COURT OF APPEALS
DECISION
DATED AND FILED

December 16, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3191-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMMY DUERR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: STANLEY A. MILLER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Timmy Duerr appeals from a judgment of conviction entered after a jury found him guilty of homicide by negligent operation of a vehicle. *See* § 940.10, STATS. He also appeals from an order denying his motion for postconviction relief. Duerr claims: (1) the drawing of his blood after the accident violated his Fourth Amendment rights; (2) the trial court

should not have admitted the evidence of his blood alcohol content (BAC) at trial; and (3) the evidence was insufficient to sustain the jury's verdict. We affirm.

At approximately 8:00 p.m. on November 8, 1994, while driving his red pick-up truck on Lincoln Avenue in the City of West Allis, Duerr collided with Rita Klopf's Ford Taurus, causing the death of her passenger, Bernadette Canaps. When the West Allis Police arrived at the scene, Duerr told Officer Jon Lovas that he had been driving at approximately forty to forty-five m.p.h. in the thirty m.p.h. zone just prior to the accident. Duerr also told the firefighter who was treating him that he had been drinking beer earlier that evening.

After learning that Duerr was the brother of fellow West Allis Police Officer Brian Duerr, Officer James Osiewalski, the chief traffic investigator at the accident, requested that Officer Duerr report to the scene. On arrival, Officer Duerr asked his brother if he had been drinking; Duerr told him that he had four to six tap beers.

Moments later, Officer Osiewalski told Officer Duerr that "they were finished with [his] brother and that [he] could take him home." Shortly after the Duerr brothers arrived at Timmy Duerr's home, Officer Osiewalski radioed Officer Duerr and requested that he bring Timmy to the station for an intoxilyzer test, in compliance with department policy requiring such tests in cases involving major accidents. On arrival at the station, however, Duerr complained of chest pain and breathing difficulty. Consequently, Officer Osiewalski advised him that he could take a blood test instead of an intoxilyzer test and then requested his consent to the procedure. Duerr read and signed the consent form and then, in the company of his brother, went to the hospital for the blood test. The blood test was

administered at approximately 11:30 p.m.; Duerr's BAC test result was .063 percent. After the test, Duerr returned to his home.

Duerr argues that the blood test was taken in violation of his Fourth Amendment rights.[1] Claiming that the police did not have probable cause to arrest him, Duerr contends that his arrest was illegal.[2] Consequently, he argues that his blood test results were the fruit of an illegal arrest and should have been suppressed. We disagree.

When reviewing a suppression motion, we uphold the trial court's findings of fact unless they are clearly erroneous. *See* ***State v. Roberts***, 196 Wis.2d 445, 452, 538 N.W.2d 825, 828 (Ct. App. 1995). Whether the established facts show that a person was under arrest is a question of law, which we review *de novo*. *See* ***State v. Swanson***, 164 Wis.2d 437, 445, 475 N.W.2d 148, 152 (1991). An arrest occurs when "a reasonable person in the defendant's position would have considered himself or herself to be 'in custody,' given the degree of restraint under the circumstances." ***Id.*** at 446-47, 475 N.W.2d at 152. This is an objective test, focusing on what the officer's actions and words would reasonably have communicated to the defendant, rather than the subjective belief of either the officer or the defendant. ***Id.***

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[1] Relying on ***State v. Doyle***, 96 Wis.2d 272, 291 N.W.2d 545 (1980), Duerr argues that the police effected a custodial arrest. However, the standard articulated in ***Doyle*** is no longer good law. *See* ***State v. Swanson***, 164 Wis.2d 437, 475 N.W.2d 148 (1991). The supreme court, commenting on ***Doyle***, explained: "we now abrogate this subjective test and adopt an objective test which assesses the totality of circumstances to determine the moment of arrest for Fourth Amendment purposes." ***Swanson***, 164 Wis.2d at 446, 475 N.W.2d at 152.

[2] Duerr's argument on appeal focuses only on the issue of whether he was under arrest at the time he consented to the blood test. He implicitly concedes that he consented to the test.

Here, the evidence clearly established that Duerr was not under arrest at the time he consented to the blood test. Officer Osiewalski radioed Officer Duerr and asked him to bring his brother to the police station for a chemical test. Officer Osiewalski met the Duerr brothers at the police station at approximately 10:15 p.m. and asked Timmy Duerr to provide a consensual chemical test. Officer Osiewalski testified that as he spoke to Duerr he could "detect an odor of an intoxicant." Although he did not observe any other signs of intoxication, Officer Osiewalski noted that when he asked Duerr about his alcohol consumption, Duerr told him that he had drunk six and one-half beers earlier that evening. Officer Osiewalski also stated that he had planned to administer an intoxilyzer test but changed his mind after Duerr complained of chest pain and shortness of breath. Instead of administering the intoxilyzer, Officer Osiewalski requested that Duerr take a blood test; Duerr agreed and signed a consent form at 10:45 p.m. His signature was witnessed by the officers in attendance. Officer Osiewalski testified that Duerr was not under arrest. Duerr was not restrained or confined in any way. He went to the hospital without any formal police escort and, at the conclusion of the test, he remained at the hospital for x-rays after the officers who had supervised the test departed. Following the x-rays, Duerr returned home.

