COURT OF APPEALS
DECISION
DATED AND FILED

August 24, 2016

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 Nos. 2015AP2138
2015AP2139

Cir. Ct. Nos. 2014TR3730
2014TR4059

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

NO. 2015AP2138
IN RE THE REFUSAL OF SANA GUTIERREZ:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SANA GUTIERREZ,

DEFENDANT-APPELLANT.

NO. 2015AP2139
WAUKESHA COUNTY,

PLAINTIFF-RESPONDENT,

V.

SANA GUTIERREZ,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Waukesha County: MICHAEL J. APRAHAMIAN, Judge. *Affirmed.*

¶1 GUNDRUM, J.[1] Sana Gutierrez appeals from judgments revoking her driver's license pursuant to WIS. STAT. § 343.305 for refusing to provide a requested breath sample following her arrest and convicting her of operating a motor vehicle while intoxicated, first offense, under WIS. STAT. § 346.63(1)(a).[2] She argues that the arresting officer did not sufficiently convey to her the implied consent warnings related to § 343.305 and that the evidence was insufficient to show she was intoxicated when she operated the vehicle. For the following reasons, we affirm.

Background

¶2 The arresting law enforcement officer—a Waukesha County sheriff's deputy—and Gutierrez were the only witnesses to testify at the court trial related to this case. Their relevant testimony is as follows.

¶3 On direct examination by the State,[3] the deputy testified that around 2:00 a.m. on June 27, 2014, he observed a vehicle, driven by Gutierrez, traveling

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

[2] Pursuant to this court's order dated April 18, 2016, these appeals are consolidated. *See* WIS. STAT. RULE 809.10(3). Gutierrez was also convicted of operating without her headlights illuminated. Because she does not challenge this conviction on appeal, we address it no further.

[3] We acknowledge that the State is prosecuting the revocation of Gutierrez's driver's license and Waukesha County her violation under WIS. STAT. § 346.63(1)(a). For simplicity, we will refer to both respondents as the State.

westbound on I-94 with no headlights or taillights illuminated. He followed Gutierrez, who exited onto a city street. When attempting to move from a "left turn only" lane to a lane continuing straight, Gutierrez went over a curb with both left tires.

¶4 The deputy stopped Gutierrez and made contact with her. He detected a moderate odor of intoxicants, and Gutierrez informed the deputy that she had consumed one glass of wine. She asked "numerous times" for "professional courtesy" due to her brother being a City of Milwaukee police officer. The deputy administered three field sobriety tests to Gutierrez, which she failed.[4] In administering those tests, the deputy first explained and demonstrated the tests, and when the deputy asked Gutierrez if she had any questions regarding the tests, she had none. She responded to the deputy that she had no physical disabilities that would prevent her from performing the tests. Following the tests, the deputy concluded Gutierrez was impaired by intoxicants and placed her under arrest.

¶5 On cross-examination, the deputy confirmed he observed no "bad driving" by Gutierrez other than her driving over the curb. Gutierrez had no problems producing her driver's license or proof of insurance, the deputy did not observe Gutierrez to have glassy eyes or to be slurring her words, and she did not

[4] Gutierrez admits on appeal that she failed the field sobriety tests. We note the deputy observed four out of six clues of impairment on the horizontal gaze nystagmus test and two clues on the walk-and-turn test. On the one-legged stand test, Gutierrez "was unable to keep her foot elevated putting her foot down three times during the test. She used her arms for balance and she was hopping."

use her vehicle to maintain her balance. Gutierrez followed the deputy's directions at the time.

¶6 Once Gutierrez was handcuffed, the deputy placed her in the back of the squad car, at which time she requested her "blood sugar kit" for her diabetes, which was in her vehicle. The deputy denied Gutierrez's request. Gutierrez made an "urgent request to go to the bathroom," and when they arrived at the sheriff's department, the deputy allowed her to use the bathroom. Upon Gutierrez's return to the back of the squad car, the deputy read to her the Informing the Accused Form, pursuant to the implied consent law. After reading the form, the deputy requested that Gutierrez submit to the breath test. She refused, without providing any medical reason for why she could not submit to the test. The deputy confirmed that at the time he asked Gutierrez to submit to the test, she was not having "any type of shortness of breath or anything" that the deputy could recall.

