

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 26, 2010

A. John Voelker
Acting Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP3207-CR

Cir. Ct. No. 2009CT144

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID E. STEINKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County:
WILLIAM F. HUE, Judge. *Affirmed*

¶1 VERGERONT, P.J.¹ David Steinke appeals a judgment of conviction for operating a vehicle with a prohibited alcohol concentration (PAC)

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) and (3) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

of 0.08 or more, second offense, contrary to WIS. STAT. § 346.63(1)(b). He argues that the circuit court, after a trial to the court, convicted him of driving with a prohibited alcohol concentration by the greater weight of the credible evidence and not beyond a reasonable doubt. He also contends that the evidence was insufficient to support his conviction beyond a reasonable doubt. We conclude the circuit court applied the proper burden of proof and that the evidence was sufficient to prove that Steinke was guilty of driving with a PAC beyond a reasonable doubt. We affirm the judgment of conviction.

BACKGROUND

¶2 There were three witnesses at the trial to the court. The first witness was Dave Kaczmarek, a probation and parole agent for the State of Wisconsin. He testified as follows.

¶3 Shortly after 1:00 p.m. on January 14, 2009, Kaczmarek was in the front office of the probation and parole office (probation office). There is a window in the front office that faces a waiting area, and at that time it was staffed by Kaczmarek's supervisor. An individual—identified as Steinke—was asking the supervisor for a Salvation Army voucher for a hotel room so that Steinke would not have to spend the night in his car. When the supervisor told Steinke that the agent in charge of giving out the vouchers was not there and no one else could give him a voucher, Steinke appeared not to like that answer and wanted more to be done. Kaczmarek went over to the window to talk to Steinke to help out his supervisor. Steinke told Kaczmarek that it was cold outside and he did not want to sleep in his car. During their conversation, Kaczmarek noticed that Steinke smelled strongly of alcohol and that the odor was emanating from Steinke's mouth. Concerned that Steinke was intoxicated and had driven to the

building, Kaczmarek had another agent call the police. Two police officers arrived five to fifteen minutes later.

¶4 Kaczmarek never saw Steinke drive his car and did not know what time he drove into the probation office parking lot. Kaczmarek did not know at what time Steinke entered the lobby of the probation office.

¶5 Officer Gary Haag, an eighteen-year veteran of the City of Jefferson police department and one of the officers who reported to the scene, testified as follows. He arrived at the probation office around 1:30 p.m. and observed Steinke talking to Kaczmarek. Kaczmarek informed Officer Haag that he suspected Steinke had driven drunk.

¶6 Officer Haag noticed that Steinke smelled strongly of liquor and was slurring his speech. Haag asked Steinke if he had been drinking, and Steinke admitted to drinking one beer. Haag testified that, in response to his question, Steinke stated he had started drinking at 9:00 a.m. Haag's testimony on Steinke's answer to the question when he stopped drinking was less clear: Haag testified "and he said—I guess what it meant was when I got to probation and parole, which is at 1:27 p.m." Haag believed that Steinke was intoxicated and that Steinke's level of intoxication was not consistent with someone who had consumed only one beer over that time span.

¶7 When Haag asked Steinke how he got to the probation office, Steinke first said his brother drove him, then said his mother drove him, and eventually admitted that he drove himself. Haag found Steinke's car in the probation office parking lot. There were two bags of empty beer cans on the floor of the car, and the passenger seat and rear seat were piled full of clothes and other items.

¶8 Haag did not know when Steinke arrived at the probation office lot nor when he stopped driving. He did not ask Steinke if he had been at a local tavern before coming to the probation office. In response to Haag's questions, Steinke told Haag that he got up at 8:00 a.m. that morning and that he was coming to Jefferson from Janesville. Haag testified this trip takes thirty to forty-five minutes.

¶9 Haag administered field sobriety tests and arrested Steinke for driving while intoxicated. Steinke agreed to submit to a blood alcohol test, and Haag took him to Fort Atkinson Hospital, where a blood kit was collected at 2:30 p.m.

¶10 The third witness was Diana Kalscheur, a chemist from the State Laboratory of Hygiene with a specialization in toxicology.² She testified as follows. Steinke's blood alcohol content (BAC) was 0.24 grams per 100 milliliters when his blood was drawn at 2:30 p.m. Kalscheur explained that an average male weighing 185 pounds, Steinke's size, would have to consume twelve

² Steinke objected to admitting Kalscheur's testimony under WIS. STAT. § 885.235(3) because Steinke's blood was drawn more than three hours after he allegedly drove with a prohibited alcohol content. Section 885.235(3) provides:

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.

