COURT OF APPEALS
DECISION
DATED AND FILED

February 24, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1463 **Cir. Ct. No. 2013TR188**

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

COUNTY OF TAYLOR,

PLAINTIFF-RESPONDENT,

V.

DEAN T. WOYAK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Taylor County: ANN KNOX-BAUER, Judge. *Affirmed*.

¶1 HRUZ, J.[1] Dean Woyak appeals a judgment convicting him of operating a motor vehicle with a prohibited alcohol concentration (PAC), first

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

offense. Woyak argues the court erroneously instructed the jury at his trial. We disagree and affirm the judgment.

BACKGROUND

¶2 Woyak was charged with operating a motor vehicle while intoxicated (OWI) and PAC after being arrested on February 12, 2013. During Woyak's jury trial, Cody Hodgson testified that he was trimming trees for power line maintenance when he observed a gold-colored vehicle travel by him "awfully fast." Immediately thereafter, Hodgson drove in the same direction as the gold-colored vehicle and saw it had entered a ditch about a mile down the road. Hodgson approached and found Woyak lying on the passenger side floor of the vehicle. He observed empty beer cans on the floor of the vehicle and described the interior as smelling "[l]ike a brewery." After helping Woyak out of the truck and determining he was not significantly injured, Hodgson observed Woyak begin "kind of brushing all the beer cans out of the passenger side of the truck and stomping them into the snowbank, trying to hide them, I guess."

¶3 Hodgson then drove to retrieve his boss from approximately one-half mile away. As Hodgson left, he observed Woyak unsuccessfully trying to get his vehicle out of the ditch. Hodgson testified he returned with his boss three to five minutes later, only to find Woyak asleep in the vehicle. Once Woyak awoke, he immediately "started revving the truck again trying to get out [of the ditch]." Hodgson further testified that, in addition to inquiring during his initial contact with Woyak, his boss also asked Woyak whether he was injured. Hodgson testified Woyak did not mention any injuries, but "was saying he was fine. Just I have to get going, get me out of the ditch." Hodgson stated he and his boss were unable to get cellular phone reception, and so they drove to a farmhouse

approximately three quarters of a mile away and called the police. Hodgson and his boss returned to Woyak approximately fifteen minutes after they had left him, and they stayed nearby until police arrived.

¶4 Hodgson confirmed that, when present, he was able to observe Woyak constantly. Hodgson testified he never observed Woyak drinking any alcohol. In fact, during half of the wait for the police to arrive, Hodgson observed Woyak revving the truck's engine and rocking the vehicle forward and backward in an attempt to exit the ditch.

¶5 Taylor County sheriff's deputy Chad Kowalczyk testified it took him approximately forty minutes to reach Woyak from the time he was dispatched at 1:53 p.m. Kowalczyk testified that, upon making contact with Woyak, Woyak did not state that he was in pain or had been injured. Kowalczyk further testified that Woyak had difficulty maintaining his balance, Woyak's speech was slurred, and he detected a strong odor of intoxicants coming from Woyak. When Kowalczyk asked what happened, Woyak gave a confusing response as to the direction he had been traveling before admitting he did not know what direction he was heading. Kowalczyk questioned Woyak about how long he had been in the ditch, to which Woyak "[f]irst … stated that he had been there for ten minutes, and then he later stated he had been there for a half an hour." Kowalczyk asked Woyak how much he had to drink, and Woyak said he "had three or four beers in the last hour or so."

¶6 Woyak performed a series of standardized field sobriety tests under Kowalczyk's direction. Kowalczyk concluded Woyak was under the influence of intoxicants and was unable to safely drive based on: his observations of the accident scene; the strong odor of intoxicants; Woyak's confusion about the direction he had been driving and how long he had been at the scene; Woyak's

admission to drinking three to four beers; and Woyak's failed field sobriety tests. Kowalczyk transported Woyak to a hospital to perform a blood draw, to which Woyak consented. The test showed that Woyak's blood-alcohol concentration at the time was .222 grams per 100 milliliters.

