COURT OF APPEALS DECISION DATED AND FILED

December 23, 2015

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2015AP84-CR

Cir. Ct. No. 2011CF1438

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL J. SPIZZIRRI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: TIMOTHY D. BOYLE, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Michael R. Spizzirri appeals from a judgment of conviction entered after a jury found him guilty of operating a motor vehicle while

intoxicated (OWI), contrary to WIS. STAT. § 346.63(1)(a) (2013-14)[1] and operating a motor vehicle with a prohibited blood alcohol concentration (PAC), contrary to § 346.63(1)(b).[2] Spizzirri argues that the trial court erred by admitting expert testimony about the result of his blood alcohol test and limiting the scope of his cross-examination concerning the possibility of another driver. Spizzirri also contends that the evidence was insufficient to support his convictions. We disagree and affirm.

¶2 At 8 p.m., Officer Justin Koepnick discovered a Toyota Prius sitting on a boat launch inclined toward the Root River. The car was running with its headlights on, but was disabled due to a punctured and flat tire. Spizzirri was passed out in the car with his upper body lying on the passenger floor board and his legs extended over the driver-side floor. The boat launch was not immediately accessible from the road and officers had to drive down a bike path to reach the Prius.

¶3 As Koepnick leaned into the vehicle, he smelled the strong odor of intoxicants. When asked for his name, Spizzirri told Koepnick to "[f]uck off!" Spizzirri said he believed he was in his mother's driveway in Kenosha. Koepnick asked if he had been drinking and Spizzirri answered "[f]uck you!" Spizzirri was unable to stand on his own to perform field sobriety tests.

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[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] Though Spizzirri was convicted of both OWI and PAC, the PAC count was dismissed prior to sentencing on the State's motion pursuant to WIS. STAT. § 346.63(1)(c), which provides that if a person is found guilty of both offenses "for acts arising out of the same incident or occurrence, there shall be a single conviction for purposes of sentencing."

¶4 Believing Spizzirri was intoxicated, officers brought him to a hospital for a blood draw. Spizzirri's blood was collected at 9 p.m. and test result showed his blood alcohol concentration (BAC) was .310 grams per 100 milliliters. Spizzirri was charged with OWI and PAC, both as a seventh, eighth or ninth offense.

¶5 Prior to trial, Spizzirri filed a motion challenging the admissibility of his BAC under WIS. STAT. § 885.235(3), which provides that if a blood sample "was not taken within [three] hours after the event to be proved," evidence of the person's BAC "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." The State argued that expert testimony was not required because the blood was taken within three hours after police discovered Spizzirri. Spizzirri countered that the § 885.235(3) "event to be proved" was operating while intoxicated on a highway,[3] and since the boat landing was not a highway, the State could not establish that the sample was taken within a three-hour window. The trial court agreed with Spizzirri and ruled that the blood test result was "not entitled to the presumptive effect of [§] 885.235" and could be admitted only through expert testimony.

¶6 After learning the State intended to call analyst Michael Knutsen from the Wisconsin State Laboratory as an expert, Spizzirri filed a motion in limine seeking to exclude Knutsen's testimony on the ground that evidence of his

[3] The two elements of OWI are (1) the defendant drove or operated a motor vehicle on a highway and (2) he or she was under the influence of an intoxicant at the time of driving or operation. *See* WIS JI—CRIMINAL 2663. In pertinent part, a "highway" includes all public ways, thoroughfares, and bridges. *See* WIS. STAT. § 340.01(22).

BAC was inadmissible absent predicate facts concerning when he last consumed alcohol or drove on a highway. The trial court held a ***Daubert***[4] hearing at which Knutsen testified that chemical testing established Spizzirri's BAC was .310, but that he had no information about the amount or timing of Spizzirri's alcohol consumption, when he operated his car on a highway, or whether he consumed any alcohol after driving. Knutsen testified that absent these facts, he could not prepare a reverse extrapolation calculation or opine as to Spizzirri's BAC or level of intoxication at the time he drove his car on a highway.

¶7 The trial court determined that evidence of Spizzirri's BAC at the time he was discovered was relevant and admissible because it had "a tendency to make a consequential fact, that is the intoxication level of the defendant more probable or less probable than it would be without the evidence." The court found that the evidence would assist the jury despite Knutsen's inability to offer an opinion as to whether Spizzirri was intoxicated at the time of driving:

> And I fully understand that along with that the jury will have to make a connection through other evidence that would be present. That he was intoxicated at the time of operation of a motor vehicle or even operated a motor vehicle for that matter. And that burden is on the state. And I believe that issue is an issue that should actually be determined by the jury and not me because based upon the instruction relative to circumstantial evidence, circumstantial evidence is neither no more or no worse than direct evidence.

