COURT OF APPEALS
DECISION
DATED AND FILED

July 28, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2766

Cir. Ct. Nos. 2014TR1083
2014TR1084

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

ONEIDA COUNTY,

PLAINTIFF-RESPONDENT,

V.

RANDALL J. BUSAROW,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oneida County: PATRICK F. O'MELIA, Judge. *Affirmed*.

¶1 HRUZ, J.[1] Randall Busarow appeals a judgment finding him guilty of operating a motor vehicle while intoxicated as a first offense. Busarow argues

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

that there was insufficient evidence to find him guilty, and that the circuit court erred when it admitted the results of his post-arrest breath test into evidence. We disagree and affirm.

BACKGROUND

¶2 Oneida County sheriff's deputy Dan Semmerling testified at Busarow's bench trial.[2] Semmerling explained he received a call from dispatch at 11:37 p.m. on May 3, 2014, reporting a one-vehicle crash on County Highway Y. While traveling to the scene, Semmerling received another call from dispatch, this time informing him "that the owner of the vehicle that crashed had called in and reported the crash" and the owner was at the Little Rice Resort, also located on County Road Y. Semmerling testified he then drove directly to the Little Rice Resort, where Busarow identified himself by name and told Semmerling that he was involved in the crash "up the road."

¶3 Soon thereafter, Semmerling transported Busarow back to the accident scene, arriving at 11:54 p.m. Semmerling testified that Busarow said he had not had anything to drink after the accident, and that he had not been drinking while he was driving.[3] In response to a defense question, Semmerling agreed Busarow had "advised [him] that he had consumed alcohol a half an hour before the accident occurred." Indeed, on the squad-car recording, Busarow can be heard telling Semmerling the following as to when he last drank: "I don't even know what time it is now. Whatever time it took me to walk from here to there, uh,

[2] Busarow was not present at his trial.

[3] This conversation was recorded on the squad-car video, which the circuit court viewed and is in the appellate record.

probably about a half hour before that." In addition to Busarow's statement suggesting that he did not remain at the scene for any significant amount of time after the accident, there was no evidence presented at trial indicating any delay between the accident and when Busarow began walking to the resort.

¶4 Semmerling stated he detected the odor of intoxicants on Busarow's breath and requested that he submit to field sobriety tests, and Busarow agreed. Semmerling then described Busarow's performance on three field sobriety tests, testifying that Busarow exhibited enough "clues" to indicate intoxication on two of the three tests. Following the field sobriety tests, Semmerling administered a preliminary breath test because he "wanted to verify that alcohol was the cause of the impairment." Semmerling testified that he then placed Busarow under arrest for operating under the influence.[4]

¶5 Semmerling testified he transported Busarow to the Oneida County jail, where Busarow submitted to an Intoximeter breath test. This breath test report, which was introduced into evidence at Busarow's trial, indicates the test was conducted between 1:41 a.m. and 1:49 a.m. and yielded a blood-alcohol concentration of .12. Busarow stipulated "to the procedure that leads up to the results[,]" but objected to the admission of the results because there was "no indication that the test was taken within three hours of the driving."

¶6 In its decision, the circuit court discussed the evidence it heard relating to the timing of events on the night at issue, and it found: (1) the initial

[4] Busarow's brief-in-chief indicates he was arrested at 1:08 a.m.; however, he cites to a completed Wisconsin Department of Transportation "Alcohol/Drug Influence Report" that indicates the arrest time was "0008," or 12:08 a.m.

dispatch came in at 11:37 p.m.; (2) Semmerling reached Busarow at the Little Rice Resort not long after the initial dispatch; and (3) soon thereafter, Semmerling and Busarow drove back to where the accident occurred—"[a]nd while there's no specific reference to time, it's minutes in terms of driving." The court also found that Busarow admitted to consuming alcohol a half hour before the accident, and that Busarow "did not drink in the car. He did not drink after the accident. All he consumed was consumed prior to him getting in the vehicle." Continuing, the court stated:

> So just extrapolating, 11:37 calls come in, one from the defendant while the deputy was en route, and taking a half hour off of that when he had his last drink, take off some time for the walk, you're back to around 11:00 … approximately…. I'm just assuming reasonable inferences from the testimony here and other circumstantial evidence.
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> ….
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> And I think it is an appropriate inference to think that he wouldn't wait [to report the accident]. … [He] [d]idn't get there and contemplate for an hour or drink at the bar. He said he didn't. … [T]he evidence suggests that he went there to report the accident, it was the closest place, and he did so minutes after dispatch received the first one.

