

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 27, 2013

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. 2013AP1166-CR

Cir. Ct. No. 2010CT133

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK K. SCHRICK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jackson County:
TODD L. ZIEGLER, Judge. *Affirmed.*

¶1 KLOPPENBURG, J.¹ Mark Schrick appeals a judgment of conviction for operating with a prohibited alcohol concentration in violation of WIS. STAT. § 346.63(1)(b). Schrick asserts that evidence presented at trial showed

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

that the arresting officer did not continuously observe Schrick for twenty minutes or remove his dentures before administering the chemical test of his breath. Therefore, Schrick argues, the circuit court erred in denying his motion for a directed verdict, there was insufficient evidence to support a conviction for operating with a prohibited alcohol concentration, and the circuit court erred by instructing the jury on the presumptions that attach to a breath test. For the reasons set forth below, I affirm the circuit court's judgment.

BACKGROUND

¶2 At approximately 12:30 a.m., Jackson County Deputy Sheriff Karie Gillett observed a vehicle traveling at sixty-five miles per hour in a fifty-five miles per hour zone, and driving with its driver side tires on the road's centerline. Gillett stopped the vehicle and identified the driver as Mark Schrick. Gillett detected an odor of intoxicants coming from the vehicle, and noticed that Schrick's eyes were "red and glossy." Gillett had Schrick perform a number of field sobriety tests. Based on Schrick's performance on the field sobriety tests, Gillett believed that Schrick was "under the influence of [an] intoxicant." Gillett transported Schrick to the jail to administer a chemical test of Schrick's breath. The test result indicated that Schrick's blood alcohol concentration was 0.17.

¶3 The State charged Schrick with operating while intoxicated as a third offense and operating with a prohibited alcohol concentration as a third offense. The case was tried to a jury. The trial testimony relevant to the issues on appeal centered on two main issues: (1) whether Gillett correctly administered the breath test; and (2) whether the fact that Schrick was wearing dentures when he blew into the testing device affected the test result.

¶4 Regarding the administration of the breath test, Gillett testified that she had been trained and certified to operate the Intox EC/IR II Breathalyzer machine that the Jackson County Sheriff's Department used in October 2010. As to the administration of Schrick's breath test specifically, Gillett explained that she observed Schrick for twenty minutes before administering the breath test. Gillett testified that the purpose of the twenty-minute observation period is to ensure the elimination of residual mouth alcohol, which can affect the reading of the breath test. Gillett testified that during the observation period, she read Schrick the "informing the accused" form, and also entered data into a machine. Gillett testified that she sat directly in front of Schrick at a distance of four to five feet during the observation period, and that Schrick did not smoke, drink, or vomit during the observation period.

¶5 After completing the observation period, Gillett obtained two samples of Schrick's breath. The Breathalyzer machine reported 0.17 grams of alcohol per 210 liters of Schrick's breath.

¶6 On cross-examination, Schrick's counsel questioned Gillett about her compliance with the breath testing procedures set forth in her training manual and WIS. ADMIN. CODE § TRANS 311.06. Gillett testified as follows:

Q. The manual tells you to do the informing the accused prior to starting the 20-minute period?

A. Okay.

Q. As it relates to that, they also tell you to enter the information into the computer prior to starting the 20-minute period, correct?

A. I would have to reference it. I have been taught that minimal paper work, minimal paper work data entries is acceptable.

....

Q. So as it relates to the machine, you agree that you did not follow the proper procedure in administering that test, which includes the observation period?

A. I did what I was trained as allowed.

Q. I understand that you did as you were trained. But you did not do as you are required?

A. Correct.

¶7 The other main issue at trial that is relevant on appeal is whether the breath test results were inaccurate because Schrick was wearing dentures when he took the breath test. Schrick testified that he wears top and bottom dentures, and that he was wearing dentures when he took the breath test.

¶8 Regarding the potential effects of dentures on a breath test, Schrick presented the expert testimony of Dr. Dennis Fater. Fater opined that Schrick's breath test was inaccurate due to residual mouth alcohol that can be caused by dentures, and based on the number of drinks that Schrick reported that he had consumed.

