COURT OF APPEALS
DECISION
DATED AND FILED

October 18, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2017AP343 **Cir. Ct. No. 2016TR9784**

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

FOND DU LAC COUNTY,

PLAINTIFF-RESPONDENT,

V.

CHRISTY ANN KASTEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: DALE L. ENGLISH, Judge. *Affirmed*.

¶1 HAGEDORN, J.[1] At around 9:30 p.m. on August 16, 2016, police—responding to a call regarding an intoxicated driver—found an inebriated

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Christy Ann Kasten in a parked vehicle in her parents' driveway. Following a blood test showing her over the legal limit, she was charged with operating while intoxicated (OWI) and operating with a prohibited alcohol concentration (PAC), both first offenses. After a bench trial, the circuit court dismissed the OWI charge but found Kasten guilty of the PAC charge. On appeal, Kasten maintains that the evidence was insufficient to convict her, resting largely on conflicting testimony as to when she actually drove. We affirm.

BACKGROUND

¶2 The following testimony was introduced at trial.

¶3 Kasten's mother, Terry, testified that on August 16, 2016, Kasten finished dinner and informed her mother and Kasten's stepfather, Paul, that she was going to drive to get ice cream. Terry thought that Kasten was actually going to get alcohol, though she testified that she did not observe Kasten drinking. Shortly after Kasten left, Terry decided to head out and look for Kasten where Kasten "usually" went to purchase alcohol. Terry could not remember what time Kasten left, only that it was sometime after 5:00 p.m.

¶4 Terry left, and before Kasten returned, Paul called the police on a nonemergency line to report possible intoxicated driving. Paul testified that he also did not see Kasten drinking, but at the time he suspected she might be. According to Paul, Kasten returned some time later, at which point he called the nonemergency line a second time to inform the police that Kasten had returned home. Paul could not recall what time Kasten left or returned. When asked how much time elapsed between Kasten leaving and his first call to dispatch, Paul estimated that it was "between 10 and 20 minutes." When Kasten returned, Terry refused to let her in the house. Kasten remained in her vehicle.

¶5 Deputy Andrea Prahl testified that she was contacted by dispatch at approximately 8:30 p.m. on August 16 concerning a possible intoxicated driver. Prahl did not respond at that time because she was busy with other calls. At 9:15 p.m., Prahl was again contacted by dispatch about locating the vehicle, and this time she was given a specific address. Prahl proceeded to the address, arriving at approximately 9:30 p.m. Upon arriving, Prahl found a vehicle matching the description she had received. Kasten was asleep in the front seat. After rousing Kasten from sleep and observing signs of intoxication, Prahl placed Kasten under arrest for OWI and transported her to a hospital where Kasten consented to a blood draw at 10:52 p.m.—a little less than two and one-half hours after Prahl received the initial call from dispatch. The blood sample was tested and revealed an alcohol concentration of .197, more than twice the legal limit of .08.

¶6 Kasten also testified on her own behalf. She stated that she drank about one third of a bottle of vodka at 6:55 p.m. and admitted that she drove after downing the vodka. However, she averred that she left the house at 7:00 p.m. and estimated that she returned to the house at 7:30 p.m. Kasten claimed that she did not feel any effects from the vodka while she was driving and was not intoxicated until after she returned home. Because her mother refused to let Kasten in the house, Kasten decided to go to sleep in the car, where she was found by Prahl.

¶7 After the close of evidence, the circuit court found Kasten not guilty of OWI. However, the court found Kasten guilty of the PAC charge. The court made the following findings regarding when Kasten drove:

> I think the Court can draw an inference that when Deputy Prahl receives a contact from dispatch at 8:30 p.m. to be on the lookout for an intoxicated driver, I think the Court can use that as a starting point.

> Again, it's not clear—I don't know if Deputy Prahl was contacted five minutes after the call, two minutes after the call, 30 seconds after the call. But I do think the Court can draw an inference that the initial contact from dispatch to Deputy Prahl, I guess it went to any deputies that were out there, they were all on different calls, came in relatively close proximity to when her stepdad called the sheriff's department.
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> Again, her mom doesn't know when the call was made. Mom doesn't know when Ms. Kasten left. [Paul] didn't know exactly when Ms. Kasten left or his wife left, but he did testify that he called the first time after the defendant left and after his wife left, and he testified that his wife left 10 to 20 minutes after the defendant left.
>
> So if the Court would use as a starting point the 8:30 initial dispatch contact and using the best timeframe for the defendant … that would place Ms. Kasten leaving approximately 8:10 p.m.

The court explicitly rejected Kasten's testimony regarding the time of driving. Kasten appeals.