¶7 Woyak testified that prior to the accident, he had consumed one twelve-ounce can of Milwaukee's Best Ice beer.[2] He stated he was searching for his cell phone and wallet when he lost control of his vehicle and drove into the ditch. Woyak testified the accident occurred at 12:46 p.m. and Kowalczyk arrived at 2:40 p.m. He described the severe damage to his vehicle, and stated he had been thrown into the passenger side of the vehicle upon the collision. Woyak testified that, after overcoming his initial shock, he began to feel pain primarily in in his head and face. Woyak then stated:

> After sitting at the site and being outdoors for what seemed for a very long period of time realizing the amount of damage that had occurred to the vehicle and literally shaking uncontrollably from a combination of cold and nerves, I felt somewhat of a helpless sense and my thought at the immediate time, even though it wasn't correct, was that consuming alcohol would provide a temporary warmth and relief from those conditions ….

He testified that he "did consume beer outside of the vehicle at the accident scene," and also drank "an unopened half pint of Seagram's 7" found in his center console while searching for his cell phone. Woyak maintained he was not impaired at the time of driving but, rather, the majority of alcohol consumption occurred while he was waiting for help after the accident.

[2] The State's expert witness testified on cross-examination that .03 grams per 100 milliliters would be the maximum alcohol concentration for a 180-pound male, such as Woyak, who had consumed one Milwaukee's Best Ice beer.

¶8 During the jury instruction conference, Woyak objected to the use of pattern jury instruction WIS JI—CRIMINAL 2668. Specifically, he objected to the use of its permissive presumption that, if a defendant's post-driving alcohol-concentration test is performed within three hours of driving and it shows a prohibited level, a jury may find from that fact alone the defendant was intoxicated at the time of driving. He argued the pattern instruction was inappropriate in this case, given his defense theory that the majority of his alcohol consumption occurred after the accident. According to Woyak, the pattern instruction would allow the jury to find him guilty even if all drinking occurred after he had crashed, as long as the blood-alcohol test was taken within three hours of driving. Woyak argued the court should modify WIS JI—CRIMINAL 2668 to comport with the "curve defense" from WIS JI—CRIMINAL 234.[3]

¶9 The circuit court agreed to modify some of the language to reflect the defense request that the jury make a specific finding as to whether the blood-alcohol test was performed within three hours. However, the court declined to include the language from WIS JI—CRIMINAL 234, stating it

[3] WISCONSIN JI—CRIMINAL 234 is titled "Blood-Alcohol Curve" and provides, in full:

> Evidence has been received that, within three hours after the defendant's alleged (driving) (operating) of a motor vehicle, a sample of the defendant's (breath) (blood) (urine) was taken. An analysis of the sample has also been received. This is relevant evidence that the defendant (had a prohibited alcohol concentration) (was under the influence) at the time of the alleged (driving) (operating). Evidence has also been received as to how the body absorbs and eliminates alcohol. You may consider the evidence regarding the analysis of the (breath) (blood) (urine) sample and the evidence of how the body absorbs and eliminates alcohol along with all the other evidence in the case, giving it the weight you believe it is entitled to receive.

> still prefer[red] the language that if there is a finding that the defendant's blood sample was taken within the three hours of operating a motor vehicle and satisfied that there was the .08 grams at the time the test was taken, that creates an ability or presumption by the jury that that was the level at the time of driving, but they don't have to make that finding. It says you're not required to do so.

¶10 The jury found Woyak guilty of operating a motor vehicle with a prohibited alcohol concentration. He now appeals.

STANDARD OF REVIEW

¶11 Circuit courts have broad discretion to determine what jury instructions to give, although they must exercise their discretion so as to "fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence." ***State v. Coleman***, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996) (quoting ***State v. Dix***, 86 Wis. 2d 474, 486, 273 N.W.2d 250 (1979)). On appeal, we review the instructions "as a whole in determining whether they were appropriate," and we "will not reverse unless the failure to include the requested instructions would be likely to prejudice the defendant." ***State v. Lenarchick***, 74 Wis. 2d 425, 455, 247 N.W.2d 80 (1976). "If the instructions of the court adequately cover the law applicable to the facts, this court will not find error in the refusal of special instructions even though the refused instructions themselves would not be erroneous." ***Id.***

DISCUSSION

¶12 Woyak argues the circuit court's instructions to the jury allowed it to find guilt even if the jury believed the consumption necessary to impair Woyak and raise his blood-alcohol concentration above the .08 prohibited alcohol concentration occurred after his operation of his vehicle. He stresses that his

entire defense was premised on his testimony that the majority of his alcohol consumption occurred after the accident and that, at the time of the accident, he had only consumed twelve ounces of beer. Woyak's argument fails because he misapprehends the nature of the instruction, and he ignores the jury's ability to find his testimony incredible, especially in light of the evidence as a whole.