The circuit court withheld a ruling until the close of Kalscheur's testimony and then concluded that Kalscheur had established the probative value of the chemical analysis evidence. WIS. STAT. § 885.235(3).

standard-size drinks to have a BAC of 0.24.³ Each standard-size drink increases the BAC of a 185-pound man by 0.02.

¶11 Kalscheur explained that the accepted elimination rate—the rate at which the body gets rid of alcohol once it is processed—is 0.015 per hour. Within certain limits, she can use this elimination rate to estimate a person’s BAC at an earlier time. If she has no information to the contrary, she makes two assumptions. First, she assumes there is no “post-situational” drinking, that is, no consumption of alcohol after the earlier time for which the estimate is being made. Second, she assumes there is no unabsorbed alcohol in the person’s system at the earlier time.⁴ Making these two assumptions, Kalscheur estimated Steinke’s BAC at 1:00 p.m. to be between 0.26 and 0.27, and his BAC at noon to be between 0.27 and 0.28.

¶12 Kalscheur acknowledged that, using this method, every hour you go back you add to the estimated BAC. However, she explained, she does not consider going back six or seven hours from the blood draw to be reliable; she considers going back three or four hours to be reasonable.

¶13 The circuit court found Steinke not guilty of operating under the influence of an intoxicant (OWI) but guilty of the PAC charge. Steinke admitted to driving on the highway and stipulated he knew he had a revoked license. He

³ A standard-size drink is a twelve-ounce beer, a glass of wine, or a shot of 100-proof alcohol.

⁴ Kalscheur testified that a person could realistically have only one unabsorbed beer in his or her stomach.

was therefore also found guilty of operating after revocation. WIS. STAT. § 343.44(1)(b).

DISCUSSION

¶14 On appeal, Steinke argues that the circuit court erred in finding him guilty of the PAC charge because (1) the court did not apply the reasonable doubt standard; and (2) the evidence was insufficient to prove beyond a reasonable doubt that he operated his vehicle while he had a PAC.

¶15 We first consider whether the circuit court applied the correct burden of proof. This presents a question of law, which we review de novo. *Wolfe v. Wolfe*, 2000 WI App 93, ¶14, 234 Wis. 2d 449, 610 N.W.2d 222.

¶16 The correct burden of proof for driving with a PAC of .08 or more, second offense, is the criminal burden of beyond a reasonable doubt. *See* WIS. STAT. § 346.65(2)(am)2.; *County of Walworth v. Rohner*, 108 Wis. 2d 713, 716-18, 324 N.W.2d 682 (1982); WIS JI—CRIMINAL 2660. Steinke argues that the circuit court applied a lower standard—the greater weight of the credible evidence standard—in deciding he was guilty of operating with a PAC. We disagree.

¶17 It is true the court used the term “greater weight of the evidence.” Both times it did so was in the context of discussing Kalscheur’s testimony. We acknowledge the use of this phrase is confusing. However, in context we understand the circuit court to be expressing its view that Kalscheur’s testimony was probative as required for admissibility under WIS. STAT. § 885.235(3) and persuasive on the issue of Steinke’s PAC. We also consider it relevant that the prosecutor argued that the evidence showed Steinke was guilty of both the OWI charge and the PAC charge beyond a reasonable doubt, and the court expressly

referred to the “beyond a reasonable doubt” standard in finding Steinke not guilty of OWI.⁵ It is not reasonable to read the record as showing the court did not understand this was the correct standard for the PAC charge as well.

¶18 We next turn to Steinke’s challenge to the sufficiency of the evidence on the PAC charge. This, too, presents a question of law, which we review de novo. See *State v. Booker*, 2006 WI 79, ¶12, 292 Wis. 2d 43, 717 N.W.2d 676. We do not overturn a verdict “unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). A finding of guilt may rest upon circumstantial evidence as well as direct evidence; indeed, a finding of guilt may rest on entirely circumstantial evidence. *Id.* at 501-02. If there is more than one reasonable inference from the evidence, we draw the inference that supports the finding of guilt. See *State v. Page*, 2000 WI App 267, ¶9, 240 Wis. 2d 276, 622 N.W.2d 285.

