COURT OF APPEALS
DECISION
DATED AND FILED

December 14, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP83-CR **Cir. Ct. No. 2014CT1987**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID ROBERT BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: MICHAEL J. APRAHAMIAN, Judge. *Affirmed.*

¶1 HAGEDORN, J.[1] David Robert Brown appeals from a judgment convicting him of operating a motor vehicle while intoxicated (OWI). He claims

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

the circuit court erred by giving the standard jury instruction that allowed the jury to infer that Brown was intoxicated based on his breath test result. We disagree and affirm.

Background

¶2 At around 11:00 p.m. on December 23, 2014, Deputy Sandra Vick spotted a white van parked on the side of the road in Waukesha County. She stopped her squad car behind the van to investigate and observed Brown walk out of a ditch on the side of the road. Vick also saw an adult passenger and a child in the van. Vick approached Brown, and he told her that he was traveling back from a family reunion in Delafield. Although Vick did not immediately observe any visible signs of impairment, she smelled alcohol on Brown's breath. Following questioning, Brown admitted that he had two "Sam Adams" beers and "a shot" earlier that evening. Vick elected to administer three field sobriety tests—horizontal gaze nystagmus (HGN), walk-and-turn, and one-leg-stand—"to make sure [Brown] was not too impaired to be driving."

¶3 At trial, Vick testified that Brown exhibited horizontal nystagmus prior to forty-five degrees and distinct and sustained nystagmus at maximum deviation, both signs of intoxication.[2] Brown also failed the walk-and-turn test by missing several heel-to-toe steps, raising his arms for balance, failing to turn around as instructed, failing to walk in a straight line, and miscounting his steps. Brown raised his arms for balance again during the one-leg-stand test, and Vick reported that he "started hopping on one foot." According to the complaint,

[2] Nystagmus refers to a lack of smooth pursuit, or "jerkiness," in a person's eyes caused by intoxication.

Brown also completed a preliminary breath test that indicated his blood alcohol concentration was .10g/210L. Based on these tests,[3] Vick concluded that Brown was intoxicated and arrested him.

¶4 During the sobriety tests and while on the way to the station, Brown repeatedly stated he was a colonel in the Air Force and "asked if there was a way [to] work something out." Vick interpreted this as a request that he not be charged with OWI. After being told that was not an option, Brown was quiet until he arrived at the station whereupon he agreed to submit to a breath test. At the station, Brown changed his story about how much alcohol he had to "a couple shots of whiskey." The breath test was completed at 1:10 a.m. and showed a result of .11g/210L, above the legal limit of .08g/210L. *See* WIS. STAT. §§ 340.01(1v)(b), (46m)(a) & 346.63(1)(b). The State charged Brown with operating while intoxicated and operating with a prohibited alcohol concentration, both first offenses.[4]

¶5 At trial, the State presented three witnesses, including Vick, and introduced the results of Brown's breath test.[5] In rebuttal, Brown presented the testimony of James Oehldrich—a forensic toxicology consultant who had previously worked for the State Crime Lab. He testified that a person goes through three stages of processing alcohol: absorption, plateau, and elimination.

[3] Brown complains that the tests were not administered correctly. We discuss this as relevant in more detail below.

[4] The complaint also alleged the presence of a minor child in the vehicle as a penalty enhancer for both charges. *See* WIS. STAT. §§ 343.30(1q)(b)4m., 346.65(2)(f)1.

[5] Unlike preliminary breath tests—which are inadmissible per WIS. STAT. § 343.303—the results of a breath test conducted in accordance with WIS. STAT. § 343.305 are admissible in an OWI prosecution. Sec. 343.305(5)(d).

These stages can be represented on a graph as a curve with the alcohol content rising until it peaks and then falling as the body eliminates the alcohol. Thus, a person who is in the process of absorbing alcohol may be under the legal limit while driving but subsequently exceed the limit when a test is taken. This phenomenon—referred to as the "alcohol curve"—formed the basis of Brown's defense.

¶6 Oehldrich prepared a report estimating Brown's alcohol concentration at 11:10 p.m.—the estimated time of driving per the police report. In doing so, Oehldrich asked Brown about his height, weight, age, what he had to drink, and when he consumed the alcohol. In response, Brown again changed his story on how much alcohol he had to drink. He told Oehldrich he consumed a "tall Canadian Club with … club soda" at 10:00 p.m. and three 2-ounce shots at 10:20 p.m., 10:35 p.m., and 10:50 p.m. Based on this information and the State's breath test, Oehldrich estimated that Brown's blood alcohol concentration at 11:10 p.m. was .078g/210L.[6] He did, however, admit that a mere two minutes later Brown's blood alcohol level would have risen to the .08 legal limit. Oehldrich also conceded that if any of the information Brown gave him was not completely accurate, he could not "say that he would be below a .08" at 11:10 p.m.