¶7 The circuit court also concluded, "So I don't have too much difficulty accepting the time frames of the three hours. The test was taken at 1:49. And the driving is arguably close, but it's 2 hours and 50 minutes from a reasonable reading of the testimony." The court proceeded to find the roads were clear on the night in question, and Busarow was driving thirty-five to forty miles per hour,[5] which, "on those roads is not uncommon or unsafe." The court described the accident as a serious one, "enough to shear off … a pretty sizeable

[5] This finding is seemingly based on Busarow's recorded response from the squad video.

tree and [Busarow's vehicle] required extraction by fire personnel." Given the clear road and Busarow's speed, the court determined there was no reasonable explanation for the accident other than Busarow's impairment. It also recounted Semmerling's observations, both in his testimony and his report, regarding Busarow's alcohol use, slurred speech, and odor of intoxicants on his breath, as well as Busarow's performance on the field sobriety tests.

¶8 The circuit court found Busarow guilty of OWI and dismissed the PAC charge. The court imposed a forfeiture and six-month license revocation. Busarow appeals.

DISCUSSION

¶9 Busarow argues the County did not establish by clear, satisfactory and convincing evidence that he operated a motor vehicle while under the influence of an intoxicant. He also argues the results of the Intoximeter breath test administered at the county jail should not have been admitted into evidence without an expert witness to establish the probative value of the results because there was "no evidence" that the test was administered within three hours of his driving.

¶10 When we review whether there is sufficient evidence presented at a bench trial to support a verdict, we will affirm unless the court's findings of fact are clearly erroneous. *See* WIS. STAT. § 805.17(2); *see also* ***Ozaukee Cnty. v. Flessas***, 140 Wis. 2d 122, 130-31, 409 N.W.2d 408 (Ct. App. 1987). The circuit court is best positioned to determine credibility and resolve conflicts in the evidence. ***Global Steel Prods. Corp. v. Ecklund Carriers, Inc.***, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269. We will accept the inferences drawn by the circuit court so long as they are reasonable, and we will search the record for

evidence to support its findings. ***Id.*** We do not look for the evidence that might support a different verdict but instead view the evidence most favorably to the verdict reached by the fact-finder. *See* ***id.***

¶11 To find Busarow guilty of first-offense OWI, the circuit court had to find that (1) Busarow operated a motor vehicle on a highway, and (2) Busarow was under the influence of alcohol at the time of operating the motor vehicle. *See* WIS JI—CRIMINAL 2668. The County bears the burden of proving the elements of first-offense OWI by clear, satisfactory and convincing evidence. *See* WIS. STAT. § 800.08(3). Busarow does not contest the fact he operated the motor vehicle involved in the accident on a highway.

¶12 Instead, Busarow contends the County did not prove he was under the influence of alcohol at the time he operated the vehicle because the record is devoid of "direct" evidence of the time of operation and of his being intoxicated while operating. Busarow criticizes evidentiary weaknesses on the County's part. These include that Semmerling did not ask Busarow at what time he was driving, that the County did not subpoena any witnesses to establish the time of his drinking or his driving, and that there was no evidence presented of the distance between the Little Rice Resort and Busarow's truck, or of the time it would take a person to walk to the resort from the accident scene. Busarow then asserts, "The admissible circumstantial evidence of Busarow's amount, and time, of drinking and driving, does not support the trial court's inference that Busarow, at the time he drove, was unable to safely manipulate the car's controls safely due to his being impaired."

