

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 24, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP291

Cir. Ct. No. 2010TR3571

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

COUNTY OF OZAUKEE,

PLAINTIFF-RESPONDENT,

V.

DAVID W. BEREND,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County:
SANDY A. WILLIAMS, Judge. *Affirmed.*

¶1 REILLY, J.¹ David W. Berend appeals from a judgment of the circuit court convicting him of operating a motor vehicle with a prohibited alcohol

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

concentration (PAC). Berend argues that his conviction should be reversed because the County of Ozaukee failed to establish that Berend drove his car within three hours of taking a breathalyzer test, and thus the circuit court provided the jury with erroneous instructions. As the circuit court's jury instructions were appropriate, we affirm Berend's conviction.

BACKGROUND

¶2 At approximately 10:00 p.m. on June 5, 2010, Ozaukee County Patrol Deputy Patrick Frame testified that he received a call about a truck stuck in the mud. The truck was driven by Berend and was in a ditch ten to fifteen feet off the roadway. When Frame arrived, he encountered Berend and Ozaukee County Patrol Sergeant Elizabeth Vargo, who had already arrived on the scene. Vargo told Frame that Berend had admitted to drinking intoxicants and that Vargo wanted Frame to perform field sobriety tests on Berend. Frame also asked Berend if he had been drinking that evening, and Berend stated that he had "six to eight Southern Comforts and beer" between 5:00 p.m. and 8:00 p.m. After Berend performed the field sobriety tests, Frame arrested him for operating a motor vehicle while impaired. A subsequent breathalyzer test conducted at 11:07 p.m. revealed that Berend had a .09 percent blood alcohol level. Berend was subsequently charged with operating a motor vehicle while intoxicated (OWI) and with PAC.

¶3 WISCONSIN STAT. § 885.235(1g) states that breathalyzer test results are admissible in OWI and PAC proceedings provided that "the sample was taken within 3 hours after the event to be proved." Furthermore, the results are presumed accurate. *State v. Walstad*, 119 Wis. 2d 483, 528, 351 N.W.2d 469 (1984). As the test was performed at 11:07 p.m. and Berend stated that he stopped

drinking at 8:00 p.m., Berend argued that the jury must first determine whether the test was taken within three hours of Berend's driving the truck before the results of the test could be given a presumption of accuracy. Accordingly, Berend asked the circuit court to amend the jury instructions to indicate that the jury must first determine whether Berend drove his truck within three hours of taking the breathalyzer test. The court thus instructed the jury:

If you are satisfied that the test was taken within three hours of the operation and you are satisfied that there was .08 grams or more of alcohol in 210 liters of the defendant's breath at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged operation or that the defendant had a prohibited alcohol concentration at the time of the alleged operati[on] or both, but you are not required to do so.

¶4 Berend was acquitted on the OWI charge and convicted on the PAC charge. He appeals, arguing that as the evidence did not establish that he drove his truck within three hours of registering a .09 percent on the breathalyzer test, the circuit court erred in reading the amended jury instructions.

STANDARD OF REVIEW

¶5 A circuit court has broad discretion in deciding whether to give a requested jury instruction, and its decision will not be reversed absent an erroneous exercise of that discretion. *State v. Hubbard*, 2008 WI 92, ¶28, 313 Wis. 2d 1, 752 N.W.2d 839. Whether a circuit court's jury instruction provided a correct statement of law is a question of law that we review de novo. *State v. Lesik*, 2010 WI App 12, ¶6, 322 Wis. 2d 753, 780 N.W.2d 210 (Ct. App. 2009).

DISCUSSION

¶6 The circuit court read the jury a modified form of WIS JI—CRIMINAL 2668, which governs jury instructions for OWI and PAC charges. At the request of Berend, the court added the phrase “[i]f you are satisfied that the test was taken within three hours of operation,” before reading the remaining instructions on the presumption of accuracy of breathalyzer tests. Berend, however, argues that WIS JI—CRIMINAL 2668 should not have been read at all because the County did not prove that Berend drove within three hours of taking the breathalyzer test. Berend misses the point of the circuit court’s amended jury instructions. The circuit court recognized that there was a factual question as to when Berend stopped driving, so the court instructed the jury that it could only rely on the breathalyzer test results if it found that Berend drove within three hours of taking the test. Berend stated that he stopped drinking at 8:00 p.m. The test was taken at 11:07 p.m. Deputy Frame testified that he responded to a call about a truck stuck in the mud at approximately 10:00 p.m. It was entirely reasonable for the jury to find that Berend was driving after 8:07 p.m. As we will sustain a jury verdict if there is any credible evidence to support it, we affirm Berend’s conviction. *See Morden v. Continental AG*, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659.

By the Court.—Judgment affirmed.

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