[4] ***Daubert v. Merrell Dow Pharms., Inc***., 509 U.S. 579 (1993). The parties stipulated that given Knutsen's credentials and the established scientific methods employed, he was qualified to testify about the result of Spizzirri's blood test. The parties also stipulated that having a .310 BAC would render a driver impaired.

The court ruled that Knutsen could testify "as to the blood alcohol concentration of the defendant when he was discovered and that that level is in fact a legal level in which someone would be impaired."

¶8 At trial, Koepnick and Knutsen testified for the State. Spizzirri did not testify but presented a rebuttal witness who stated that his Prius could not have been running as Koepnick testified at trial. The jury found Spizzirri guilty on both counts.

The trial court properly admitted evidence of Spizzirri's blood test result.

¶9 At trial, Knutsen testified that a chemical analysis of Spizzirri's blood established that at 9 p.m. on the day in question, his BAC was .310. On cross-examination, Spizzirri elicited that Knutsen did not know the amount or timing of Spizzirri's alcohol consumption or if and when he drove his car in relation to the blood draw. Spizzirri maintains that because Knutsen could not tie the blood test result to the time of driving, his testimony lacked probative value and ran afoul of ***Daubert***'s "goal … to prevent the jury from hearing conjecture dressed up in the guise of expert opinion." ***State v. Giese***, 2014 WI App 92, ¶19, 356 Wis. 2d 796, 854 N.W.2d 687 (citations omitted).

¶10 The admissibility of expert testimony is governed by WIS. STAT. § 907.02(1), which provides:

> 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, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

This version of the statute was enacted in 2011 to embody ***Daubert***'s reliability standard. ***Giese***, 356 Wis. 2d 796, ¶17. It assigns to the trial court a gate-keeping function "to ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues." ***Id.***, ¶18. A trial court's decision to admit expert testimony is discretionary and will not be reversed if it has a rational basis and was made in accordance with the accepted legal standards and facts of record. ***Id.***, ¶16.

¶11 We conclude that the trial court properly exercised its discretion in determining that evidence of Spizzirri's BAC was relevant and admissible. Evidence is relevant if it has any tendency to make the existence of a material fact more or less probable than it would be without the evidence. WIS. STAT. § 904.01. That Spizzirri had a BAC of .310 one hour after he was found passed out in his running car with its headlights illuminated while stranded on a boat ramp makes it more probable that he was intoxicated when he last drove on a highway. The lack of direct evidence concerning Spizzirri's alcohol consumption and driving goes to the weight of the expert testimony, which is a matter for the jury. ***Giese***, 356 Wis. 2d 796, ¶28. Knutsen did not improperly speculate in the name of science that Spizzirri must have been intoxicated at the time of driving. The jury was fully apprised that the probative value of Spizzirri's blood test result was to be determined in light of Knutsen's limited knowledge of the surrounding circumstances. We are satisfied that the admission of Knutsen's testimony did not run afoul of WIS. STAT. § 907.02(1).

¶12 In a related claim, Spizzirri argues that because Knutsen was unable to tie his BAC to the time of driving by conducting a reverse extrapolation calculation, his testimony failed to "establish[] its probative value" and was inadmissible under WIS. STAT. § 885.235(3) (chemical analysis of a person's BAC

can be admitted "only if expert testimony establishes its probative value and may be given prima facie effect only if the effect is established by expert testimony"). We disagree.

¶13 It is undisputed that Knutsen was a qualified analyst who used well-established and accepted scientific methods to test Spizzirri's blood sample and reach a reliable result. Knutsen established that the chemical test was probative of Spizzirri's BAC at 9 p.m. on the day in question, one hour after he was discovered by Koepnick. WISCONSIN STAT. § 885.235(4) provides that the statute's provisions "relating to the admissibility of chemical tests for alcohol concentration or intoxication … shall not be construed as limiting the introduction of any other competent evidence bearing on the question of whether or not a person was under the influence of an intoxicant." It is unreasonable to construe § 885.235(3) as an absolute bar to the admission of chemical test results in every case where the time of operation or driving cannot be established. Knutsen did not imply that Spizzirri's BAC constituted prima facie evidence of drunk driving. Like Koepnick's observations of Spizzirri's condition and the location of his car, the test result was a piece of circumstantial evidence for the jury to consider in determining whether Spizzirri committed the charged crime.