¶7 Gutierrez requested to change her insulin pump, which the deputy "did not feel comfortable" allowing her to do. She informed the deputy her "heart was racing, [and] she felt hot," and the deputy summoned an ambulance. The emergency medical technicians (EMTs) who arrived evaluated Gutierrez and reported that her blood sugar level was "303," which the deputy realized was "high" only because of what the EMTs told him. The EMTs permitted Gutierrez to change her insulin pump. The deputy never thought to reread the Informing the Accused Form to Gutierrez even though it would not have been difficult for him to do so.

¶8 On redirect examination, the deputy confirmed that Gutierrez did not indicate any symptoms such as "heart racing or sweating or anything like that" before he read the Informing the Accused Form to her or while he read it to her;

rather, she informed the deputy of her symptoms "after," when he was "filling out other paperwork." When the deputy asked Gutierrez if she would submit to the breath test, she seemed to be coherent and to understand what he was saying.

¶9 After the State rested, Gutierrez testified on her own behalf. She stated she is a "Type 1 diabetic" with a "target range" for her blood sugar "between 70 and 120." Regarding her blood sugar level the morning she was arrested, Gutierrez stated:

> For me having a blood sugar of 303 means the first symptoms I'll start to notice are extreme thirst and then along with that frequent urination and then if prolonged my heart, my heart beats a little bit faster. I get sweaty and then one of the more progressive symptoms confusion, the inability to concentrate and if prolonged even further nausea.

She stated that she was driving without the lights illuminated on the vehicle because she had earlier turned off the "automatic light feature" and "just did not think to go switch it back on."

¶10 Gutierrez testified that when she was in the back of the squad car at the sheriff's department, she started to feel "confused and very disoriented and at that moment before I was read anything I remember telling the officer I feel confused and disoriented." She agreed to have an ambulance called. She testified that the deputy read the Informing the Accused Form to her "after" the deputy called the ambulance but before it arrived, confirming he read the form "after" she had symptoms. She added that he read the form "after I had said very clearly that I felt confused, disoriented, hot, light-headed." When asked by her counsel if she understood what the deputy was indicating to her when he read the form to her, Gutierrez stated: "I knew he was reading something but I couldn't comprehend

what he was saying. All I could really think about was how I was feeling, how hot I was, how fast my heart was beating. And I really didn't understand anything that he said." She then testified that after the deputy read the form to her, he asked her if she had any questions and she responded by asking if she could call an attorney or make a phone call. She added, "I remember him asking me … if I had any questions. He didn't ask me if I understood." The following exchange then occurred between Gutierrez and her counsel:

> [Counsel:] But reading this, given your state, obviously you can remember that he asked that but you had a hard time comprehending what it was that he was [asking], why is that?
>
> [Gutierrez:] So I know looking back I know because of my elevated blood sugar I wasn't able to comprehend what he was saying, you know…. I know that I'm in the back of a police car. I know that I'm being arrested and I feel like, you know, what most normal people know to do is to ask for a lawyer and a phone call and that's what I had done.

¶11 Gutierrez testified that the deputy never took her into a room with "a machine to blow into" or asked her a second time if she would be willing to submit to a breath test. She then testified as follows:

> [Counsel:] My final question to you is did you understand what the officer was telling you when he read that sheet of paper to you, the Informing the Accused?
>
> [Gutierrez:] I did not. I was ill. I couldn't focus or concentrate. My heart was beating very fast. I felt light headed so I was not able to put those pieces together to understand what he was saying.
>
> [Counsel:] Do you think you would have been able to understand that after you had received your insulin?
>
> [Gutierrez:] Absolutely. If about 20 to 30 minutes had gone by, I think I would have been in a better state to comprehend what was happening and to understand what he had read to me.