¶9 At the close of the evidence, the court presented the prosecutor and Schrick's attorney with proposed jury instructions. The proposed jury instruction regarding the prohibited alcohol concentration charge stated:

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.

The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.

¶10 Schrick then moved for a directed verdict on the operating with a prohibited alcohol concentration charge, arguing that because Gillett admitted that she did not follow the proper protocol in conducting the breath test and because Gillett did not remove Schrick's dentures, the court was required to direct the verdict in Schrick's favor.

¶11 The circuit court concluded:

[I]n the light most favorable to the state it is still a jury issue for the jury to decide. I believe that the jury can determine that the observation period was met. There is certainly the part in the jury instruction where the state is required to establish that the device was in proper working order and that it was correctly operated by a qualified person. The jury can determine whether it was correctly operated or not.

In addition, as far as the information regarding the dentures in the mouth, the jury has the information to make their own determination as to whether or not they believe that that is what, well, is what caused the higher test result than Mr. Schrick believes it should have been.... I'm going to let the jury decide the particular issue or issues.

Accordingly, the circuit court denied Schrick's motion for directed verdict on the prohibited alcohol concentration charge.

¶12 Schrick's counsel objected to the use of the jury instruction regarding the prohibited alcohol concentration charge. The circuit court noted the objection, but read to the jury the proposed instruction.

¶13 The jury found Schrick guilty of operating with a prohibited alcohol concentration, and the circuit court entered a judgment convicting Schrick of that charge. Schrick appeals that judgment.

DISCUSSION

¶14 Schrick raises a number of arguments on appeal. I will discuss each in turn.

The Statutory Presumptions

¶15 Schrick grounds his claims for relief on the argument that the State could not rely on the “statutory presumptions of admissibility and reliability” because Gillett did not comply with the twenty-minute observation period set forth in WIS. ADMIN. CODE § TRANS 311.06(3), or remove Schrick’s dentures when she administered the breath test. As I will explain, Schrick misconstrues the presumptions that attach to a breath test.

¶16 The statutory presumption of admissibility is codified at WIS. STAT. § 343.305(5)(d), which states:

At the trial of any civil or criminal action ... arising out of the acts committed by a person alleged to have been driving or operating a motor vehicle while ... having a prohibited alcohol concentration ... the results of a test administered in accordance with this section are admissible on ... any issue relating to the person’s alcohol concentration.

The requirements set forth in § 343.305(5)(d) that tests be administered in accordance with that section to be admissible, does not extend to compliance with administrative code procedures. *See City of New Berlin v. Wertz*, 105 Wis. 2d 670, 674, 677, 314 N.W.2d 911 (Ct. App. 1981) (holding that the State is not required to affirmatively prove compliance with administrative code procedures as a foundation for the admission of a breath test result, and that “claimed noncompliance with certain provisions of the [administrative] code goes only to the weight, not to the admissibility, of the breathalyzer test [result].”). Thus,

Schrick’s argument that Gillett failed to comply with the administrative code procedures when administering the breath test goes to the *weight*, not to the *admissibility*, of the breath test. Accordingly, the breath test was admissible under § 343.305(5)(d).²

¶17 Schrick also refers to the statutory presumption of reliability, which Wisconsin case law refers to as the “presumption of accuracy.” Regarding the presumption of accuracy, the supreme court has held:

[A] method or process for testing which is expressly authorized by statute is entitled to a prima facie presumption of correctness of purpose. In such a case, all that needs to be proved is that the method was followed. A scientific ... method not recognized as acceptable in the scientific ... discipline as accurate does not enjoy the presumption of accuracy But tests by recognized methods need not be proved for reliability in every case of violation. Examples [include] ... breathalyzer [tests]. These methods of measurement carry a prima facie presumption of accuracy. Whether the test was properly conducted or the instruments used were in good working order is a matter of defense.

