

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 19, 2012

Diane M. Fremgen
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. 2012AP1025
STATE OF WISCONSIN

Cir. Ct. No. 2011CT499

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT B. SONNENBERG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: DANIEL BISSETT, Judge. *Affirmed.*

¶1 REILLY, J.¹ Robert B. Sonnenberg appeals his conviction for first-offense operating a vehicle while under the influence of an intoxicant (OWI).

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

Sonnenberg admits he drank before he drove his motor vehicle. Sonnenberg also testified that he drank after his vehicle had a flat tire but before the police arrested him. Sonnenberg argues that, as he testified he was unable to recall precisely when he drove or how much he drank on the day he was arrested, and as the State's other witnesses could not provide precise information as to when and how much he drank before driving, the evidence was insufficient for a conviction. Sonnenberg's argument goes to the weight of the evidence, and we affirm his conviction.

BACKGROUND

¶2 Sonnenberg's testimony at his court trial was that he was uncertain about how many alcoholic drinks he consumed over the course of the day of his arrest, when he consumed those drinks, or when he stopped driving his car. He admitted that he had been consuming alcohol prior to and while driving that day. Sonnenberg testified that he did not know the exact time when he pulled his car over to work on a flat tire, but he thought it occurred sometime after five o'clock around dusk. The court took judicial notice that the sun set that night at 8:37 p.m. and civil twilight occurred at 9:13 p.m.

¶3 Sonnenberg testified that after his car developed a flat tire, he drank more alcohol on the side of the road and in a vehicle owned by friends who came to assist him. Sonnenberg did not recall how many drinks he consumed after he pulled his car over. Neither friend was able to confirm that Sonnenberg was drinking after his car was disabled. Sonnenberg's girlfriend, who was a passenger in his car, testified that she did not know whether Sonnenberg drank alcohol on the side of the road after his car developed a flat tire.

¶4 A Winnebago County sheriff's deputy arrived at Sonnenberg's stranded vehicle at 10:36 p.m. and observed that Sonnenberg's "eyes were very glassy, his speech was very slurred and his movements appeared to be very slow and methodical." Sonnenberg smelled strongly of intoxicants. The deputy did not see any beer cans, open coolers, or other evidence that Sonnenberg had been drinking on the side of the road. The deputy testified that Sonnenberg told him that he had not been drinking. Sonnenberg performed poorly on a number of field sobriety tests, and a blood test taken at 11:46 p.m. showed that he had a .184 blood alcohol content (BAC).

¶5 Based upon the testimony offered, the trial court determined that Sonnenberg was under the influence of intoxicants while operating his vehicle. While the court found the results of Sonnenberg's blood test were "significant ... [c]ertainly well in excess of the limits," it declined to find that he had been driving with a specific BAC or within three hours of when his blood was drawn. The court questioned Sonnenberg's credibility, given that no other witness supported his testimony that he had been drinking alcohol after he pulled his vehicle over to the side of the road. The court found Sonnenberg guilty of first-offense OWI.

STANDARD OF REVIEW

¶6 We review de novo whether the evidence presented at trial is sufficient to support the verdict. *State v. Booker*, 2006 WI 79, ¶12, 292 Wis. 2d 43, 717 N.W.2d 676. The test for determining sufficiency of the evidence is whether the evidence 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). We do not substitute our evaluation of the evidence for that of the trier of fact's, but look at whether the trier of fact's

evaluation of the evidence was reasonable, including any inferences drawn from the evidence. *See State v. Smith*, 2012 WI 91, ¶33, ___ Wis. 2d ___, 817 N.W.2d 410. We also look at whether the totality of the evidence supports the trier of fact's conclusion, not whether a single piece of evidence contradicts it. *Id.*, ¶36.

DISCUSSION

¶7 The elements necessary to establish that someone has driven under the influence of an intoxicant are (1) the defendant drove a motor vehicle on a highway and (2) the defendant was under the influence of an intoxicant at the time the defendant drove the motor vehicle. WIS JI-CRIMINAL 2668. Establishing that a person is under the influence of an intoxicant requires showing “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.” *Id.* Unlike a conviction for driving with a prohibited alcohol concentration, a conviction for operating under the influence does not require establishing that a person drove the vehicle with a certain BAC. *See id.* The State bears the burden of proving the elements of first-offense OWI with clear, satisfactory, and convincing evidence. *See* WIS. STAT. § 800.08(3).

¶8 As Sonnenberg did not contest that he had been driving his car on a highway on the day of his arrest, the only issue is whether the State proved with clear, satisfactory, and convincing evidence that he was under the influence of an intoxicant when he was driving. Sonnenberg argues that the State did not meet its burden because the State failed to present evidence of when precisely he drove as well as when he drank and how much alcohol he drank. Sonnenberg also asserts that testimony by his friends that he did not seem impaired when they picked him

up at his disabled vehicle supports his contention that he was not impaired while driving.

¶9 Our review of the record and the standard of review applied to these facts supports the trial court's conclusion that Sonnenberg was driving while under the influence of alcohol. Sonnenberg admitted he had been drinking both before and while driving his vehicle that day. Although Sonnenberg claimed he consumed alcohol after he stopped driving his vehicle, no other witness supported this self-serving testimony. Sonnenberg's inability to recall times of the day, durations of time, quantities of alcohol he consumed, and the strength of the alcohol he consumed all raised questions as to whether his testimony was credible. As the finder of fact, the court was entitled to weigh the evidence and discount Sonnenberg's account at trial that he drank after he stopped driving as not credible. *See State v. Paegelow*, 56 Wis. 2d 815, 821-22, 202 N.W.2d 916 (1973).

¶10 Sonnenberg argues that, as the trial court was unable to establish a specific BAC for when he was driving, the trial court did not have sufficient evidence to conclude that he was driving under the influence. Sonnenberg's argument misses the mark; Sonnenberg was not convicted of driving with a prohibited alcohol concentration, but rather of operating under the influence, which requires a finding that he was driving while impaired. Although the trial court placed import on the results of Sonnenberg's blood test, it did not rely on this evidence alone to determine that Sonnenberg was impaired when he was driving. Instead, the trial court relied on the deputy's observations of Sonnenberg's impairment before and during the field sobriety tests and on inferences drawn from the evidence that Sonnenberg, if he had been drinking at all, had consumed a small amount of alcohol after pulling his car over to the side of the road. Even though Sonnenberg's friends testified that they did not believe

him to be impaired, the totality of the evidence was sufficient for the trial court to conclude otherwise.

CONCLUSION

¶11 As the trial court reasonably found that the State provided clear, satisfactory, and convincing evidence that Sonnenberg drove while under the influence, we affirm Sonnenberg's conviction for first-offense OWI.

By the Court.—Judgment affirmed.

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