¶12 On cross-examination, Gutierrez acknowledged asking the deputy for a "professional courtesy," due to her brother being a police officer; but she stated she stopped asking for this courtesy once the officer began the field sobriety tests. When asked: "And when you indicate professional courtesy, you mean to just let you go and not investigate you for OWI?" She responded: "Or call someone to come and get me." The prosecutor also questioned Gutierrez about medical records from an appointment with her doctor two months earlier. Gutierrez acknowledged that she indicated to her doctor that "on average [she] consume[s] six alcoholic drinks per day, two days per week."

¶13 The court questioned Gutierrez regarding the effect of alcohol consumption on her blood sugar. Gutierrez responded in part that "what happens when you drink alcohol from a diabetic standpoint is if you drink too far and you forget to give yourself insulin, that's really why Type 1 diabetes and drinking isn't recommended." Testimony continued:

> [Court:] Generally speaking the consumption of alcohol increases your blood sugar, true?
>
> [Gutierrez:] Depending on the type of alcohol.
>
> [Court:] Generally speaking.
>
> [Gutierrez:] Generally speaking if you're drinking beer, yes. If you're drinking liquor probably not.
>
> [Court:] Wine?
>
> [Gutierrez:] Because liquor—
>
> [Court:] Wine?
>
> [Gutierrez:] Wine—wine falls in the same category probably as what type of wine. Is it a sweet wine, is it a dry wine because it's all about sugar. It's sugar.
>
> [Court:] So the more sugar, the more it will increase your blood sugar?

> [Gutierrez:] Correct.

¶14 The court found the deputy to be credible in his testimony and Gutierrez to be credible with regard to some portions of her testimony and incredible with regard to other portions. The court specifically found the deputy credible with regard to his testimony related to informing Gutierrez pursuant to the implied consent law. The court found that Gutierrez's "memory of the incident [around the time when she refused the breath test] was incredibly lucid." The court continued:

> [F]or her to claim that she was not coherent and couldn't possibly understand what was going on with respect to the Informing the Accused I found to be incredible.
>
> I think she did understand. She asked questions such as may I contact a lawyer, can I make a phone call clearly in response to the Informing the Accused and I believe she did understand it and she refused to provide a chemical test as required….

¶15 As to whether Gutierrez had been OWI, the circuit court found she had been operating her vehicle without her headlights on, drove over a curb, failed "at least in some aspects each one of [the field sobriety tests]," refused to submit to the breath test, admitted drinking, and smelled of alcohol. The court added that

> she is in the early stages of some diabetic reaction with her blood sugar potentially but we have no specific evidence of when that started to occur given the nature or the various field sobriety tests and I do think it is consistent with the fact that she did have alcohol, that her blood sugar would potentially go to a 303.

The court found Gutierrez guilty of OWI and found that she unlawfully refused to submit to a breath alcohol test under Wisconsin's implied consent law. Gutierrez appeals.

Discussion

Reasonableness of Implied Consent Warnings

¶16 Gutierrez concedes the deputy read to her the implied consent warnings required by WIS. STAT. § 343.305(4). She asserts, however, that the deputy's reading of the warnings to her in the squad car was not reasonable because she was "under medical duress" at that time due to her diabetic condition.[5] We conclude the deputy reasonably conveyed the warnings to Gutierrez.

¶17 WISCONSIN STAT. § 343.305(2) states in relevant part:

> Any person who … drives or operates a motor vehicle … is deemed to have given consent to one or more tests of his or her breath … for the purpose of determining the presence or quantity in his or her … breath, of alcohol … when requested to do so by a law enforcement officer [upon arrest for a violation of WIS. STAT. § 346.63(1)].

