**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

February 2, 1999

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 98-2683-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**MARK A. MAYER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: ROBERT C. CRAWFORD, Judge. *Affirmed.*

CURLEY, J.[1] Mark A. Mayer appeals from a judgment of conviction, following a jury trial, for a third offense of operating a motor vehicle while intoxicated. He claims that the trial court erroneously exercised its discretion both in striking the arresting officers' opinion testimony concerning

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

whether Mayer was intoxicated when he was driving, and in refusing to permit the appellant's father, a detective with thirty-three years' experience (Detective Mayer), to give his opinion as to whether the appellant was under the influence of an intoxicant. Because Mayer failed to object to the trial court's striking of the arresting officers' opinion testimony, he may not raise that issue on appeal and it is deemed waived. Additionally, while the trial court did erroneously exercise its discretion by refusing to permit the appellant's father to give either a lay or expert opinion concerning whether the appellant was under the influence of an intoxicant, the error was harmless. Consequently, the judgment is affirmed.

## I. BACKGROUND.

The trial testimony revealed that early in the evening of April 21, 1997, James Bohl witnessed a car driven by Mayer jump the curb in front of his (Bohl's) house and drive onto the adjacent lawn. Bohl testified that he then watched as Mayer parked his car and entered a house up the street. Bohl called the police, who responded to the call approximately twelve to eighteen minutes after Bohl witnessed the erratic driving.

Mayer testified in his own defense. He told the jury that after fighting with his wife, he drove to his father's house, who lives on the same block as Bohl. He admitted that he was driving too fast when he came around the corner and he stated that this was the reason he jumped the curb. He told the jury that after parking the car he went into his father's house, had two beers and then went outside to fix a flat tire on his car, which he was doing when the police arrived.

The arresting officers, Michael Fischer and Anthony Knox, agreed that when they arrived, Mayer was outside changing a tire on his car. Both officers testified that after approaching Mayer, they suspected that he was

intoxicated because they smelled alcohol on his breath, which led to the administration of four field sobriety tests. The officers testified that Mayer was able to satisfactorily complete only two of the four tests. During the cross-examination of the two officers, Mayer's trial attorney asked both officers whether they ever saw the appellant driving. Both officers testified that they did not see Mayer driving. Appellant's trial attorney then inquired of both officers whether the officers had an opinion as to whether Mayer was under the influence of an intoxicant when he was driving. Officer Fischer answered that, "As in the time he was driving, no. I have to say it says [sic] it after we got to the scene." Officer Knox responded, "My opinion is that it was possible he was under the influence while he was driving." The prosecutor never objected to this line of questioning.

After the State completed its case, the trial court *sua sponte* advised the parties that the opinion testimony elicited from the officers was not appropriate and proceeded to instruct the jury that they were to disregard the officers' opinions concerning whether Mayer was operating a motor vehicle while under the influence of an intoxicant. At the same time, the trial court also informed Mayer's trial attorney that Detective Mayer would not be allowed to render an opinion as to whether Mayer was under the influence of an intoxicant when Mayer arrived at his home.

When the trial resumed, Mayer's trial attorney called Detective Mayer as a witness and attempted to lay a foundation that Detective Mayer, with thirty-three years of experience on the Milwaukee Police Department, was an expert in detecting intoxicated persons. The trial court refused to permit Detective Mayer to testify as an expert witness concerning his son's level of intoxication, believing that it was inappropriate under the Wisconsin rules of evidence. Later

the jury found Mayer guilty and the trial court sentenced him to the maximum sentence of one year at the House of Correction.

**II. Mayer has waived his right to appeal the trial court's ruling concerning the opinion testimony of the police officers because he never objected to the trial court's ruling.**

Mayer argues that the trial court erroneously exercised its discretion when it *sua sponte* decided to strike from the record the opinion testimony of the arresting officers concerning whether they thought Mayer was under the influence of an intoxicant when driving. Mayer argues that the trial court erred because the decision to strike their testimony was based upon the trial court's belief that FEDERAL RULE OF EVIDENCE 704(b) forbids such questioning and that the federal rule is identical to Wisconsin's RULE 907.04, STATS.

Whether or not this is a correct ruling will not be entertained in this context because Mayer failed to object to the trial court's ruling. Not only did Mayer's trial counsel fail to object to the trial court's reasoning, but he actually indicated his agreement with the trial court's analysis.