¶7 Based on Oehldrich's testimony, Brown requested that the jury be instructed on the alcohol curve. He also argued that the part of the standard jury instruction informing the jury they could find intoxication based on the breath test

[6] The intoxication report and police report estimated that Brown had been driving at approximately 11:10 p.m.

alone was not relevant in light of Oehldrich's testimony on the alcohol curve.[7] *See* WIS JI—CRIMINAL 2669. The court gave the alcohol curve instruction, but also gave the standard jury instruction. The relevant portion of the court's instruction was as follows:

> The law states that the alcohol concentration in a defendant's breath sample taken within three hours of operating a motor vehicle is evidence of the defendant's alcohol concentration at the time of the operating.
>
> If you are satisfied beyond a reasonable doubt 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 operating … but you are not required to do so.
>
> 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 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.

The jury convicted Brown on both counts, though the PAC charge was dismissed by operation of law. Brown was sentenced and now appeals.

Discussion

¶8 The circuit court is tasked with fully and fairly informing the jury of the applicable law. ***State v. Ferguson***, 2009 WI 50, ¶9, 317 Wis. 2d 586, 767

[7] It does not appear that Brown argued—as he does here—that giving the standard intoxication instruction was unconstitutional and violated WIS. STAT. § 903.03. Although we would like to see a more clear and developed objection, Brown did generally contend that the instruction was inappropriate in this case. Thus, we will address the merits of his constitutional and statutory arguments. *See* ***State v. Freymiller***, 2007 WI App 6, ¶17, 298 Wis. 2d 333, 727 N.W.2d 334 ("The waiver rule, like the invited error doctrine, is a rule of judicial administration, and, we may, in our discretion, decide to disregard a waiver and address the merits of an unpreserved issue.").

N.W.2d 187. It has broad latitude in completing this task, and we will not disturb the court's decision absent an erroneous exercise of discretion. ***Id.*** However, whether the jury instructions are "an accurate statement of the law applicable to the facts of a given case" is a question of law we review de novo. ***State v. Anderson***, 2014 WI 93, ¶16, 357 Wis. 2d 337, 851 N.W.2d 760 (citation omitted). We will affirm the circuit court as long as the "overall meaning communicated by the instructions was a correct statement of the law." ***Id.*** (citation omitted).

¶9 A jury instruction creates a permissive presumption or inference if it allows, but does not require, the jury to find an elemental fact upon proof of some basic fact. ***State v. Vick***, 104 Wis. 2d 678, 693, 312 N.W.2d 489 (1981). That is what the instruction here did. The breath test result is the basic fact. If the jury finds beyond a reasonable doubt that the defendant had a result of .08 or higher at the time of the test, then the jury may, but is not required to, conclude the elemental fact that the defendant was intoxicated while operating the vehicle. *See* ***id.*** at 694.

¶10 Such legally prescribed permissive inferences are generally acceptable; Brown does not suggest otherwise. Rather, Brown argues that its application in this case violated his constitutional due process rights. A defendant's due process rights have been violated by a permissive inference "only if, under the facts of the case, there is *no rational way* the trier of fact could make the connection permitted by the inference." ***Vick***, 104 Wis. 2d at 695 (citation omitted; alteration in original). In other words, there must be a rational connection between the basic fact and the elemental fact inferred. ***Id.*** The test is "whether it can be said with substantial assurance that the latter is 'more likely than not to flow from the former.'" ***Id.*** (citation omitted). This is a tall hurdle, and one which Brown cannot surmount.

¶11 An OWI conviction requires the State to prove two elements beyond a reasonable doubt: (1) that the defendant was operating a motor vehicle and (2) he or she was under the influence of an intoxicant at the time of driving. ***Id.*** at 692. The instruction here allowed the jury to infer the second element—intoxication—from Brown's breath test.

¶12 Brown argues that—given Oehldrich's unrebutted blood alcohol curve testimony that his blood alcohol concentration was likely below the legal limit at precisely 11:10 p.m.—there is no rational connection between his breath test two hours later and his blood alcohol level at the time he was driving.

