COURT OF APPEALS
DECISION
DATED AND FILED

March 4, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

Nos. 98-1140
98-2080-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JEFFREY S. LOVE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Crawford County: MICHAEL KIRCHMAN, Judge. *Affirmed.*

VERGERONT, J.[1] Jeffrey S. Love appeals his judgment of conviction for operating a motor vehicle while under the influence of an intoxicant in violation of § 346.63(1)(a), STATS., and an order of revocation resulting from his refusal to submit to a blood test as required by the implied consent law. *See*

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

§ 343.305(10), STATS. He argues: (1) there was insufficient evidence at trial for the court to find beyond a reasonable doubt that Love was driving the vehicle, and (2) there was insufficient evidence at the refusal hearing to establish probable cause that he was the driver. We conclude, viewing the evidence most favorably to the conviction, a reasonable trier of fact could have found beyond a reasonable doubt that Love was driving. We also conclude the State presented sufficient evidence at the refusal hearing to establish that the deputy's determination of probable cause was plausible. We therefore affirm.

BACKGROUND[2]

While on duty at approximately 1:30 a.m. in the morning, Deputy McCullick came upon the scene of a single vehicle accident. He observed a truck that had apparently hit a sign and driven off the road about fifteen feet. Two men were asleep in the truck: Jeffrey Love, the defendant, was on the driver's side of the bench seat and John Love, the defendant's brother, was on the passenger side. Both men were in sitting positions and had to be awakened by the deputy. They did not know they had been in an accident and they did not remember anything about it. They were both intoxicated.[3]

After Love was transported to a hospital, Deputy McCullick told Love he would be issuing Love a citation for operating a motor vehicle under the influence of an intoxicant. Love responded by saying he was not the driver.

[2] The facts in the background section are taken from the evidence presented at the trial to the court. Additional facts taken from testimony at the refusal hearing that are relevant to the probable cause determination are discussed later.

[3] Love conceded that he was intoxicated. The only issue at the trial was whether he was driving the truck. John Love also testified that he (John) was intoxicated at the time of the accident.

Deputy McCullick testified that when he asked who was driving, Love said either he did not know or he could not remember. Deputy McCullick issued the citation based on the fact that he found Love behind the wheel with the keys in the ignition after an accident. Love refused permission for a blood test.

During the trial to the court, both Love and his brother testified that the last thing they remembered was getting in the truck and leaving a bar in Lynxville, about seven miles away from the accident site. When they left the bar, Jamie Smith, the owner of the truck, was driving, Love was sitting in the middle and his brother was on the passenger side. Love said that he fell asleep as they drove away and did not wake up until the deputy woke him after the accident. Love said he did not know for sure who was driving during the accident because he was asleep, but that he was sure it was not him.

Deputies from the Sheriff's Department testified that the truck was registered to Smith and that Smith did pick up the truck from the police the next day. Deputy McCullick testified that someone whom he assumed to be Smith was picked up by first responders (presumably the emergency medical technicians) as he was walking towards Lynxville sometime after the accident. Deputy McCullick also testified that Smith had a bad driving record and his license was either suspended or revoked.

In its oral decision, the court made the following findings of fact: (1) the testimony that Smith was driving the truck when the three men left the bar in Lynxville was credible, but (2) Love's testimony that he knew he was not driving at the time of the accident was not credible, (3) the inference that Smith was the driver at the time of the accident and had left the scene after the accident was speculative, and (4) the deputy found Love sitting behind the wheel of the

truck with the keys in the ignition shortly after the accident. The court concluded that Love was the driver and found him guilty beyond a reasonable doubt.

Love argues there was insufficient evidence presented at the trial for the court to find beyond a reasonable doubt that he was the driver of the truck at the time of the accident. In reviewing the sufficiency of the evidence in a criminal trial to the court, we do not disturb the trial court's findings unless they are contrary to the great weight and clear preponderance of the evidence. ***State v. Bartlett***, 149 Wis.2d 557, 564, 439 N.W.2d 595, 599 (Ct. App. 1989) (citing ***Jameson v. State***, 74 Wis.2d 176, 181, 246 N.W.2d 541, 544 (1976)). Therefore, the issue on this appeal is whether the trier of fact could, acting reasonably, be convinced that Love was driving by evidence it had a right to believe and accept as true. ***Id.*** at 564-65, 439 N.W.2d at 599. If there is more than one inference that can be drawn from the evidence, we must adopt the inference that supports the trial court's finding. ***Id.*** at 565, 439 N.W.2d at 599.

In ***State v. Poellinger***, 153 Wis.2d 493, 451 N.W.2d 752 (1990), the supreme court explained this standard of review when, as in this case, the defense has presented an arguably reasonable theory of innocence:

> A theory of innocence which appears to be reasonable to an appellate court on review of the record may have been rejected as unreasonable by the trier of fact in view of the evidence and testimony presented at trial. It is the function of the trier of fact, and not of an appellate court, to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.
>
> In viewing evidence which could support contrary inferences, the trier of fact is free to choose among conflicting inferences of the evidence and may, *within the bounds of reason,* reject that inference which is consistent with the innocence of the accused. Thus, when faced with a record of historical facts which supports more than one

> inference, an appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law.

Id. at 506-07, 451 N.W.2d at 757 (citations omitted).

We conclude that there is reasonable evidence supporting the trial court's finding of guilt beyond a reasonable doubt: Love was found shortly after the accident asleep in a sitting position behind the wheel of the truck, rather than in the middle of the bench seat or on the passenger side, where one would expect to find a passenger. Additionally, the court found that Love did not remember whether he was driving and therefore discounted Love's testimony that he was not the driver. Based on these facts, the trial court's conclusion that Love is guilty beyond a reasonable doubt is not "incredible as a matter of law." ***Id.*** We therefore need not consider Love's "theory of innocence"—that while Love was a sleeping passenger, Smith was driving his (Smith's) truck, had an accident, and, motivated by his bad driving record and the fact that he was not a licensed driver, left the accident scene on foot.

The defendant also argues there was insufficient evidence for the trial court's finding of probable cause at the refusal hearing. At a refusal hearing the State needs to present only enough evidence to show that the officer's determination of probable cause was plausible. ***State v. Wille***, 185 Wis.2d 673, 681, 518 N.W.2d 325, 328 (Ct. App. 1994). The trial court is not to weigh the evidence for and against probable cause or determine the credibility of the witnesses; it need only determine if the State's account is plausible. ***Id.***

We conclude, as the trial court did, that the deputy's determination of probable cause was plausible. He found Love asleep or unconscious in the

driver's seat of the truck. Although Love denied that he was driving, he did not indicate who was driving and no one else was around except for Love's brother, who was asleep in the passenger seat of the truck. Although there was admissible hearsay evidence at the refusal hearing that Smith, the owner of the truck, was picked up by first responders three miles from the accident claiming that two men stole his truck, this evidence does not defeat probable cause: the deputy did not know how Smith would have walked three miles away so quickly after the accident if he were actually the driver instead of Love, Love did not indicate that Smith was the driver, and the deputy was not even certain that the man three miles away was Smith.

By the Court.—Judgment and order affirmed.

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