¶13 As an initial matter, even Woyak admits WIS JI—CRIMINAL 2668 creates a *permissive* presumption. *See* ***State v. Vick***, 104 Wis. 2d 678, 694, 312 N.W.2d 489 (1981). A permissive presumption, as the County observes, "leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof." ***Ulster Cnty. Court v. Allen***, 442 U.S. 140, 157 (1979). Stated slightly differently, "[a] permissive presumption allows, but does not require, the trier of fact to infer the elemental fact from proof by the prosecutor of the basic [fact] and that places no burden of any kind on the defendant." ***Vick***, 104 Wis. 2d at 694-95 (citing ***Allen***, 442 U.S. at 157). WISCONSIN JI—CRIMINAL 2668 and the statute on which it is based, WIS. STAT. § 885.235(1g), merely provide the County with an evidentiary basis from which the jury *could* find a defendant was intoxicated at the time he or she operated the vehicle even without direct proof to that effect and without expert testimony. This evidentiary presumption is not improper merely because there also is evidence of an opportunity for alcohol consumption after the defendant's operation of a vehicle has concluded.

¶14 Accordingly, we examine the instruction given to determine whether it was appropriate and "fully and fairly inform[ed] the jury of the rules of law applicable to the case and … assist[ed] the jury in making a reasonable analysis of the evidence." ***Coleman***, 206 Wis. 2d at 212. The circuit court instructed the jury, in relevant part:

> The law states that the alcohol concentration in the defendant's blood sample taken within three hours of operating a motor vehicle is evidence of the defendant's alcohol concentration at the time of operating. If you find that the defendant's blood sample was taken within three hours of operating a motor vehicle and if you are satisfied that there was .08 grams or more of alcohol in 100 milliliters of the defendant's blood 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 operating or that the defendant had a prohibited alcohol concentration at the time of the alleged operating or both. *But you are not required to do so.*
>
> You, the jury, are here to decide this question based upon all of the evidence in this case and you should not find that the defendant had a prohibited alcohol concentration at the time of the alleged operating unless you are satisfied of that fact to a reasonable certainty by evidence that is clear, satisfactory and convincing.

(Emphasis added.)

¶15 Woyak's assertion that this jury instruction "rendered meaningless the fact that Mr. Woyak claimed he consumed the majority of alcohol post-driving" is false. The jury was not required to find Woyak was intoxicated at the time he last operated his vehicle because he was intoxicated at the time of testing. Rather, the jury was simply told it could find Woyak was intoxicated at the time he operated the vehicle even without direct proof to that effect. Meanwhile, the jury was specifically instructed that it had to be satisfied to a reasonable certainty, by evidence that was clear, satisfactory, and convincing, that Woyak had a prohibited alcohol concentration at the time of the alleged driving. To do so, the jury would necessarily have to weigh all the evidence, including Woyak's testimony. In this context, the circuit court's instruction did not "render meaningless" Woyak's defense predicated solely on his testimony.

¶16 In ***Vick***, our supreme court determined a circuit court had not erred when it issued a similar jury instruction with a permissive presumption regarding the use of blood-alcohol testing as evidence. ***Vick***, 104 Wis. 2d at 695. While the underlying facts in ***Vick*** differ from this case, in both instances the defendant argued that, even though he was intoxicated at the time of testing, he was not intoxicated at the time he was operating the vehicle. After analyzing the instruction, which notably also used the word "may," the ***Vick*** court stated, "No reasonable juror would believe that he must, as a matter of law, find that defendant was intoxicated while operating his vehicle if the juror found defendant had a certain blood alcohol level at the time of testing." ***Id.*** at 694. It held "the presumed fact that the defendant was under the influence of an intoxicant at the time of driving 'more likely than not' flow[ed] from the proven fact of intoxication at time of testing." ***Id.*** at 695.

