COURT OF APPEALS
DECISION
DATED AND FILED

April 22, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2957-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CHRIST GROH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County: ANDREW P. BISSONNETTE, Judge. *Affirmed*.

DEININGER, J.[1] Christ Groh appeals a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant (OMVWI), in violation of § 346.63(1)(a), STATS., as a second offense. He claims the trial court erred in its instruction to the jury regarding the testimony of an expert witness concerning his alcohol concentration at the time he was driving. We

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

conclude the trial court did not erroneously exercise its discretion in giving the challenged instruction. Accordingly, we affirm Groh's conviction for OMVWI.

BACKGROUND

Groh was arrested for OMVWI following a one-vehicle traffic accident in which his pick-up truck struck a bridge railing and ended up in a ditch. He did not report the accident to police until several hours after the accident. A sample of his blood was drawn approximately five hours after he had driven his truck into the ditch. A chemist from the Wisconsin State Laboratory of Hygiene testified at trial that the sample produced a blood alcohol concentration (BAC) of .144 g/100 mL. She also testified that, through "retrograde extrapolation," she determined that Groh's BAC at the time of the accident would have been .228 g/100 mL if he had consumed no alcohol after the accident. Additionally, she testified that if Groh had consumed three or four, twelve-ounce beers between the time of the accident and the time the blood was drawn, as his wife had testified, his BAC at the time of driving would have been between .116 and .144 g/l00 mL.

At the instructions conference, Groh objected to the court's instructing the jury that, if it found that Groh's BAC was .10 g/100 mL at the time of driving, it could find "from fact that alone" that Groh was OMVWI. The court denied the objection and instructed the jury as follows:

> You have heard expert testimony about the defendant's alcohol concentration at the time of the alleged driving. If you are satisfied beyond a reasonable doubt that the defendant's alcohol concentration at the time of the alleged driving was .10 grams or more, you may find from that fact alone that the defendant was under the influence of an intoxicant. But you are not required to do so. You, the jury, are here to decide this question on the basis of all of the evidence in this case.

The jury found Groh guilty of both OMVWI and operating a motor vehicle with a prohibited alcohol concentration (PAC). *See* § 346.63(1)(a) and (b), STATS. On the State's motion, the court dismissed the PAC charge and entered a judgment convicting Groh of OMVWI, second offense. Groh appeals the judgment of conviction.

ANALYSIS

Groh does not challenge the admission into evidence of the blood test result or the chemist's testimony extrapolating that result to the time of his driving. His only claim of error is the court's giving of the instruction quoted above. Our review of a trial court's jury instructions is deferential; we inquire only whether the trial court misused its broad discretion to give jury instructions. *See* ***Young v. Professionals Ins. Co.***, 154 Wis.2d 742, 746, 454 N.W.2d 24, 26 (Ct. App. 1990). We will reverse the trial court and order a new trial only if the jury instructions, taken as a whole, misled the jury or communicated an incorrect statement of the law. *See* ***Miller v. Kim***, 191 Wis.2d 187, 194, 528 N.W.2d 72, 75 (Ct. App. 1995). Whether jury instructions are a correct statement of the law is a question of law that we review de novo. *See* ***State v. Neumann***, 179 Wis.2d 687, 699, 508 N.W.2d 54, 59 (Ct. App. 1993). The choice among requested instructions which correctly state the law, however, is a matter for the exercise of trial court discretion, based upon the facts adduced at trial. *See* ***State v. Lenarchick***, 74 Wis.2d 425, 455, 247 N.W.2d 80, 96 (1976).

Groh's challenge to the instruction regarding the use the jury may make of the chemist's testimony regarding his BAC at the time of driving is based on § 885.235, STATS. That statute provides, in relevant part, as follows:

> (1g) In any action or proceeding in which it is material to prove that a person was under the influence of

> an intoxicant or had a prohibited alcohol concentration … while operating or driving a motor vehicle … evidence of the amount of alcohol in the person's blood at the time in question, as shown by chemical analysis of a sample of the person's blood or urine or evidence of the amount of alcohol in the person's breath, is admissible on the issue of whether he or she was under the influence of an intoxicant or had a prohibited alcohol concentration … if the sample was taken within 3 hours after the event to be proved. The chemical analysis shall be given effect as follows without requiring any expert testimony as to its effect:
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> ….
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> (b) Except with respect to the operation of a commercial motor vehicle as provided in par. (d), the fact that the analysis shows that the person had an alcohol concentration of more than 0.04 but less than 0.1 is relevant evidence on the issue of intoxication or an alcohol concentration of 0.1 or more but is not to be given any prima facie effect.
>
> ….
>
> (c) The fact that the analysis shows that the person had an alcohol concentration of 0.1 or more is prima facie evidence that he or she was under the influence of an intoxicant and is prima facie evidence that he or she had an alcohol concentration of 0.1 or more.
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> ….
>
> (3) If the sample of breath, blood or urine was not taken within 3 hours after the event to be proved, evidence of the amount of alcohol in the person's blood or breath as shown by the chemical analysis is admissible only if expert testimony establishes its probative value and may be given prima facie effect only if the effect is established by expert testimony.

