

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 26, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 99-0972-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY J. BARTOS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dunn County:
WILLIAM C. STEWART, Judge. *Affirmed.*

¶1 CANE, C.J. Timothy Bartos appeals from a judgment convicting him of operating a motor vehicle while intoxicated, seventh offense, operating with a prohibited alcohol concentration, seventh offense, and operating after his license had been revoked or suspended, contrary to §§ 346.63(1)(a) and (b) and 343.44(1), STATS. Bartos argues that because the State failed to present evidence as to the time of operation, thus failing to establish that Bartos was operating while

under the influence of an intoxicant, the trial court erred by denying his motion for a directed verdict at the close of the State's evidence and his convictions should therefore be reversed. Because the evidence presented at trial would allow a reasonable jury to find Bartos guilty beyond a reasonable doubt of operating his vehicle while intoxicated and with a prohibited alcohol concentration, this court affirms the judgment.

¶2 At trial, the State's witnesses provided the following testimony. On August 28, 1998, at approximately 8 p.m., Village of Boyceville Police Chief, Brian Hurt, responded to a dispatch call regarding a reported accident on Highway K, about one mile south of Boyceville. Hurt testified that as he approached the scene, he encountered Bartos walking along the shoulder of the road, in the direction of Boyceville. Hurt asked Bartos if he had seen a vehicle off of the roadway or any type of accident in the area and Bartos informed him that his vehicle had gone off the roadway. During the course of his conversation with Bartos, Hurt smelled "the odor of intoxicants on his person, ... noticed that his balance seemed to be somewhat unsteady," and found his speech to be "somewhat slurred."

¶3 Shortly thereafter, Dunn County Deputy Sheriff Randy Smeltzer arrived on the scene and further questioned Bartos. Smeltzer testified that Bartos told him that he had gone off the road and, in an attempt to get his truck back out of the ditch, he got stuck in a swamp. Smeltzer asked Bartos if he had been drinking, to which Bartos responded that he had. Smeltzer administered a number of field sobriety tests. Bartos was thereafter arrested and a blood sample was taken. Testimony established that Bartos' blood ethanol concentration was 0.263 grams of alcohol per one hundred milliliters of blood.

¶4 At the close of the State’s case, Bartos moved for a directed verdict on the grounds that the State had failed to present evidence as to the time Bartos was operating his vehicle. The trial court denied the motion and Bartos was subsequently convicted. This appeal followed.

¶5 Bartos argues that the trial court erred by denying his motion for a directed verdict because the State, by failing to provide evidence as to the time of operation, failed to prove that Bartos was, in fact, operating while intoxicated. “A verdict ought to be directed if, taking into consideration all the facts and circumstances as they appear in evidence, there is but one inference or conclusion that can be reached by a reasonable [person].” *State v. Leach*, 124 Wis.2d 648, 664, 370 N.W.2d 240, 249 (1985) (quoting *Milwaukee v. Bichel*, 35 Wis.2d 66, 68, 150 N.W.2d 419, 421 (1967)). In *Leach*, our supreme court recognized:

In determining whether or not the trial court was in error in failing to direct the verdict, this court must take that view of the evidence which is most favorable to the party against whom the verdict was sought to be directed. *If there is any evidence to sustain a defense or a cause of action, the case must be submitted to the jury.* The weight and sufficiency of the evidence is for the jury, as is the weight to be given to the witness’ positive or negative testimony. Furthermore, it is basic that the credibility of the evidence and the inferences to be drawn therefrom are matters for the jury. If there is any evidence other than mere conjecture or incredible evidence to support a contrary verdict, the case must go to the jury.

Id. at 664, 370 N.W.2d at 249 (emphasis added) (citations omitted). The *Leach* court further recognized that “the party having the burden of proof must come forward with evidentiary facts that establish the ultimate facts; and the degree of proof must be such as to remove these ultimate facts from the field of mere speculation and conjecture.” *Id.*

¶6 Further, when, as here, there is a challenge to the sufficiency of the evidence, “the test is whether this court can conclude that the trier of fact could reasonably be convinced that the defendant was guilty beyond a reasonable doubt.” *State v. Gaudesi*, 112 Wis.2d 213, 222, 332 N.W.2d 302, 306 (1983). This court’s reversal of a conviction is required only when:

the evidence considered most favorably to the state and the conviction is so insufficient in probative value and force that it can be said as a matter of law that no trier of facts acting reasonably could be convinced to that degree of certitude which the law defines as “beyond a reasonable doubt.”

State v. Lossman, 118 Wis.2d 526, 540-41, 348 N.W.2d 159, 166 (1984).

¶7 This court concludes that given the evidence presented at trial, a jury acting reasonably could be convinced beyond a reasonable doubt that Bartos was operating his vehicle while intoxicated and with a prohibited alcohol concentration.¹ *See id.* As such, the trial court did not err by denying Bartos’ motion for directed verdict.

¶8 As the *Leach* court recognized, a case must be submitted to the jury “if there is any evidence to sustain a defense or a cause of action.” *Id.* at 664, 370 N.W.2d at 249. Although the State did not present direct evidence as to the time Bartos operated his motor vehicle, a jury may rely upon circumstantial evidence in a criminal case. *See State v. Johnson*, 11 Wis.2d 130, 104 N.W.2d 379 (1960).

¹ To be found guilty of operating a motor vehicle while under the influence of an intoxicant, the State must prove that: (1) the defendant operated a motor vehicle on a highway, and; (2) the defendant was under the influence of an intoxicant at the time he operated the motor vehicle. *See WIS J I—CRIMINAL 2663*. Similarly, the essential elements of a prosecution for operating a motor vehicle with a prohibited alcohol concentration are that: (1) the defendant operated a motor vehicle on a highway, and; (2) the defendant had a prohibited alcohol concentration at the time he operated the motor vehicle. *See WIS J I—CRIMINAL 2660*.

“Circumstantial evidence is the proof of certain facts from which a jury may logically infer the existence of other facts according to the knowledge or common experience of mankind.” WIS J I—CRIMINAL 170.

¶9 Here, the evidence established that the police officers, responding promptly to the report of an accident, encountered Bartos walking along the road, in the vicinity of the reported accident. It was further established that Bartos had driven his vehicle off the road, that he had been drinking and that a blood test revealed a blood ethanol concentration of 0.263 grams of alcohol per one hundred milliliters of blood, a prohibited alcohol concentration. Although there is no direct evidence as to the time Bartos operated his motor vehicle, given all the evidence presented, a reasonable jury could infer that the police encountered Bartos shortly after he drove his car off the road and consequently find Bartos guilty beyond a reasonable doubt of operating his vehicle while intoxicated and with a prohibited alcohol concentration. Accordingly, this court affirms the judgment.

By the Court.—Judgment affirmed.

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

