COURT OF APPEALS
DECISION
DATED AND FILED

June 8, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0402-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT THOMAS URBANEC,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Robert Thomas Urbanec appeals from the judgment entered after a jury convicted him of homicide by intoxicated use of a motor vehicle, homicide by intoxicated use of a motor vehicle while having a blood alcohol concentration of 0.1% or more, and duty upon striking a person resulting in death (hit-and-run), in violation of §§ 940.09(1)(a), 940.09(1)(b),

346.67 and 346.74(5)(d), STATS. Urbanec claims: (1) the trial court erred in denying his request for an affirmative defense jury instruction; (2) the evidence was insufficient to establish a violation of the hit-and-run statute; and (3) the trial court improperly responded to jury questions requesting clarification on the question of when a defendant must have knowledge of his involvement in an accident resulting in injury, before being obliged to stay at or return to the scene of the accident. We affirm.

BACKGROUND

Shortly after 5:15 p.m. on January 25, 1997, Urbanec hit and killed Milwaukee County Deputy Sheriff David Demos. Trial testimony established that Urbanec's pickup truck veered off the road into the distress lane of I-94 and hit Deputy Demos, who was assisting motorist Youzadik Aziz. Charles Mather, another motorist, testified that just prior to the accident he observed Urbanec swerving from the right lane into the distress lane and then into the center lane. Mather decided to "get around [Urbanec's] vehicle in case something happened." As Mather went around Urbanec's truck, he noticed that Urbanec appeared to be sleeping behind the wheel. Mather testified that he "continued southbound watching in [his] rear view mirror, and [he] noticed the vehicle swerving in the [distress] lane again." Upon observing this erratic driving, Mather used his cellular phone to call 9-1-1. Mather testified that within moments of contacting the 9-1-1 dispatcher, he noticed Urbanec's pickup truck in the right lane ahead of him and then witnessed Urbanec swerve a third time into the distress lane and hit Deputy Demos, causing him to "cartwheel[] over the [squad car] and hit the pavement." Mather proceeded to follow Urbanec while maintaining contact with the 9-1-1 dispatcher. Mather testified that Urbanec drove south on I-94 and then headed west on I-894. Urbanec exited at 60th Street, drove south on 60th Street,

and immediately re-entered I-894 in the eastbound lanes. Shortly thereafter, City of Greenfield police apprehended Urbanec near the 27th Street exit.

At trial, Urbanec admitted consuming four or five beers before the accident. The State's blood alcohol evidence indicated that the concentration of alcohol in the sample of blood drawn from Urbanec at 7:30 p.m. was 0.17%.

ANALYSIS

Urbanec argues that the trial court erred in refusing to give his requested affirmative defense jury instruction under § 940.09(2), STATS.[1] The trial court rejected his request, noting that Urbanec failed to present sufficient evidence to raise an affirmative defense to the charge of homicide by intoxicated use of a motor vehicle. We conclude that the trial court properly denied Urbanec's request.

A trial court has wide discretion regarding jury instructions. *See* ***State v. McCoy***, 143 Wis.2d 274, 289, 421 N.W.2d 107, 112 (1988). A defendant is entitled to an instruction on a valid applicable theory of defense only where a request for such an instruction is supported by credible evidence. *See* ***Turner v. State***, 64 Wis.2d 45, 52, 218 N.W.2d 502, 505-06 (1974). Thus, the issue is "whether a reasonable construction of the evidence [would] support the

[1] Section 940.09(2), STATS., 1995-96, provides:

> The defendant has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant or did not have an alcohol concentration described under sub. (1)(b) or (bm) or (1g)(b).

defendant's [theory of defense]." *See* ***State v. Mendoza***, 80 Wis.2d 122, 153, 258 N.W.2d 260, 273 (1977) (discussing instruction regarding lesser included offense).

At trial, Urbanec based his affirmative defense on a claim that he was asleep when the fatal accident occurred. He testified that he fell asleep just before reaching Milwaukee and that he did not awaken until he was stopped by the police at the 27th Street exit on I-894. He maintains that trial evidence supported the instruction, pointing in particular to evidence of his sleep disorder and mechanical difficulties with his truck which caused it to pull to the right.

In response, the State argues that Urbanec's claim is incredible as a matter of law. The State contends that any such argument is impossible and contrary to the laws of nature, noting:

> This would have meant that Urbanec managed to navigate through the northern suburbs to downtown Milwaukee in rush-hour traffic on the freeway, that he found his way through the maze of the Marquette [i]nterchange, that he crossed the high-rise bridge spanning the [Menomonee] Valley, that he struck a deputy sheriff on the side of the road with sufficient force to throw the deputy over the top of his squad car and collapse the roof, that he continued to drive at freeway speed with a broken windshield which allowed unusually cold wind to blow straight into his truck, and that he exited the freeway at 60th Street, crossed over it, and reentered it going back in the opposite direction, all without waking up or being aware of what was happening.