A person's refusal to submit to a chemical test properly results in the revocation of the person's driving privileges if, among other things, the officer used reasonable means to convey the implied consent warnings of § 343.305(4) to him/her. ***State v. Piddington***, 2001 WI 24, ¶¶22-23, 241 Wis. 2d 754, 623 N.W.2d 528. Whether the officer used reasonable means is a question of law we review independently; however, a circuit court's findings of evidentiary or historical fact related to the question will not be overturned unless clearly erroneous. ***State v. Begicevic***, 2004 WI App 57, ¶11, 270 Wis. 2d 675, 678 N.W.2d 293. The question turns not upon

[5] Gutierrez claims the deputy should have read the Informing the Accused Form to her "back at the station, where the breath test will occur," instead of "in the squad car." However, the undisputed testimony of both the deputy and Gutierrez was that the deputy did read the form to her in the squad car, but did so "back at the station," specifically at the "Sheriff's station," as Gutierrez referred to it.

whether a suspect in fact understood the warnings, but upon whether the officer used reasonable methods to convey them based upon the circumstances at the time. ***Id.***, ¶¶15-16 (quoting ***Piddington***, 241 Wis. 2d 754, ¶¶23, 32 n.19). The State bears the burden of proving, by a preponderance of the evidence, that the methods used by an officer would "reasonably convey the implied consent warnings." ***Piddington***, 241 Wis. 2d 754, ¶22.

¶18 On appeal, Gutierrez discusses both ***Piddington*** and ***Begicevic***, looking primarily to ***Begicevic*** for support. Both cases, however, are markedly different from this case, in that in both the question was whether the officer used reasonable means to convey the implied consent warnings to an apprehended individual for whom standard spoken English was not the individual's primary language. ***Begicevic***, 270 Wis. 2d 675, ¶¶11-12, 17 (primary language was Croatian and spoke some German and some English) (citing ***Piddington***, 241 Wis. 2d 754, ¶¶1, 2, 18 (sign language was primary means of communication for "severely deaf" defendant)). The case before us presents no such issue. There is no question Gutierrez could understand standard spoken English and the deputy used this method to convey the implied consent warnings to her. Nevertheless, Gutierrez argues that the question presented is "whether the officer's attempts to convey the warnings were reasonable in light of [her] undisputed medical problems." She insists the deputy should have read the warnings to her a second time, after her diabetic condition had been treated.

¶19 It is undisputed Gutierrez suffered from high blood sugar sometime during her arrest. The deputy testified, however, that at the time he read the Informing the Accused Form to Gutierrez and asked her to submit to the breath test, she did not indicate she was experiencing any symptoms such as "heart racing

or sweating or anything like that," but that she informed him of her symptoms "after," when he "was filling out other paperwork." The deputy also testified that when he asked Gutierrez if she would submit to the breath test she seemed to be coherent and to understand what he was saying; and the circuit court found that she did in fact understand what the deputy read to her, specifically pointing out that after the deputy read her the warnings, Gutierrez asked if she could contact a lawyer or make a phone call. Because the court found the deputy's testimony credible and Gutierrez's testimony that she did not understand the warnings incredible, i.e., not believable, and these credibility findings are supported by the evidence,[6] we accept the deputy's testimony as true. *See* ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979) ("[W]hen the trial judge acts as the finder of fact, and where there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses."). Because the deputy obviously observed that Gutierrez could understand standard spoken English, observed her to be in sufficient condition to understand the warnings at the time he conveyed them to her, and, relatedly, observed no objective indication—due to her diabetic condition or otherwise—that she might not be able to understand them, we conclude that the method the deputy used to convey the warnings to her—reading them to her a single time, in English—was reasonable.

[6] As the circuit court noted, the fact that Gutierrez asked if she could contact a lawyer or make a phone call after the deputy read the warnings to her indicated she understood what the deputy had communicated and significantly undermined the credibility of her testimony that she "couldn't comprehend what [the deputy] was saying" and "really didn't understand anything that he said."

¶20 The deputy "need[ed] only ensure that the implied consent warnings [were] reasonably conveyed under the circumstances facing [him] at the time of the arrest." *See* ***Piddington***, 241 Wis. 2d 754, ¶43. He did that.