State v. Trailer Service, Inc., 61 Wis. 2d 400, 407-08, 212 N.W.2d 683 (1973) (citations omitted). Thus, the presumption of accuracy extends only to the validity of the underlying scientific process employed by the testing method—in Schrick’s case, the Intox EC/IR II Breathalyzer machine. Here, the breath test was entitled to a prima facie presumption of accuracy because the method of testing used in this case has been recognized as scientifically accurate. *Id.* at 408. However, whether the machine was in proper working order, and whether Gillett correctly

² Schrick cites a number of cases in support of his argument that “[t]he statutory presumption of admissibility ... can be lost based on non-compliance with proper testing procedures.” However, Schrick takes those cases out of context, and disregards the distinctions between those cases and his case which render the cases inapplicable.

operated the machine, were matters of defense, and were factual issues for the trier of fact to determine. *Id.* I address Schrick’s arguments related to those factual issues next.

Motion for Directed Verdict and Insufficient Evidence Claim

¶18 Schrick argues that the circuit court erred when it denied his motion for a directed verdict. He also argues that the evidence was insufficient to support a finding of guilt on the prohibited alcohol concentration charge. Schrick bases both arguments on his contention that Gillett did not correctly conduct the test because she read him the “informing the accused” form and did data entry during the twenty-minute observation period, contrary to required procedures, and because she did not remove Schrick’s dentures.

¶19 When this court reviews a denial of a motion for a directed verdict, we consider all credible evidence and reasonable inferences in the light most favorable to the party against whom the motion was made to determine whether there is any credible evidence to sustain a finding in favor of that party. *Warren v. American Family Mut. Ins. Co.*, 122 Wis. 2d 381, 384, 361 N.W.2d 724 (Ct. App. 1984). “[A] verdict should be directed only where there is no conflicting evidence as to any material issue and the evidence permits only one reasonable inference or conclusion.” *Millonig v. Bakken*, 112 Wis. 2d 445, 451, 334 N.W.2d 80 (1983).

¶20 The following is the evidence most favorable to the State. Regarding whether the breath test was correctly operated by a qualified person, the State presented evidence through the following testimony by Gillett. Gillett has worked as a deputy sheriff since 2007. She has been trained and certified to operate the Intox EC/IR II Breathalyzer machine, and she administered the breath

test in accordance with her training. Gillett observed Schrick for twenty minutes before administering the breath test, and she sat directly in front of Schrick at a distance of four to five feet during the observation period. Schrick did not smoke, drink, or vomit during the observation period.

¶21 As to the potential impact of Schrick's dentures on the breath test, Schrick presented evidence through his expert Dr. Fater. On cross-examination, Fater testified that the information that he relied on regarding dentures, denture adhesive, and residual mouth alcohol came from a study published in 1995, which used a breath testing machine from 1994 or 1995. Fater testified that the technology employed by the current generation of breath testing machines is more refined. Fater did not replicate the 1995 study with Schrick, and did not examine the Breathalyzer machine used to test Schrick's breath. In reaching his estimate of what Schrick's alcohol concentration would have been, Fater testified that he relied solely on Schrick's account of how much alcohol he had consumed.

¶22 Consistent with the statutory presumptions analysis set forth at the start of this discussion section, it was for the jury to weigh the evidence presented at trial and to determine whether Gillett's alleged noncompliance with the breath testing procedures and the presence of Schrick's dentures affected the reliability of the test results. Accordingly, I agree with the circuit court that the evidence, viewed most favorably to the State, did not warrant a directed verdict, because there was credible evidence to support a finding that the breath test was correctly administered and that the test accurately reported Schrick's blood alcohol concentration.

¶23 Schrick also argues that the evidence was insufficient to convict him of operating with a prohibited alcohol concentration. This court may not reverse a

conviction on the basis of insufficient evidence “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 guilt beyond a reasonable doubt.” *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). It is the function of the jury to decide issues of credibility, to weigh the evidence, and to resolve conflicts in the testimony. *State v. Gomez*, 179 Wis. 2d 400, 404, 507 N.W.2d 378 (Ct. App. 1993).

