His fiancée agreed that she had heard someone "say that [Rodenkirch had] a speech impediment." Such evidence is hardly uncontroverted and, in any event, the trial court is permitted to make credibility determinations. *See* ***State v. Daniels***, 117 Wis. 2d 9, 17, 343 N.W.2d 411 (Ct. App. 1983) ("An appellate court will only substitute its judgment for that of the trier of fact [regarding credibility determinations when the evidence is] inherently or patently incredible—that kind of evidence which conflicts with nature or with fully established or conceded facts." (footnote omitted)).

Whether Expert Testimony was Erroneously Admitted

¶9 Rodenkirch argues that the expert testimony, that all persons are unfit to drive when their BAC level exceeds .08, was erroneously admitted. "[E]xpert testimony is admissible in Wisconsin if relevant and will be excluded only if the testimony is superfluous or a waste of time." ***State v. Donner***, 192 Wis. 2d 305, 316, 531 N.W.2d 369 (Ct. App. 1995).

¶10 Rodenkirch does not dispute whether the expert was properly qualified; rather, Rodenkirch contends the expert testimony was irrelevant. "Relevancy is satisfied if the evidence assists the trier of fact in understanding the evidence or a fact in issue." ***Id***. at 317. "We review a circuit court's decision to admit or exclude evidence under an erroneous exercise of discretion standard." ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. "As with other discretionary determinations, this court will uphold a decision to admit or exclude evidence if the circuit court examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion." ***Id***.

¶11 The expert's opinion testimony was relevant. The City needed to show that Rodenkirch was driving while impaired by alcohol. The expert testified that "persons that have blood or breath alcohol concentrations exceeding .08 are unfit and unable to safely operate a motor vehicle." If true, the expert's opinion makes it more likely that Rodenkirch was impaired by alcohol.

¶12 Rodenkirch points out that our state legislature has decided that a BAC greater than .10% is presumptive evidence of intoxication. Therefore, he contends the expert's testimony is impermissible because it "usurps the job of both the court to find facts and the legislature to make law." We disagree. Expert

testimony such as that presented here neither prevents a fact finder from finding facts nor makes new law. A fact finder is free to accord such testimony great, little, or no weight. Furthermore, defendants are free to cross-examine such experts or present rebuttal experts.

¶13 An analogous situation arose in ***Donner***. In that drunk-driving case, an expert for the State was permitted to testify that "all persons are impaired to a varying degree at a BAC level of .09%." ***Donner***, 192 Wis. 2d at 317. In ***Donner***, this court found that this testimony was properly admitted. ***Id***. at 319. Rodenkirch argues that the expert's testimony in the instant case is different because she generalized that *all* people with Rodenkirch's BAC level are unfit to drive, rather than leaving open the possibility that Rodenkirch was fit to drive. Rodenkirch points to the following language in ***Donner***: "In addition, [the expert] acknowledged that the degree of impairment might vary with a person's drinking experience." ***Id***. In effect, Rodenkirch complains that the expert in this case reached a conclusion that only the jury is permitted to reach: that Rodenkirch was impaired.

¶14 We disagree with Rodenkirch's characterization of the evidence. The expert gave a general opinion encompassing all people, but did not give an opinion specific to Rodenkirch. More to the point, experts are routinely allowed to give opinions which, if believed, are dispositive on important factual issues in cases. For example, medical experts often give testimony that actions attributed to a defendant caused the death of another.

¶15 Although we might question the credibility of the City's expert, that is not our role. Rodenkirch has not demonstrated that the expert's testimony was improperly admitted.

By the Court.—Order affirmed.

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