Sufficiency of the Evidence

¶21 Gutierrez also contends the evidence presented at the court trial was insufficient to convict her of OWI. We disagree.

¶22 On a challenge to the sufficiency of the evidence, we may not reverse a conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found" that the appropriate burden of proof had been met. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). In this case, the State was required to prove this first-offense violation of WIS. STAT. § 346.63(1)(a) with evidence that was "clear, satisfactory and convincing." *See* WIS. STAT. § 345.45. Whether the evidence presented at trial ultimately was sufficient to support the conviction is a question of law we review de novo. ***State v. Booker***, 2006 WI 79, ¶12, 292 Wis. 2d 43, 717 N.W.2d 676.

¶23 Gutierrez claims that evidence presented at the trial "significantly mitigates the inference of guilt." Specifically, she states that the deputy observed "no other erratic driving" ("other" than her driving over the curb with both left tires); she told the deputy she had only one glass of wine; the odor of alcohol was "not 'strong'"; she "had to perform the field sobriety tests in her bare feet"; "she was suffering genuine medical distress when she 'refused' the breath test"; she exhibited no problems with her dexterity or balance (other than in failing the field

sobriety tests); her speech was not slurred; she was cooperative; and she did not have glassy eyes. On appeal, however, we are directed to look to the record for evidence supporting the verdict, *see* ***Poellinger***, 153 Wis. 2d at 501, and this record has plenty.[7]

¶24 The undisputed facts from the trial on the question of whether Gutierrez was intoxicated at the time she operated her vehicle are: (1) she was operating her vehicle on the freeway without her headlights on, (2) it was 2:00 a.m., (3) she drove over a curb with two tires, (4) she emitted a moderate odor of and admitted to consuming alcohol, (5) she failed her field sobriety tests, (6) she refused to submit to the breath test, and (7) she requested the "professional courtesy" of the deputy not pursuing her for OWI because her brother was a police officer. To begin, the time of day when all this transpired is a time more often associated with intoxicated driving. *See* ***State v. Post***, 2007 WI 60, ¶36, 301 Wis. 2d 1, 733 N.W.2d 634 (poor driving around "bar time" lends to the belief that

[7] Gutierrez states, "It is also undisputed that [she] was suffering from extraordinarily high blood sugar levels at the time that the officer made his observations of her." Because Gutierrez does not develop an argument on this point, we do not consider it. *See* ***ABKA Ltd. P'ship v. Board of Review***, 231 Wis. 2d 328, 349 n.9, 603 N.W.2d 217 (1999) (we do not address undeveloped arguments). That said, as detailed in ¶24, *supra*, there was ample evidence presented at the trial from which the circuit court could conclude she was intoxicated at the time she operated the vehicle. Furthermore, the circuit court stated:

> I think the driving itself is evidence of some impairment potentially compounded by the fact that she is in the early stages of some diabetic reaction with her blood sugar potentially but we have no specific evidence of when that started to occur given the nature or the various field sobriety tests and I do think it is consistent with the fact that she did have alcohol, that her blood sugar would potentially go to a 303.

Thus, the court found that Gutierrez's high blood sugar level was evidence of her alcohol consumption. This finding is supported by Gutierrez's own testimony, as shown in ¶13, *supra*, above.

operator is driving while intoxicated). Second, we believe it highly unlikely a sober driver would have the evidentiary combination of smelling of alcohol, driving on an interstate freeway at 2:00 a.m. without headlights on, driving over a curb, and failing field sobriety tests. Additionally, Gutierrez's refusal to submit to a breath test and request for a "professional courtesy" both indicate her consciousness of her guilt—that she knew she had consumed an amount of alcohol that might make her operation of the vehicle illegal and she did not want the deputy to discover and pursue this. These facts strongly support the circuit court's determination that Gutierrez was intoxicated at the time she operated her vehicle and we conclude the evidence was sufficient to support the circuit court's finding of guilt.

¶25 For the foregoing reasons, we affirm.

By the Court.—Judgments affirmed.

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