> THE COURT: Now before we recess I want to take up the question that has been troubling me from both sides of the table. Both sides have been asking the investigating officers whether they believe that Mr. Mayer was under the influence of an intoxicant. That opinion testimony from the arresting officer isn't appropriate. The Federal cases have been very complete with discussions about the inappropriateness of that type of conclusion as being unsubstantiated conclusions [sic] which is inadmissible under 907.04.
>
> ….
>
> THE COURT: So, Mr. Resler [assistant district attorney] I'll hear from you your position as to whether opinion testimony from the investigation officer is appropriate.
>
> ….

> THE COURT: Mr. Jackson [Mayer's trial attorney].
>
> MR. JACKSON: Well, I agree. I'm confused. Are you saying the testimony is not admissable. [sic] You are going to strike it?
>
> THE COURT: That's right. Whether they believe who they arrested is guilty which was the question put to Officer Fischer and Officer Knox.
>
> MR. JACKSON: I agree with you.

In light of the exchange between the trial court and Mayer's trial counsel, Mayer cannot now challenge the trial court's ruling. Mayer has waived his right to do so by failing to object.[2] ***State v. Rogers***, 196 Wis.2d 817, 825, 539 N.W.2d 897, 900 (1995) (failure to raise a specific challenge in the trial court waives the right to raise it on appeal).

### III. The trial court's ruling concerning Detective Mayer, although erroneous, was harmless error.

The trial court's determination to admit or exclude evidence is a discretionary decision that will not be upset on appeal absent an erroneous exercise of discretion. ***State v. Jenkins***, 168 Wis.2d 175, 186, 483 N.W.2d 262, 265 (Ct. App. 1992).

The State has conceded that the trial court erroneously exercised its discretion in its ruling that Detective Mayer could not give opinion testimony on the appellant's level of intoxication because the underpinnings of the trial court's ruling presumed that FEDERAL RULE OF EVIDENCE 704(b) was identical to Wisconsin's corresponding RULE 907.04 when, in fact, the statutes are dissimilar. FEDERAL RULE OF EVIDENCE 704(b) reads: "No expert witness testifying with

[2] The State's brief is silent on this issue. In fact, the State's brief does not even acknowledge the first issue at all.

respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone." Contrary to the trial court's belief, RULE 907.04, STATS., is not identical:

> **Opinion on ultimate issue.** Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

The State and Mayer have both correctly concluded that there is no corollary to FEDERAL RULE OF EVIDENCE 704(b) in the Wisconsin rules of evidence. As a result, the trial court improperly exercised its discretion because its reasoning was based on an incorrect view of the law.

The record reveals that Mayer tried unsuccessfully to admit Detective Mayer's opinion testimony through two different avenues. First, trial counsel queried the court as to whether Detective Mayer could give an opinion, as a lay witness under RULE 907.01,[3] as to whether the appellant was under the influence of an intoxicant when he arrived at Detective Mayer's house. This inquiry took place before the appellant put on his case:

[3] RULE 907.01, STATS., provides:

> **Opinion testimony by lay witnesses.** If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

> MR. JACKSON: Before they arrive, I have a question that is in regards to the testimony of Mr. Mayer who is a police officer.
>
> Is the ruling going to be that I can't ask him if he had an opinion whether the defendant was under the influence of an intoxicant when he came to his house?
>
> THE COURT: Yes, because that term is simply a legal term that applies to the drunk driving. You can ask Mr. Mayer if his son had been drinking alcohol before he came to the house.
>
> MR. JACKSON: So he can't give an opinion?
>
> THE COURT: He can testify as to whether his son was drinking alcohol before the crash and before he came to the house based on his observations of what he saw when his son came in.
>
> MR. JACKSON: So really the ruling means no one is going to be testifying as to whether he was under the influence of an intoxicant; is that correct?

Later during trial Mayer's trial attorney attempted to lay a foundation to allow Detective Mayer to testify as an expert. In his questioning of Detective Mayer, Mayer's trial counsel advised the trial court that Detective Mayer was an expert in the area of detecting people under the influence of intoxicants based upon his thirty-three years as a police officer. Unlike his earlier attempt to introduce Detective Mayer's opinion as a lay witness, Mayer's trial counsel relied on RULE 907.02, STATS., as authority.[4]

> MR. JACKSON: Now, in your occupation as a Milwaukee police Officer for 33 years, had [sic] you had an opportunity to observe people who are more under the influence of an intoxicant?

[4] RULE 907.02, STATS., provides:

> **Testimony by experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

> MR. RESLER: I would object to using those words. If he wants to arrest a person maybe at the scene but whether someone is under the influence is a legal conclusion.
>
> THE COURT: Are you trying to qualify Mr. Mayer as an expert in detecting people who are drunk?
>
> MR. JACKSON: Under the influence, yes. After 33 years, I think I can attempt to qualify him as an expert.
>
> THE COURT: I'm satisfied that is an area where opinion testimony is not helpful to the jury. I will not allow opinion testimony on that subject under 907.02 Next question.