¶24 The jury was instructed that to find Schrick guilty of operating with a prohibited alcohol concentration, it needed to be satisfied beyond a reasonable doubt that the following elements were present: (1) the defendant drove or operated a motor vehicle on a highway; and (2) the defendant had a prohibited alcohol concentration at the time the defendant drove or operated a motor vehicle. The jury was instructed that prohibited alcohol concentration means 0.08 grams or more of alcohol in 210 liters of the person’s breath.

¶25 The evidence, viewed most favorably to the State and the conviction, is clearly sufficient to support the jury’s guilty verdict. Gillett testified that Schrick was driving at 12:30 a.m. when Gillett stopped him. A chemical test of Schrick’s breath indicated that Schrick had 0.17 grams of alcohol in 210 liters of his breath. As explained above, there was competing testimony as to the reliability of the breath test result, and whether the breath test accurately reported Schrick’s blood alcohol concentration. However, “[w]hen this court is faced with a record of historical facts which supports more than one inference, we must accept the inference drawn by the jury unless the evidence on which that inference is based is incredible as a matter of law.” *Gomez*, 179 Wis. 2d at 406. Using this standard, I conclude that the jury could infer from the testimony presented at trial

that the breath test result was reliable, that the report indicating that Schrick's blood alcohol concentration was 0.17 was accurate, and that the elements of operating with a prohibited alcohol concentration were proven beyond a reasonable doubt. Therefore, the evidence was sufficient to support a conviction for operating with a prohibited alcohol concentration.

Jury Instruction Regarding the Presumptions that Attach to the Breath Test

¶26 Schrick argues that the circuit court erred by instructing the jury, over his objection, “on the statutory presumption of the reliability of the breath test.” The court instructed the jury, in part:

The law recognizes that the testing device used in this case is a scientifically sound method of measuring the alcohol concentration of an individual. The state is not required to prove the underlying scientific reliability of the method used by the testing device. However, the state is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.

Schrack contends that the circuit court erred by giving this instruction because Gillett “committed numerous errors in the testing process.” Schrick therefore asks this court to grant a new trial.

¶27 The purpose of a jury instruction is to inform the jury fairly and fully of a rule or principle of law applicable to any particular case. *Nommesen v. American Cont'l Ins. Co.*, 2001 WI 112, ¶36, 246 Wis. 2d 132, 629 N.W.2d 301. The circuit court has great latitude when giving jury instructions. *State v. Laxton*, 2002 WI 82, ¶29, 254 Wis. 2d 185, 647 N.W.2d 784. “Only if the jury instructions, as a whole, misled the jury or communicated an incorrect statement of law will we reverse and order a new trial.” *Id.* If the overall meaning conveyed

by the jury instructions was a correct statement of law, no grounds for reversal exist. *Id.*

¶28 Schrick challenges one portion of the jury instruction relating to the prohibited alcohol concentration charge. The prohibited alcohol concentration instruction given by the circuit court was identical to the Wisconsin pattern jury instruction, WIS JI—CRIMINAL 2669. Because the instruction was identical to the pattern jury instruction, which follows the text of the statute, I conclude that the jury instruction correctly stated the law regarding the operating with a prohibited alcohol concentration charge.

¶29 I also conclude that the jury instruction did not mislead the jury; rather, it accurately framed the jury's task. Consistent with the statutory presumptions analysis set forth above, the jury instruction informed the jury that the method used by the testing device, here the Intox EC/IR II Breathalyzer, was *scientifically* reliable. However, the jury instruction also informed the jury that in assessing whether Schrick was guilty of operating with a prohibited alcohol concentration, it was required to determine whether the State proved that the testing device was correctly operated by a qualified person. Accordingly, the jury instruction correctly informed the jury that while the *method* employed by the testing device was scientifically reliable, the jury still needed to weigh the evidence to determine whether the *operation* of the test was proper. *Wertz*, 105 Wis. 2d at 674. Because the instructions did not mislead the jury or communicate an incorrect statement of law, Schrick is not entitled to a new trial on this basis.

CONCLUSION

¶30 For the reasons set forth above, I affirm the circuit court's judgment.

By the Court.—Judgment affirmed.

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