We agree with the State. Urbanec's claim that he was asleep prior to, during, and following the accident is incredible as a matter of law because it is physically impossible to drive the route Urbanec drove, while asleep, without crashing.

Moreover, even assuming for the sake of argument that Urbanec presented sufficient evidence to prove that he struck and killed Deputy Demos while he was asleep, he nevertheless failed to present sufficient evidence to prove

that he would have been asleep absent the influence of alcohol. Urbanec's medical expert, Dr. Paul Nausieda, conducted a sleep study on Urbanec and testified that Urbanec has a sleep disorder, moderately severe sleep apnea, which could cause him to fall asleep during the day. Other defense witnesses testified that, over the years, they had seen Urbanec lose consciousness during the day. No testimony, however, established that Urbanec had ever fallen asleep at work, where he drove a mail truck. Thus, the possibility that he fell asleep on the afternoon of the accident as a result of his sleep disorder alone, and not because of his sleep disorder coupled with his consumption of alcohol, would be based on pure speculation. *See* ***State v. Flynn***, 190 Wis.2d 31, 48, 527 N.W.2d 343, 350 (Ct. App. 1994) (burden of proof must be met by evidence, not mere speculation). Dr. Nausieda testified that he attempted to determine the effects of alcohol consumption upon Urbanec's sleep patterns by having Urbanec consume sixty ounces of beer prior to repeating the sleep study; the results of that study, as compared to the original study in which no alcohol was consumed, were that Urbanec was sleepier, fell asleep faster, and slept a shorter amount of time. Thus, the evidence indicated that alcohol may have been a contributing cause of his sleepiness and, therefore, a contributing cause of the accident. Consequently, we conclude Urbanec failed to present credible evidence establishing a basis for his affirmative defense. *See* ***Turner***, 64 Wis.2d at 52, 218 N.W.2d at 505-06 ("[A] request for instruction on a theory of defense must be supported by credible evidence.").

Urbanec also failed to prove that the accident would have happened "even if he ... had been exercising due care." *See* § 940.09(2), STATS. As the State maintains, falling asleep at the wheel of a moving vehicle is reasonably foreseeable for a person with a sleep disorder who consumes alcohol; therefore,

such behavior is negligent as a matter of law. *See* ***Breunig v. American Family Ins. Co.***, 45 Wis.2d 536, 541-42, 173 N.W.2d 619, 623 (1970). Urbanec admitted that he was aware of his drowsiness on the day in question, and that he even attempted to revive himself by pinching his nose. Yet he continued to drive. Urbanec failed to do the following: (1) present any credible evidence to establish the factual predicate for his affirmative defense; (2) prove that the death would have occurred even if he had not been under the influence of alcohol; and (3) prove that the death would have occurred even if he had been exercising due care. Consequently, we conclude that the trial court properly refused to submit the affirmative defense instruction to the jury.

Urbanec next argues that the evidence was insufficient to support his conviction for hit-and run, in violation of § 346.67, STATS. We disagree. As the supreme court has explained:

> [I]n reviewing the sufficiency of the evidence to support a conviction, 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. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990) (citations omitted). Thus, "[t]his court will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible—that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts." ***State v. Tarantino***, 157 Wis.2d 199, 218, 458 N.W.2d 582, 590 (Ct. App. 1990).

Section 346.67, STATS., 1995-96, provides:

> **Duty upon striking person or attended or occupied vehicle. (1)** The operator of any vehicle involved in an accident resulting in injury to or death of any person or in damage to a vehicle which is driven or attended by any person shall immediately stop such vehicle at the scene of the accident or as close thereto as possible but shall then forthwith return to and in every event shall remain at the scene of the accident until the operator has fulfilled the following requirements:
>
> (a) The operator shall give his or her name, address and the registration number of the vehicle he or she is driving to the person struck or to the operator or occupant of or person attending any vehicle collided with; and
>
> (b) The operator shall, upon request and if available, exhibit his or her operator's license to the person struck or to the operator or occupant of or person attending any vehicle collided with; and
>
> (c) The operator shall render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person.

