COURT OF APPEALS
DECISION
DATED AND FILED

October 26, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1008
00-1009
00-1010

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

COUNTY OF DANE,

PLAINTIFF-RESPONDENT,

V.

JOHN S. MCKENZIE,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed.*

¶1 DEININGER, J.[1] John McKenzie appeals judgments convicting him of operating a motor vehicle while under the influence of an intoxicant

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

(OMVWI) and failure to notify police of an accident.[2] He claims the County did not establish that the blood test result admitted at trial was from the blood sample taken from him following his arrest, and that the County did not prove that his vehicle sustained property damage in an amount requiring police to be notified. We reject both claims and affirm the appealed judgments.

BACKGROUND

¶2 The testimony at McKenzie's court trial relevant to the issues he raises on appeal is as follows. The arresting deputy testified that he transported McKenzie to a hospital for the blood draw, and thereafter, that he placed the sample in a refrigerator located in the evidence room at the Dane County Public Safety Building. Later that morning, another deputy took the sample to the State Hygiene Laboratory. There, he had "the analyst who I physically turn over the sealed kit to" sign a Dane County "Transmittal of Evidence Form," to indicate receipt of the sample. The form was signed by "Laura J. Liddicoat" at "9:35 a.m." on "7-3-99," although the deputy testified that the transfer was accomplished on July 8, 1999.

¶3 The blood sample was analyzed by Noel Stanton on July 12, 1999. Stanton testified that he opened the "shipping container" at 9:18 a.m. on that date and noted on the Blood/Urine Analysis form, which accompanies the sample, that the "[s]pecimens … were labeled and sealed." He also noted on the form that the sample had been "[d]elivered by Dep. Schlicht 7-8-99 0935," and explained:

[2] McKenzie was also convicted of failure to keep his vehicle under control, but he raises no issue relating to that conviction in these consolidated appeals. Also, the court found McKenzie guilty of both OMVWI and operating with a prohibited alcohol concentration, but it entered judgment only on the former.

> My denotation that they were labeled means that the blood tubes had a name that corresponded to the subject name in that box [on the Blood/Urine Analysis form], in this case John McKenzie. The fact that they were sealed is shorthand to indicate that there were adhesive seal strips over the rubber caps of the blood tubes. I also noted that the package had been delivered to the laboratory by Deputy Schlicht on July 8th at 9:35 a.m.

Stanton also said that "the vials or any of the packaging" did not "appear to have been tampered with in any way," and that the sample yielded a test result of ".195 grams of ethanol per 100 milliliters of blood."

¶4 McKenzie objected to admission of the blood test result, noting the discrepancies in dates of receipt and the identity of the person at the Hygiene Lab who received the sample from the deputy. He thus argued that the County had not established that the sample Stanton analyzed and reported on was the one drawn from him following his arrest. The court reviewed the testimony and exhibits and concluded:

> Frankly, I don't have an issue—On the record before me, I don't have a question about whether or not the blood that was tested was the blood from Mr. McKenzie. [The Blood/Urine Analysis form] travels with that blood. There's nothing to suggest that [the form] that has McKenzie's name on it and the blood draw, the information on it, somehow got separated from the McKenzie tubes around it with some other tubes.
>
> The question is whether or not there is reason to suspect tampering with the McKenzie samples and there's [not] any concern about that. I think I'd have to guess that between 9:35 and 9:38 on July 8th, Ms. Liddicoat did something with the blood. I'm not willing to make that much of a stretch.
>
> I think that the State [sic] in proving up a chain of custody has to satisfy me that as to the integrity of the evidence, that it remained the same between gathering and

> examination and that what was examined was that which was gathered. On the record here, frankly, I'm satisfied as to that….

¶5 During the trial, the arresting deputy testified that he had investigated "hundreds" of motor vehicle accidents, and that from this experience, "[i]t's very easy to tell for the most part by looking at it and the extent of injury … if it's a reportable accident." He also testified that, in his opinion based on his observations, the damage sustained by McKenzie's vehicle in the one-car accident at issue "was over a thousand dollars." Another deputy who investigated the McKenzie accident testified that he had investigated "between 50 and 100 accidents," and in so doing had access to data on "approximate costs of vehicle damage," and that he believed the McKenzie vehicle had sustained damage "greater than one thousand dollars." In both instances, the court overruled McKenzie's objections on foundation grounds, concluding "[t]hat's part of what policemen investigating accidents do."