In spite of the fact that Officer Osiewalski and Officer Barwick, the officer who had been directed to observe Duerr during the pretest waiting period, testified that they would have arrested Duerr if he had tried to leave, they never conveyed that to Duerr. Even Duerr conceded that he had never been restrained or told that he was under arrest. The trial court correctly concluded that Duerr was not in custody and that he consented to the blood test. Therefore, we conclude that the trial court properly denied Duerr's motion to suppress.

Duerr next argues that the trial court erred in admitting his BAC at trial. A trial court's decision to admit or exclude evidence is discretionary and will not be upset on appeal if the court "examined the facts of record, applied a proper legal standard, and, using a rational process, reached a reasonable conclusion." ***State v. Hamm***, 146 Wis.2d 130, 145, 430 N.W.2d 584, 591 (Ct. App. 1988). This court will not reverse a discretionary decision unless it is wholly unreasonable. ***State v. Johnson***, 118 Wis.2d 472, 481, 348 N.W.2d 196, 201 (Ct. App. 1984). Our review is limited to determining whether the trial court exercised discretion in accordance with accepted legal standards and the facts of record. ***State v. Alsteen***, 108 Wis.2d 723, 727, 324 N.W.2d 426, 428 (1982).

Duerr's BAC of .063 percent was relevant and admissible to show that he was criminally negligent. *See* ***State v. Seibel***, 163 Wis.2d 164, 180-81, 471 N.W.2d 226, 233-34 (1991) ("evidence that the defendant had imbibed enough [alcohol] to lessen or impair his ability to exercise ordinary care ... constitute[s] proof of criminal negligence"). Section 885.235(1), STATS., provides that a blood alcohol test "within 3 hours after the event to be proved" is admissible at the suspect's trial without expert testimony. If the sample is obtained more than three hours later, however, the test result "is admissible only if expert testimony establishes its probative value." *See* § 885.235(3), STATS.

At trial, the expert testimony confirmed the relevance and probative value of the blood alcohol evidence to establish criminal negligence. Chemist Patrick Harding testified that at the time of the accident Duerr's BAC would have been somewhere between .08 and .10 percent. Harding testified that, beginning at a blood alcohol level of .08, the driving skills of all individuals are impaired. He explained that the first driving skill which is affected by alcohol is judgment. He noted that "[d]rivers tend to be more aggressive with alcohol at those

concentrations." Even defense expert Mary McMurry agreed that judgment is the first faculty affected by alcohol, thus impairing a person's perception of time and space. Given this testimony, we conclude that the BAC evidence was admissible.

Finally, Duerr contends that there was insufficient evidence to support the jury's verdict. We review a challenge to the sufficiency of evidence to determine whether the evidence, viewed 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 fact, acting reasonably, could have found guilt beyond a reasonable doubt. See ***State v. Ray***, 166 Wis.2d 855, 861, 481 N.W.2d 288, 291 (Ct. App. 1992). Circumstantial evidence, often stronger and more satisfactory than direct evidence, may support a finding of guilt. *See* ***State v. Poellinger***, 153 Wis.2d 493, 501-02, 451 N.W.2d 752, 755 (1990). The standard for reviewing the sufficiency of the evidence is the same in either a direct or circumstantial evidence case. *See* ***id***. at 501, 451 N.W.2d at 755.

The trial court instructed the jury that before it could find Duerr guilty of homicide by negligent use of a vehicle it had to find: (1) the defendant operated a vehicle; (2) the defendant operated the vehicle in a manner constituting criminal negligence; and (3) such criminal negligence caused the death of the victim. *See* WIS J I—CRIMINAL 1170. Moreover, the jury instruction provided that "for conduct to constitute criminal negligence, the defendant should have realized that the conduct created a substantial and unreasonable risk of death or great bodily harm to another," and that "[b]efore the relation of cause and effect can be found to exist, it must appear that criminal negligence by the defendant was a substantial factor in producing the death." ***Id.***

Although the evidence in Duerr's case was circumstantial, it was very strong. Trial testimony established that Duerr was operating a vehicle and that his driving was a substantial factor in causing the death of Bernadette Canaps. Evidence also showed that Duerr was criminally negligent: he was driving too fast for the wet road conditions; he failed to brake within a reasonable distance of the turning vehicle; and he had consumed more than six beers earlier that evening. The evidence was sufficient to support the jury's verdict.

By the Court.—Judgment and order affirmed.

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