¶13 Essentially, Busarow is attempting to retry his case on appeal. His arguments merely go to the weight of the evidence, and he fails to identify any

unreasonable inferences the circuit court made in reaching its factual findings. After examining the record, we perceive the following evidence as supporting the circuit court's finding of guilt: (1) Semmerling detected the smell of intoxicants on Busarow's breath, and observed other physical indicia of Busarow's impairment due to alcohol; (2) Busarow failed two of the three field sobriety tests that were conducted, as Semmerling testified about in detail and the court observed when it reviewed the squad-car video;[6] (3) Busarow was unable to control his vehicle, as his vehicle suffered severe damage in the context of a single-car accident occurring on a clear road when he was driving between thirty-five and forty miles per hour; (4) Busarow told Semmerling he had nothing to drink while driving or after the accident, but that he had consumed alcohol up to a half hour before the accident; and (5) as for the distance Busarow walked after the accident, the site of the accident and the Little Rice Resort are known points on a map, from which the judge may make reasonable inferences in determining how long it would take Busarow to walk the distance. In addition, the evidence was

[6] Busarow argues his performance on these field sobriety tests is "immaterial" because

> without knowing what Busarow drank, or when he drank, relative to the time he drove, his exhibiting signs of intoxication while performing the [field sobriety tests] is of no evidentiary significance. The ultimate question is: was Busarow under the influence of an intoxicant when he was driving? Busarow's performance of the [field sobriety tests] is in no degree determinative of the ultimate question.

We reject this specious argument. As stated above, *supra*, ¶6, the circuit court made findings of fact regarding the timeframe of the incident, relying in part on Busarow's answers to Semmerling's questions regarding when he drank in relation to the accident and the time of the interview. In any event, field sobriety tests exist to evaluate intoxication. Busarow could contest on appeal the intoxication-indicating "clues" or how the tests were administered, but he has not done so. We conclude the circuit court's reliance on Busarow's performance on the tests was reasonable and not improper, and that the test results are material to the determination of his intoxication.

sufficient to support the circuit court's finding that the breath test was conducted within three hours of Busarow's driving, and, accordingly, the court was able to consider that Busarow's Intoximeter breath test showed his blood-alcohol concentration was .12 at 1:49 a.m.[7]

¶14 Given the record and the deference we owe to a factfinder's credibility determinations, we will not upset the circuit court's factual findings. Contrary to Busarow's arguments, there is ample evidence in the record that shows Busarow was intoxicated at the time he operated the vehicle and that otherwise supports the verdict. We find meritless Busarow's assertions that there was "no evidence" of the time he drank, nor of the time he drove. In fact, Semmerling testified about his conversation with Busarow regarding the time of Busarow's drinking, which conversation was further recorded on video and viewed at trial. The circuit court clearly found Semmerling's testimony credible, and, as the finder of fact, it was entitled to weigh the evidence and so find. *See* ***State v. Paegelow***, 56 Wis. 2d 815, 821-22, 202 N.W.2d 916 (1973). In addition, based on the evidence submitted at trial, including Busarow's own comments at the scene, it was not unreasonable for the court to infer he left the scene shortly after the accident. Finally, we do not require that the elements of a charge be

[7] The County argues that even without considering the results of the breath test administered at the county jail, the other evidence provided at trial was sufficient to find Busarow guilty of operating while intoxicated, if not of his having a prohibited alcohol content. Furthermore, the County suggests a "close reading" of the record indicates the circuit court did not use the Intoximeter result in making its determination that Busarow was operating while intoxicated.

We need not reach the parties' contentions in this regard, as we conclude that the circuit court's finding that the Intoximeter test was administered within three hours of Busarow's operation of the vehicle was neither unreasonable nor clearly erroneous. *See* WIS. STAT. § 885.235(1g). Given that a bench trial occurred here, it is of little significance whether that determination was one of admissibility, of fact finding relating to guilt, or of both, as the circuit court's conclusion was not improper in either context, under the applicable standards of review.

proved only by direct evidence; rather, reasonable inferences may suffice. *See* ***Bautista v. State***, 53 Wis. 2d 218, 223, 191 N.W.2d 725 (1971). Here, the court reasonably determined the time Busarow drove, based on all of the evidence of record and reasonable inferences therefrom.

¶15 Altogether, and when considering the evidence in the light most favorable to the verdict, the record supports the circuit court's finding that the breath test was taken within three hours of Busarow's driving, and that the County provided clear, satisfactory, and convincing evidence that Busarow operated a motor vehicle on a public highway while under the influence of alcohol.

By the Court.—Judgment affirmed.

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