¶19 The State had the burden to prove beyond a reasonable doubt that Steinke drove a motor vehicle on a public road while he had a PAC of .08 or more. WIS. STAT. § 346.65(2)(am)2.; WIS JI—CRIMINAL 2660. There is ample evidence that Steinke drove on a public road to the probation office. Steinke argues that there is no evidence of when between approximately 9:00 a.m. and shortly after 1:00 p.m. he arrived at the parking lot. (The approximate time of 9:00 a.m. is

⁵ Like the charge of driving with a PAC of .08 or more, second offense, the charge of OWI, second offense, is a misdemeanor and subject to the criminal burden of proof. See WIS. STAT. § 346.65(2)(am)2.; *County of Walworth v. Rohner*, 108 Wis. 2d 713, 716-18, 324 N.W.2d 682 (1982).

based on Haag's testimony that Steinke said he got up at 8:00 a.m. that morning and came from Janesville and that this trip takes thirty to forty-five minutes; the latest time of arrival at shortly after 1:00 p.m. is based on Kaczmarek's testimony of when he saw Steinke in the probation office.) Steinke contends that, without knowing when within that time range he drove and when he drank, there is no evidence that he was driving with a prohibited PAC. The expert's testimony does not supply that evidence, he asserts, because her backward extrapolation is simply a rising number of blood alcohol content; and without knowing when he drank and drove, the expert could not and did not offer an opinion that Steinke had the requisite PAC at the time he drove.

¶20 The circuit court here stated that Steinke could have arrived anytime between 9:00 a.m. and 1:30 p.m. We are uncertain of the court's reasoning in finding Steinke guilty of the PAC charge, given this broad time frame. In particular, we are uncertain what the court believed the expert's testimony established concerning Steinke's PAC at any particular time before he was seen by Kaczmarek at the probation office shortly after 1:00 p.m. However, because our review is *de novo*, we conduct our own analysis of the testimony, bearing in mind that we are to draw all reasonable inferences from the evidence in favor of the determination of guilt.⁶

⁶ We recognize that the circuit court did not draw the inferences on Steinke's arrival time that we conclude are reasonable and support the guilty verdict. Steinke does not argue that, on a challenge to the sufficiency of the evidence in a trial to the court, a reviewing court must accept the inferences drawn by the circuit court even if they do not support a finding of guilt, when there are competing inferences that are reasonable and support the court's guilty finding. We are not aware of any authority requiring this.

¶21 Although there is no direct evidence of when Steinke arrived at the probation office parking lot—and, thus, when he last drove—we conclude there is circumstantial evidence based on reasonable inferences from the evidence. There is a reasonable inference—a very strong inference—that Steinke went into the probation building immediately upon arriving at the building parking lot. This is a reasonable inference from the evidence that it was January and cold outside, that Steinke had a specific purpose—to get a hotel voucher for that night so that he did not have to sleep in his car—and that he was impatient to accomplish this purpose. His impatience is a reasonable inference from his reaction to being told that the person who could give him the voucher was not there.

¶22 Kaczmarek’s testimony provides a reasonable basis for inferring that Steinke entered the building and went to the window to talk to the supervisor at approximately 1:00 p.m. Although Kaczmarek testified he did not see Steinke enter the building, it is reasonable to infer that, when Steinke entered the building, he went directly to the window to speak to the person there in order to get the voucher. Kaczmarek’s testimony of what Steinke said to the supervisor provides a reasonable basis for inferring that Steinke had just arrived at the window and begun talking to the supervisor when Kaczmarek intervened in their conversation. Kaczmarek testified that his first contact with Steinke was “right after 1 o’clock sometime.”

¶23 Given the reasonable inference that Steinke entered the building and went to the front window of the probation office at approximately 1:00 p.m., it is reasonable to infer that he did not consume alcohol from that time until 2:30 p.m., when the blood draw was taken. During that time period he was in the presence of probation agents or law enforcement personnel. A reasonable factfinder could draw this inference despite Officer Haag’s testimony that Steinke said something

that Haag thought meant that Steinke stopped drinking when Haag arrived. Not only did Haag express uncertainty of what Steinke meant, but it is improbable that Steinke was drinking in the presence of Kaczmarek and his supervisor before Haag arrived.

¶24 Given the reasonable inferences that Steinke last drove just before going into the building at approximately 1:00 p.m. and did not drink after that, Kalscheur's testimony is sufficient to permit a factfinder to conclude that Steinke's BAC when he drove was .08 or above. Kalscheur testified that, assuming no drinking between 1:00 p.m. and 2:30 p.m. and assuming no unabsorbed alcohol in his stomach, his BAC at 1:00 p.m. would be between .26 and .27. Accounting for any unabsorbed beer in Steinke's stomach would reduce this by .02, given Kalscheur's testimony that a person realistically could have no more than one unabsorbed beer in the stomach at a time and her testimony that one drink increases the BAC of a man of Steinke's weight by .02.

¶25 In short, given reasonable inferences about when Steinke last drove and drank, Kalscheur's testimony provides sufficient evidence for a factfinder to determine that his BAC was approximately three times .08 when he last drove. We are satisfied that the evidence was sufficient for a trier of fact, acting reasonably, to find Steinke guilty of driving with a PAC of .08 or more beyond a reasonable doubt.

CONCLUSION

¶26 We affirm the judgment of conviction on the PAC charge.

By the Court.—Judgment affirmed.

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