The trial court's decision to limit the scope of trial counsel's cross-examination did not constitute reversible error.

¶14 The State filed a motion in limine asking the court to "order the preclusion of third party liability evidence, pursuant to ***State v. Scheidell*** [citation

omitted] and ***State v. Denny*** [citation omitted]."[5] The court reviewed the motion the morning of trial and the defense offered no objection, indicating Spizzirri did not intend to introduce evidence of third-party liability.

¶15 In cross-examining Koepnick, trial counsel elicited testimony that the officer did not know when or where the car was last driven or whether Spizzirri consumed alcohol before or after driving the car. Trial counsel then asked Koepnick the following question:

> Q: And you didn't find any evidence that would rule out a possibility that somebody else drove Mr. Spizzirri there and left him there sleeping in the car, did you—didn't find any evidence to rule that out, did you?
>
> A: No.

The State objected and, in a side bar, argued that counsel's question violated the agreement to avoid introducing evidence of third-party liability. Trial counsel responded that his cross-examination did not seek to elicit evidence of "third-party liability" as described in the State's motion, and that his agreement to the State's motion was premised on the type of third-party evidence at issue ***Denny*** and ***Scheidell***. Counsel also confirmed that Spizzirri would not be calling a witness to testify that he or she was the driver.

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[5] In ***State v. Denny***, 120 Wis. 2d 614, 621-22, 357 N.W.2d 12 (Ct. App. 1984), the defendant sought to introduce evidence that other named third parties had the motive and opportunity to commit the crime charged. The ***Denny*** court established a framework, known as the "legitimate tendency test," to determine the admissibility of evidence that a person other than the defendant committed the crime. ***Id***. at 623-25. In ***State v. Scheidell***, 227 Wis. 2d 285, 290-91, 595 N.W.2d 661 (1999), the defendant sought to introduce evidence of similar crimes committed by an unknown third party. The ***Scheidell*** court determined that ***Denny***'s legitimate tendency test "is not applicable to the introduction of allegedly similar crime evidence that is committed by an unknown third party." ***Scheidell***, 227 Wis. 2d at 296-97. Instead, the admissibility of such evidence should be analyzed under the other acts test in ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). ***Scheidell***, 227 Wis. 2d at 287-88.

¶16 The trial court observed that "during the pendency of this case there's never been any discussion or any offers of proof that there was a third party." Though the trial court acknowledged that trial counsel's questions did not seem to implicate the type of third-party liability at issue in ***Denny*** or ***Scheidell***, it expressed concern that Spizzirri's line of questioning would imply there existed outside evidence of another driver:

> I think the problem I have with the questioning is it's setting up a possibility that there is evidence [of another driver] out there. And since I've ruled that there is no evidence not only the defense can't introduce that evidence the State has really little indication or little means to defend that being out there.

The court ruled it would strike trial counsel's question and Koepnick's answer concerning his inability to rule out the possibility of another driver, but would "allow the defense … to ask a more general question did you see was there anyone else or do you have any evidence of anyone else driving period. And then the officer can answer no."

¶17 A trial court's decision to limit cross-examination or the introduction of evidence is a discretionary determination which we will uphold so long as it was made in accordance with the proper legal standards and facts of record. ***State v. Rhodes***, 2011 WI 73, ¶22, 336 Wis. 2d 64, 799 N.W.2d 850. Whether the circuit court relied on the appropriate and applicable law is a question of law subject to de novo review. ***Id.***, ¶25. Though a criminal defendant has a constitutional right to confront his accusers, the right to cross-examine witnesses is not absolute. ***Id.***, ¶¶28-29, 32. A trial court may impose reasonable limits on cross-examination "to preclude evidence that is irrelevant or immaterial, designed to confuse the issues in the instant case, and interject undue prejudice into the jury's decision making process." ***Id.***, ¶40 (citation omitted).

¶18 Spizzirri argues that the trial court's decision to limit the scope of his cross-examination was erroneous because it was based on the misapplication of ***Denny***'s legitimate tendency test and infringed on his constitutional right to confront his accusers and present a defense.[6] While Spizzirri's argument distinguishing ***Denny*** has some merit, the trial court's decision limiting the scope of cross-examination was ultimately based on other considerations. Specifically, after determining there was no evidence of another driver and upon Spizzirri's confirmation that the defense would not call a witness to testify he or she drove Spizzirri's car on the day in question, the trial court precluded Spizzirri from asking questions which would imply the existence of another driver. Having balanced Spizzirri's confrontation rights against the trial court's discretionary authority to limit evidence that is irrelevant or could lead to confusion of the issues or the jury, we determine the trial court appropriately exercised its discretion. ***Rhodes***, 336 Wis. 2d 64, ¶48.