DISCUSSION

¶8 The issue on appeal is whether sufficient evidence supports Kasten's conviction for PAC.[2] Per WIS. STAT. § 885.235(1g), a chemical analysis of a blood sample "is admissible on the issue of whether [the defendant] … had a prohibited alcohol concentration … if the sample was taken within 3 hours after" driving. If the sample shows "an alcohol concentration of 0.08 or more"—as Kasten's sample did here—then the results are "prima facie evidence" that the

[2] Kasten also maintains that the circuit court "improperly sentenced Kasten to an ignition interlock device." This argument spans a mere three sentences and is simply a rehash of Kasten's core argument that the court could not infer the time of driving from the dispatch call. As we reject her main argument, we reject this one as well. To the extent she raises any other objection to the imposition of an ignition interlock device, her arguments are undeveloped. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we need not address undeveloped arguments unsupported by citation to legal authority).

defendant operated with a prohibited alcohol concentration.[3] Sec. 885.235(1g)(c). The circuit court found that Kasten's blood draw at 10:52 p.m. was within three hours of her driving, which he inferred began at 8:10 p.m.

¶9 Kasten admits that she consumed alcohol and operated a vehicle but contests the court's finding that she drove at 8:10 p.m. She contends that the circuit court could not have inferred the 8:10 p.m. departure-time on the basis of Prahl's testimony that she was initially contacted by dispatch at about 8:30 p.m. Specifically, Kasten argues that there was no evidence as to how much time elapsed between Paul's initial call and Prahl being contacted by dispatch. Thus, Kasten reasons, the court was speculating when it concluded that she drove at 8:10 p.m. Without any other evidence regarding when she drove, other than her "uncontradicted" testimony that it was no later than 7:30 p.m., Kasten maintains that the court could not use the test results as a basis for finding her guilty of PAC. And without the test results, there was insufficient evidence to support the PAC charge.

¶10 When reviewing the sufficiency of the evidence after a bench trial, "an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990); *see also* ***State v. Watkins***, 2002 WI 101, ¶68,

[3] A test showing results greater than 0.08 is also prima facie evidence of operating under the influence of an intoxicant. WIS. STAT. § 885.235(1g)(c) ("The fact that the analysis shows that the person had an alcohol concentration of 0.08 or more is prima facie evidence that he or she was under the influence of an intoxicant and is prima facie evidence that he or she had an alcohol concentration of 0.08 or more.").

255 Wis. 2d 265, 647 N.W.2d 244. Kasten's specific argument is that the circuit court erred in making a factual finding regarding the time she drove, and therefore the admissibility of the test results. In the face of such a challenge, we will not reverse the circuit court's factual findings unless those findings are clearly erroneous. *See* WIS. STAT. § 805.17(2).

¶11 The circuit court's finding that Kasten drove at approximately 8:10 p.m. was not clearly erroneous. The court's conclusion rested on the time dispatch initially contacted Prahl at 8:30 p.m. and the inferences that could be drawn from that fact. Kasten was driving when Paul initially contacted the police; she does not contest Paul's testimony that she had not returned when he called dispatch. While Paul could not remember the exact time he called, it was reasonable for the circuit court to infer that dispatch would—with reasonable promptness—notify officers in an attempt to prevent any harm. This is not pure speculation as Kasten insists, but a reasonable inference based on the nature of Paul's report. We do not agree with Kasten that the fact finder (here, the court) cannot infer, without testimony stating as much, that the dispatcher acted in a reasonably prompt manner to notify on-duty law enforcement of a potentially dangerous situation.

¶12 A timeline further illustrates the point. Since Kasten's blood was drawn at 10:52 p.m., the test results were admissible and prima facie evidence of a PAC as long as Kasten's blood was drawn within three hours of driving, which would have been any time after 7:52 p.m. Dispatch contacted Prahl at 8:30 p.m. Given that Kasten was still out when her stepfather called, in order for Kasten's driving to have been outside the three hour window, dispatch would have had to delay contacting Prahl for at least thirty-eight minutes—the time between 7:52 and 8:30. And if we accepted Kasten's claim that she last drove at 7:30 p.m., then dispatch would have delayed an hour or more prior to contacting Prahl. Though

this scenario is possible, it is not the only reasonable view of the evidence.[4] The circuit court permissibly concluded that dispatch acted in a reasonably prompt manner, at least not more than thirty-eight minutes after the initial call. This was within the three hour window permitted by WIS. STAT. § 885.235(1g).

¶13 Accordingly, the test results were admissible as prima facie evidence that Kasten drove with a PAC, and sufficient evidence supports Kasten's conviction.

By the Court.—Judgment affirmed

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

[4] Kasten maintains that the court erred in rejecting her "uncontradicted" testimony about when she drove. Kasten's testimony was not undisputed. As the circuit court reasonably concluded, Kasten's testimony was contradicted by the circumstantial evidence presented—chiefly the timing of the initial call to dispatch. It is beyond argument that credibility determinations—including rejecting Kasten's testimony regarding when she drove—are left to the circuit court.