Clearly, then, Mayer's attempts at introducing Detective Mayer's opinion as to Mayer's intoxication took two forms—first, to have Detective Mayer's opinion admitted as a lay witness opinion pursuant to § 907.01, and later, to have Detective Mayer qualified as an expert witness pursuant to § 907.02.

Pursuant to § 907.01 and the developed case law, Detective Mayer could have testified as a lay witness and given an opinion as to whether his son was under the influence of an intoxicant. The statute permits lay witnesses to state an opinion if it is "rationally based on the perception of the witness." Further, case law permits lay witnesses to give an opinion concerning whether someone appeared intoxicated if the witness has had sufficient time to observe the person. ***City of Milwaukee v. Bichel***, 35 Wis.2d 66, 69, 150 N.W.2d 419, 421 (1967) (internal quotation marks omitted) ("a lay witness who has had the opportunity to observe facts upon which he bases his opinion may give his opinion as to whether a person at a particular time was or was not intoxicated").

Having concluded that Detective Mayer's opinion regarding whether his son was under the influence of an intoxicant was admissible, the next question is whether the trial court's ruling constitutes harmless error. The test for

determining whether harmless error exists, found in ***State v. Alexander***, 214 Wis.2d 628, 652-53, 571 N.W.2d 662, 672 (1997), is

> whether there is a reasonable possibility that the error contributed to the conviction. If it did, reversal and a new trial must result. The burden of proving no prejudice is on the beneficiary of the error, here the state. The state's burden, then, is to establish that there is no reasonable possibility that the error contributed to the conviction.

Mayer argues that the error was not harmless because the inclusion of such evidence would have allowed defense counsel to argue that neither officer witnessed Mayer driving and that Detective Mayer did not believe his son to be under the influence of an intoxicant. He argues that had a jury been permitted to hear such argument, "the jury's verdict could very conceivably have been not guilty." The State counters by arguing that "there was ample evidence upon which the jury could find the defendant guilty." The State points to the evidence established at trial that Mayer "drove over a front lawn and curb; smelled of intoxicants; slurred his speech; admitted consuming four beers; and failed some of the field sobriety tests." Further, the State contends that the impact of prohibiting Detective Mayer from giving opinion testimony as to whether his son was under the influence of an intoxicant was significantly lessened by the opinions that Mayer was allowed to give.

Detective Mayer was permitted to testify that he did not smell any alcohol on Mayer's breath when he arrived at his home. Mayer's attorney was also allowed to ask Detective Mayer whether he saw his son perform several of the field sobriety tests. In response, Detective Mayer told the jury that he witnessed his son perform several of the tests and he thought his son "performed them well." More damaging to Mayer's contention that trial court error contributed to the

conviction was the fact that Detective Mayer was allowed to testify that he thought his son could have safely operated an automobile on the night in question. The State proffers that this testimony served the same purpose as the prohibited opinion would have served. The State is correct as this question and answer comes very close to asking the prohibited question, did Detective Mayer think his son was under the influence of an intoxicant?

Therefore, given the state of the record and the strength of the State's case, this court concludes that there is no reasonable possibility that the trial court's error contributed to the conviction. Besides evidence being admitted at trial that approximately eighteen minutes before the police arrived Mayer's driving was so erratic that a witness felt obligated to call the police, there was also evidence that the police smelled alcohol on Mayer's breath when they arrived and that he was unable to pass two of four field sobriety tests that were administered. Additionally, Mayer evinced a guilty conscience by first denying drinking any alcohol at all, only later admitting that he had had four beers.

The jury heard conflicting versions of what occurred that evening and, in weighing the credibility of the witnesses, they gave more credence to the officers' and the eyewitness's accounts than they did to the accounts related by Mayer and his father. The jury was well aware of the fact that neither Mayer nor his father felt that the appellant was impaired by alcohol and the jury rejected that testimony. Had Mayer's trial attorney been able to ask Detective Mayer's opinion as to whether Mayer was under the influence of an intoxicant it would have added little to the resolution of the dispute. The jury already knew that Detective Mayer did not believe his son was under the influence of an intoxicant on the night in question because he testified he smelled no alcohol on his breath; that he believed Mayer satisfactorily performed the field sobriety tests; and that, in his opinion,

Mayer was able to safely operate a motor vehicle. Thus, there was no reasonable possibility that the error contributed to the conviction. Consequently, the judgment is affirmed.

*By the Court*.—Judgment affirmed.

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