¶6 At the close of the trial, the court concluded that the County had met its burden of establishing by clear and convincing evidence that (1) McKenzie had operated his vehicle "at a speed that was more than reasonable and prudent"; (2) he failed to immediately report to police an accident as required under WIS. STAT. § 346.70; and (3) he was guilty of both OMVWI and operating with a prohibited alcohol concentration. Judgments of conviction were entered accordingly, and McKenzie appeals.

ANALYSIS

¶7 The County does not dispute, nor could it, McKenzie's assertion that if the blood that was analyzed was not his, the blood test result was not relevant

evidence and was thus inadmissible. The parties also agree that the standard to be applied is the one we described in ***B.A.C. v. T.L.G.***, 135 Wis. 2d 280, 400 N.W.2d 48 (Ct. App. 1986):

> [A] chain of custody, or authentication, must be established before expert testimony as to blood tests … or the samples themselves may be admitted as relevant evidence.
>
> The degree of proof necessary to establish a chain of custody is a matter within the trial court's discretion.… The testimony must be sufficiently complete so as to render it improbable that the original item has been exchanged, contaminated or tampered with.

Id. at 289-90 (citations omitted).

¶8 McKenzie argues the County did not meet its burden to establish that the blood Mr. Stanton analyzed on July 12, 1999, was McKenzie's, or that the sample had not been tampered with. The County responds that the trial court did not erroneously exercise its discretion in determining that it had established a chain of custody for the blood sample. We agree. We have described above the relevant testimony and documentary evidence on the issue, as well as the court's ruling on it. We are satisfied that the trial court applied the correct law to the relevant facts, and through a well-articulated, rational process, reached a conclusion which a reasonable judge could reach. *See* ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). Moreover, we note that McKenzie did not file a reply to the County's explication of the trial court's proper exercise of discretion. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (An appellant "cannot complain" when "the respondent raises the

grounds relied upon by the trial court, and the appellant fails to dispute these grounds in a reply brief.").[3]

¶9 McKenzie's second claim of error is that the trial court should not have relied on the testimony of police officers to establish the property damage threshold under WIS. STAT. § 346.70.[4] According to McKenzie, "[p]olice officers without demonstrated training in the estimating of vehicle repair costs lack the requisite expertise to offer more than a lay opinion on such matters." It is not entirely clear from McKenzie's brief argument on this issue whether he challenges the court's discretionary ruling to permit the testimony, or whether his claim is that the court's finding the accident to be reportable under the statute was clearly erroneous. We are not persuaded the trial court committed either error.

¶10 First, whether to permit a witness to testify as an expert on a given issue lies within the trial court's discretion, and one need not have actually performed a specific activity, or within a specific field, in order to gain expertise on that activity or field. *See* ***Tanner v. Shoupe***, 228 Wis. 2d 357, 369, 374-75, 596 N.W.2d 805 (Ct. App. 1999). We conclude that the trial court did not erroneously exercise its discretion in crediting the officers' experience as traffic accident investigators as sufficient foundation for them to give opinion testimony

[3] McKenzie also argues that, without the blood test result, there was insufficient evidence to convict him of OMVWI. We do not reach this issue, given that we conclude the trial court did not err in admitting the blood test result.

[4] WISCONSIN STAT. § 346.70(1) provides, in relevant part that "[t]he operator of a vehicle involved in an accident resulting in … total damage to property owned by any one person … to an apparent extent of $1,000 or more shall immediately by the quickest means of communication give notice of such accident to the police department, the sheriff's department or the traffic department of the county or municipality in which the accident occurred or to a state traffic patrol officer."

on whether the dollar value of the damages sustained by McKenzie's vehicle exceeded the statutory reporting threshold. Second, even if not admissible as expert opinion, the court could have received the officer's estimates of value as lay opinion, given that the opinions were "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." *See* WIS. STAT. § 907.01.

¶11 Finally, to the extent that McKenzie's challenge goes to the weight and credibility to be given the officers' damage value estimates, these matters are absolutely the province of the trier of fact. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 503-04, 451 N.W.2d 752 (1990). Here, in addition to the officers' testimony, the court had before it a photograph showing extensive damage to the right front quarter-panel, head and running lights and bumper of McKenzie's sports utility vehicle. We conclude that the court's finding that McKenzie had been in an accident meeting the reporting threshold under WIS. STAT. § 346.70(1) is not clearly erroneous.

CONCLUSION

¶12 For the reasons discussed above, we affirm the appealed judgments.

By the Court.—Judgments affirmed.

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