Groh asserts that subsection (3) imposes two requirements for the use at trial of test results from a blood sample taken more than three hours after driving: (1) that there be expert testimony of the test result's probative value; and (2) that there be "additional and separate expert testimony as to the effect upon a Defendant of a blood alcohol concentration result as reported." Groh concedes that the chemist's testimony met the first requirement, but he argues that it did not meet the second requirement, and that the trial court thus erred in instructing the

jury "as to the prima facie effect of the blood alcohol test reading as given by the expert."

We conclude that Groh misreads both the statute and the court's instruction. Nowhere in § 885.235, STATS., is there a requirement that expert testimony be given regarding the effects that a given BAC level would have on a driver. Under subsection (1g), a test result may be admitted into evidence at trial, without expert testimony, if the sample was taken within three hours of driving. If the test result is between .04 and .1, it may only be used as "relevant evidence on the issue of intoxication or an alcohol concentration of 0.1 or more," but if the test result is .1 or greater, the result itself "is prima facie evidence that [the driver] was under the influence of an intoxicant and is prima facie evidence that he or she had an alcohol concentration of 0.1 or more" at the time of driving. Section 885.235(1g)(b) and (c), STATS.

If, however, the sample is drawn more than three hours after driving, subsection (3) of the statute requires that expert testimony be given as to the probative value of the test result before the test result may be admitted into evidence. The probative value of a test result based on a sample drawn more than three hours after driving will generally be established, as Groh concedes was done here, by having an expert testify as to what the test result tells us about the driver's likely BAC at the time of driving, based on the body's alcohol absorption and elimination rates, the driver's consumption of food or alcohol at relevant times based on evidence at trial, and related factors. Once admitted, however, the statute specifies that the test result based on an untimely sample "may be given prima facie effect only if the effect is established by expert testimony." Section 885.235(3), STATS. It is on the meaning of the words "the effect" that Groh bases his claim of error.

We conclude that the second use of the word "effect" in subsection (3) refers back to its first use in the phrase "prima facie effect," and not, as Groh argues, to the effect of a given BAC on a driver's ability to operate a motor vehicle. Thus, if there is expert testimony that extrapolates the test result to a BAC at the time of driving of .1 or greater, its "prima facie effect" is established and the driver can be found to have been OMVWI or with a PAC based on the test result alone. If, however, an expert's extrapolation results in a BAC of less than .1 at the time of driving, the test result may only be used as evidence of intoxication at the time of driving, but it may not be given "prima facie effect."

Moreover, the court did not instruct the jury that the test result in this case was to be given prima facie effect. The court's instruction referred only to the "expert testimony about the defendant's alcohol concentration at the time of the alleged driving," not to the effect to be given the test result. In composing the instruction it gave on the issue, the court relied on a memorandum from the reporter for the Criminal Jury Instructions Committee, who explained:

> The Committee decided there should be no instruction on any prima facie effect of an after-three-hour test in prohibited alcohol concentration cases. The reason: the expert testimony needed to justify the prima facie effect for the late test will always include direct reference to BAC at the time of driving. This makes it more direct to just rely on the expert's testimony about the BAC at the time of driving rather than to rely on any prima facie effect for the late test. The expert is making the connection with his testimony that is otherwise provided by the statutory prima facie effect provision.

The memorandum also indicated that a jury might be instructed on "the relationship between the BAC and being under the influence," and suggested language similar to that employed by the court in this case. We find the reasoning relied upon by the trial court to be persuasive.

Groh concedes that "the effects on a person of alcohol content in excess of .10 are generally now known in the community, those effects being that the subject person is under the influence." We thus conclude that the court did not erroneously exercise its discretion in instructing the jury that, if it believed from the expert's testimony that Groh's BAC was .1 or greater at the time of driving, it could, but was not required to, find that he was under the influence of an intoxicant when he drove his truck into the ditch.

Finally, we note that the challenged instruction addressed only the charge of OMVWI, and that the jury found Groh guilty of both OMVWI and with a PAC. Section 346.63(1)(c), STATS., provides that if a defendant "is found guilty of both [OMVWI and with a PAC] for acts arising out of the same incident or occurrence, there shall be a single conviction for purposes of sentencing and for purposes of counting convictions." Thus, the jury's verdict would support a conviction and sentence in this case, even if its finding of guilt on the OMVWI charge had been based on an erroneous instruction. *See* ***State v. Peterson***, 220 Wis.2d 474, 482, 584 N.W.2d 144, 147-48 (Ct. App. 1998) (concluding that instructional error is not prejudicial if it appears that the result would not have been different had the error not occurred), *review denied,* 221 Wis.2d 656, 588 N.W.2d 633 (1998).

By the Court.—Judgment affirmed.

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