Urbanec argues that the trial court should have dismissed the § 346.67 charge as insufficient as a matter of law. Specifically, Urbanec contends that because the medical examiner testified that Deputy Demos died instantaneously, and because motorists Aziz and Mather immediately sought medical assistance for the deputy, his own failure to render assistance did not violate the statute. In support of this contention, Urbanec asks this court to overrule ***State v. Swatek***, in which we held that a driver involved in a fatal accident is required to stop and "at least minimally investigate whether assistance is required" rather than concluding that assistance is not required based upon "the impact and [the driver's] view of [the victim's] body at night from sixty to ninety feet away." ***State v. Swatek***, 178 Wis.2d 1, 9-10, 502 N.W.2d 909, 913 (Ct. App. 1993).

First, irrespective of Urbanec's opinion and argument on the issue, ***Swatek*** is the law and cannot be overturned or modified by this court. *See* ***Cook v. Cook***, 208 Wis.2d 166, 190, 560 N.W.2d 246, 256 (1997) (court of appeals cannot reverse or modify its published decisions). Second, sufficient evidence established that Urbanec failed to comply with § 346.67, STATS. Urbanec struck and killed Deputy Demos on a freeway but failed to stop until he was pulled over by police. Urbanec was aware of the accident. The impact of the deputy's body broke the windshield and supporting frame of the passenger-side window of Urbanec's truck, allowing the cold January air into his vehicle. And, while denying any specific recollection of the accident, Urbanec, according to the testimony of Officer Craig Busche, admitted that he heard a bash or bang that woke him; that he knew he hit something; and that he should have stopped. In fact, he even admitted that he drove the circuitous route after the accident to avoid apprehension. Thus, unquestionably, Urbanec violated the requirement that he stop and render assistance to a person hit by his vehicle.

Additionally, because Urbanec failed to stop and render assistance, he necessarily failed to leave his name, address and registration with the victim as required by § 346.67(1)(a), STATS. Nevertheless, Urbanec argues that he cannot be convicted of failing to comply with this requirement since the victim died instantaneously, thus making it impossible for him to leave the information with the victim. We disagree.

In ***State v. Mann***, this court rejected a similar argument, stating: "Section 346.67, Stats., does not limit the duty to remain on the scene and leave one's name to accidents where the injured person remains conscious .... The statute mandates that 'in every event [the operator] shall remain at the scene ... until he has fulfilled the [stated] requirements.'" ***State v. Mann***, 135 Wis.2d 420,

430, 400 N.W.2d 489, 493 (Ct. App. 1986) (brackets in original). Clearly, Urbanec did not fulfill these requirements.

Finally, Urbanec argues that the trial court improperly responded to the jury's request for clarification on the question of when a defendant must have knowledge of involvement in an accident resulting in injury, before being obligated to stay at or return to the scene. We disagree.

The trial court recited the pattern jury instructions, advising the jurors that they could not convict Urbanec of hit-and-run unless they were satisfied beyond a reasonable doubt that he "knew that the vehicle he was operating was involved in an accident involving a person." During deliberations, the jury requested clarification of the "time frame" of this element. In response, the court advised the jury that "to find [this element], the state must prove beyond a reasonable doubt that [the] defendant had this knowledge before law enforcement alerted him of their intent to apprehend him." Urbanec now complains:

> The court refused to limit the knowledge inquiry to the time of the actual impact. Moreover, the court refused to tell the jury that the defendant must know the location of the accident scene, in addition to the fact that there was an accident, in order to have a duty to return to the scene of the accident.

Citing ***State v. Mancuso***, 652 So.2d 370 (Fla. 1995), he contends that this was error because "other jurisdictions with similar statutes have held that [a] defendant must know that he has been in an accident and that he is leaving the scene of an accident," and that if a defendant "lacks this knowledge, and acquires it only later, there is no violation of the statute."

The State responds that, at trial, although Urbanec contended that the law imposed no obligation to stop unless he was immediately aware of the

accident and its location, when the jury posed its question regarding the "time frame," Urbanec did not object to a response framed in terms of the facts of the case. Indeed, the defense drafted the response the court read to the jury. Accordingly, if the trial court committed error, the error was one Urbanec invited and, therefore, he cannot complain of it now. *See* ***Soo Line R.R. Co. v. Office of the Comm'r of Transp.***, 170 Wis.2d 543, 557, 489 N.W.2d 672, 678 (Ct. App. 1992). Moreover, given the overwhelming evidence establishing that Urbanec was aware he had been in an accident, and that the accident occurred somewhere during his route through Milwaukee,[2] we conclude that any error in the instruction was harmless. *See* ***State v. Dyess***, 124 Wis.2d 525, 543-45, 370 N.W.2d 222, 231-32 (1985).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

[2] Because Urbanec admitted he was awake before arriving in Milwaukee, he should have realized that the accident occurred somewhere on the Milwaukee freeway. Consequently, he could have retraced his route upon realizing that he had been involved in an accident.