¶13 As a preliminary matter, Brown focuses on the wrong inferred elemental fact. Brown is appealing his conviction for operating while intoxicated; his charge and conviction for prohibited blood alcohol concentration was dismissed. The question then is whether there is a rational connection between the alcohol concentration reflected in his breath test and whether he was *intoxicated* while driving his vehicle—not Brown's actual level of blood alcohol concentration.[8]

¶14 Seen in this light, the question is not even close. In layman's terms, the law merely allows a jury to conclude that a driver was intoxicated if the driver took a test within three hours of driving that showed a certain elevated blood alcohol level. It is difficult to see how such a permissive inference is irrational. It

[8] The jury instruction did state that—with respect to the PAC charge—jurors could infer Brown had a prohibited blood alcohol concentration of .08g/210L or above while operating the vehicle based upon a test of .08g/210L within three hours of operating the vehicle. But this charge, and therefore this portion of the instruction, is not before us on appeal.

is assuredly more likely than not that intoxication can be inferred from an elevated blood alcohol level. *See* ***id.*** at 695.

¶15 This is true, by the way, even if the jury fully credited Oehldrich's testimony. Brown appears to suggest that a finding of intoxication would be impermissible had he been ever so slightly under the legal limit while driving. But the legislature has defined intoxication as being under the influence of an intoxicant (here, alcohol) "to a degree which renders him or her incapable of safely driving." WIS. STAT. § 346.63(1)(a). The jury instructions describe this as being "less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle." WIS JI—CRIMINAL 2669. It is perfectly rational for the legislature to conclude and the circuit court to instruct a permissive inference that a test within three hours of driving showing an elevated blood alcohol concentration is sufficient evidence from which a jury may infer intoxication—even if the driver's blood alcohol content at the time of driving was a touch below .08.

¶16 Moreover, the instruction only allows—but does not require—the inference. Giving the instruction permitted the jury to weigh the credibility of Oehldrich's conclusions. Oehldrich freely conceded that Brown would have reached the legal limit of .08 precisely two minutes after 11:10 p.m. (which was only an estimated time of driving), and that if any of Oehldrich's assumptions were inaccurate, Brown actually might have been over .08 when he was driving. In view of all the evidence, the jury could have rationally inferred from Brown's breath test showing .11 (which the jury was free to accept or reject as proven beyond a reasonable doubt) that Brown was intoxicated. So instructing the jury did not violate due process.

¶17 Brown also argues that the jury instruction violated WIS. STAT. § 903.03(2). In order to give an instruction creating a presumption or inference, § 903.03(2) specifies that a circuit court may give the instruction "only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt." ***Id***. The presumed fact here is intoxication. Having already explained the rational connection between an elevated blood alcohol level and intoxication, a reasonable juror could certainly conclude Brown was intoxicated based on his test and "the evidence as a whole." ***Id.***

¶18 The State made the case at trial that Brown smelled of alcohol and failed all three sobriety tests. While he complains that the one-leg-stand and HGN tests were improperly administered, Vick testified that she based her opinion of intoxication on all three.[9] And Brown offers no rebuttal to his repeated failures during the walk-and-turn test. Brown also changed his story, initially minimized what he had to drink, and repeatedly inquired whether something could be worked out. This evasive conduct could be interpreted as consciousness of his intoxication. Brown glosses over these important facts and emphasizes Oehldrich's testimony and Vick's admission that she did not initially observe any visible signs of impairment. His story is that his body was in the process of absorbing alcohol, and he did not become impaired until his body fully absorbed

[9] Brown complains that Vick should have turned her squad lights off during the HGN test and that she asked him to raise his leg too high during the one-leg-stand test. Although her squad lights were on, Vick had Brown stand with his back to the car and testified that she was not aware of surfaces that would reflect the squad lights back into Brown's face, and he did not indicate that the lights interfered with his vision. During the one-leg-stand test, Vick asked Brown to raise his foot twelve inches off the ground instead of six as she had been trained. She conceded that this could possibly affect the reliability of that particular test but explained that her conclusion that Brown was intoxicated was based on "all three of the tests."

the alcohol. Brown's account is plausible; the jury could have believed him. But this is hardly the only way to view the evidence. The evidence, including the test, also supported the inference by a reasonable juror of intoxication beyond a reasonable doubt.

¶19 Accordingly, the circuit court's instruction that the jury could infer that Brown was intoxicated based on his breath test result did not violate due process or WIS. STAT. § 903.03(2). The jury instructions were a full, fair, and correct statement of the law.

By the Court.—Judgment affirmed.

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