¶19 Further, we decide that even if the trial court improperly restricted the scope of Spizzirri's cross-examination, any error was harmless. ***Id.***, ¶32 (the harmless error doctrine applies to confrontation clause violations). An error is harmless if it is clear beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. ***Chapman v. California***, 386 U.S. 18, 24 (1967). Where the alleged error concerns restrictions on a defendant's ability to cross-examine witnesses, the harmless error test focuses on "whether, assuming

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[6] On appeal, Spizzirri attempts to broaden the impact of the trial court's ruling by suggesting that had he chosen to take the stand, he would have been precluded from testifying that another driver was involved in the day's events. Spizzirri's speculative claim goes far beyond the trial court's ruling and was never raised in the trial court by way of an offer of proof or postconviction motion. We will not review issues raised for the first time on appeal. ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727.

that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." ***Rhodes***, 336 Wis. 2d 64, ¶33 (citing ***Delaware v. Van Arsdall***, 475 U.S. 673, 684 (1986)).

¶20 Here, despite the stricken testimony, trial counsel reminded the jury that the possibility of another driver could not be ruled out. The jury was keenly aware that Koepnick never actually witnessed Spizzirri engaged in the act of driving, which enabled trial counsel to point out in his closing argument that

> [the State has] given you direct evidence that doesn't say that [Spizzirri] did it. They give you an officer who doesn't know when the car got down there. Doesn't know who drove it down there. Doesn't know if my client drove it down there.…

and

> You heard their first witness, Officer Koepnick. And I'm understanding that people make mistakes but he made two pretty big mistakes. First, he made a mistake that the car was on a highway when it wasn't.
>
> Secondly, he made a mistake that the car was running when it wasn't. And because he made those two mistakes he mistakenly arrested Mr. Spizzirri for operating under the influence at that time for what he was doing at that time at that place. He never looked at anything else. He admitted he never touched the hood. He never even asked Mr. Spizzirri if he was driving.…

The State did not object. Trial counsel made his point.

¶21 Additionally, trial counsel's thorough cross-examination of Koepnick highlighted that the officer had no direct knowledge of the events leading up to his 8 p.m. contact with Spizzirri. By inference, the jury understood there were a number of scenarios Koepnick could not rule out. It is not beyond the

jury's common knowledge that people travel together or let friends and family drive their cars. Similarly, given Koepnick's lack of information, any potential testimony in response to questions about an unknown driver would not have significantly damaged the State's case. On these facts, it is clear beyond a reasonable doubt that the limitations placed on Spizzirri's cross-examination of Koepnick did not contribute to the guilty verdicts.

There was sufficient evidence to support the jury's guilty verdicts.

¶22 Spizzirri challenges the sufficiency of the evidence supporting his convictions. We review the sufficiency of the evidence de novo, but in the light most favorable to sustaining the conviction. ***State v. Hanson***, 2012 WI 4, ¶15, 338 Wis. 2d 243, 808 N.W.2d 390. We will sustain a conviction unless the evidence is so insufficient in probative value "that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it." ***Id.*** at 507. Convictions may be supported solely by circumstantial evidence. ***Id.*** at 501. The standard of review is the same whether the conviction relies upon direct or circumstantial evidence. ***Id.*** at 503.

¶23 A rational juror could have found beyond a reasonable doubt that Spizzirri drove his car on a public highway while intoxicated. Koepnick testified that he located the Prius at a boat launch around 8 p.m. with a punctured and flat tire. He testified that the keys were in the ignition, the motor was running and the

headlights were illuminated. Though Spizzirri's car was not found on a highway, the only direct access to the boat launch was a bike path which was itself accessible only from surrounding public streets. Spizzirri was the car's sole occupant and its registered owner. He was passed out across the front floor and his wallet was on the driver's seat. Koepnick noticed a heavy odor of intoxicants but observed no containers of alcohol. Spizzirri told the officer he thought he was in his mother's driveway in Kenosha. He was unable to stand on his own for field sobriety tests and his BAC at 9 p.m. was .310. Viewed together, these facts give rise to a reasonable inference that while driving his car in an intoxicated state, Spizzirri veered off a public road, down a bike path and onto a boat launch where a punctured, flat tire prevented further movement. We cannot say as a matter of law that no rational juror could have found Spizzirri guilty beyond a reasonable doubt.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.