¶17 In this case, the jury was well aware of Woyak's defense that his intoxication occurred only after the accident.[4] The jury heard Woyak's testimony that he began to feel pain after the initial shock of the accident wore off, so to keep warm and dull the pain, he consumed alcohol he found in his vehicle. Woyak testified he consumed beer while standing outside his vehicle after the accident. He testified that in addition to the beer, he consumed half a pint of whiskey he found in his vehicle while searching for his cell phone. Woyak described tossing

[4] Woyak's appellate briefs repeatedly state that his theory of defense was that the majority of his alcohol consumption occurred after he operated the vehicle. As explained, Woyak's testimony amplified his theory. The opening and closing statements at trial were not transcribed and therefore are not part of the appellate record. Presumably, however, Woyak's counsel's statements would have addressed Woyak's theory of defense. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993) (when record on appeal is incomplete in connection with an issue raised by appellant, this court assumes that the missing material supports the circuit court's ruling).

the crushed cans and the whiskey bottle in front of the vehicle after drinking their contents. Importantly, he denied drinking anything other than one can of beer prior to the accident, and the State's expert testified such consumption would have led to a maximum alcohol concentration for Woyak well below the legal limit at the time he operated the vehicle.

¶18 The jury had the opportunity to weigh Woyak's credibility and to consider his testimony, as well as the evidence he offered of what his blood-alcohol concentration would have been after consuming twelve ounces of beer. The jury obviously did not accept his account of the events regarding his consumption prior to the accident, his consumption after the accident, or both. *See* ***O'Connell v. Schrader***, 145 Wis. 2d 554, 557, 427 N.W.2d 152 (Ct. App. 1988) (the jury is ultimate arbiter of credibility). The fact that the jury did not subscribe to his version of events does not equate to error by the circuit court in exercising its discretion to issue the modified jury instructions—instructions involving an evidentiary presumption the State had a statutory right to rely upon if the jury rejected Woyak's testimony regarding his alcohol consumption. *See* WIS. STAT. § 885.235(1g).

¶19 Further, Woyak's declaration that "the evidence was clear that there was post-driving consumption" is a fallacy. As recounted above, there was substantial evidence supporting the County's contrasting account of the timing of Woyak's consumption. This evidence—although disputed, at least in part, by Woyak—could allow a reasonable jury to draw the permissive presumption, after examining all the facts before it, that it was more likely than not that the defendant was intoxicated at the time of driving because of the proven fact that he was intoxicated at the time of testing. *See* ***Vick***, 104 Wis. 2d at 695-96. In all, the jury

was neither instructed nor otherwise obligated to find Woyak guilty even if they believed his version of events.

¶20 Finally, Woyak asserts in a conclusory fashion that because he put forth a valid theory of defense, he was entitled to have the jury hear the instruction in WIS JI—CRIMINAL 234.[5] We reject his undeveloped argument, *see* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992), and reiterate the wide discretion a circuit court has in issuing jury instructions. We conclude the court's jury instructions were appropriate and it was not error to refuse Woyak's requests.

By the Court.—Judgment affirmed.

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

[5] As previously stated, jury instructions are appropriate when they "cover the law applicable to the facts," *see* ***State v. Lenarchick***, 74 Wis. 2d 425, 455, 247 N.W.2d 80 (1976), and "assist the jury in making a reasonable analysis of the evidence," *see* ***State v. Coleman***, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996). On appeal, Woyak argues he was entitled to the WIS JI—CRIMINAL 234 instruction, yet he fails to discuss how that instruction would have assisted the jury in reasonably analyzing the evidence presented at trial of his alleged post-driving consumption. Woyak focused his appeal on his belief that the jury instruction given allowed the jury to find him guilty even if they believed his version of events, and in so doing, he failed to develop an argument beyond a bare assertion of entitlement to the instruction of his preference. This court does not consider undeveloped arguments, *see* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992), and we decline to abandon our neutrality to develop Woyak's undeveloped argument for him, *see* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995).