COURT OF APPEALS
DECISION
DATED AND FILED

July 29, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1700-CR **Cir. Ct. No. 2011CF2257**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD S. ROHDE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEAN A. DIMOTTO, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Richard S. Rohde appeals from an amended judgment of conviction for causing great bodily harm by the intoxicated use of a motor vehicle and for operating a motor vehicle while intoxicated, causing injury, second or subsequent offense. *See* WIS. STAT. §§ 940.25(1)(a) & 346.63(2)(a)1.

(2011-12).[1] Rohde challenges the sufficiency of the evidence to convict him and argues that the trial court, as fact-finder, failed to consider his affirmative defense. Alternatively, he seeks a new trial in the interest of justice arguing that the real controversy was not fully tried. We affirm.

I. BACKGROUND

¶2 In an amended information, Rohde was charged with six counts arising out of the collision of his vehicle with a Milwaukee Police Department squad car on May 17, 2011. The counts were as follows: (1) operating a motor vehicle while intoxicated, fifth or sixth offense, contrary to WIS. STAT. § 346.63(1)(a); (2) causing great bodily harm by the intoxicated use of a motor vehicle, contrary to WIS. STAT. § 940.25(1)(a); (3) operating while intoxicated, causing injury, second or subsequent offense, contrary to WIS. STAT. § 346.63(2)(a)1.; (4) operating a motor vehicle with a prohibited alcohol concentration, fifth or sixth offense, contrary to WIS. STAT. § 346.63(1)(b); (5) causing great bodily harm by the operation of a vehicle with a prohibited alcohol concentration, contrary to WIS. STAT. § 940.25(1)(b); and (6) causing injury by the operation of a motor vehicle with a prohibited alcohol concentration, second or subsequent offense, contrary to WIS. STAT. § 346.63(2)(a)2.

¶3 The parties agreed to a court trial with stipulated facts and limited testimony. The stipulated facts and the evidence presented at trial revealed that Rohde was operating his Chevrolet van when it collided with a Milwaukee Police Department squad car. The two officers inside the car, Philyus Pulliam and

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Valeria Zorich, were injured as a result of the collision. Weather, lighting, and road conditions were good, and the traffic signals were functioning properly at the time of the collision.

¶4 Rohde told police at the scene that the crash occurred when he tried to make a left turn off of 27th Street onto Parnell Avenue. There are three lanes in each direction on 27th Street, with left turn bays at the intersection with Parnell Avenue. Rohde said he saw the squad car coming toward him traveling southbound on 27th Street but he believed he could make it safely across the three lanes of traffic.

¶5 The accident reconstruction expert for the defense opined that the primary cause of the crash was the speed of the squad car, which the defense expert estimated at 50 to 59 miles per hour. The defense expert estimated the speed of Rohde's van at 24 to 28 miles per hour. The accident reconstruction expert called by the State arrived at similar figures. The speed limit on 27th Street was 40 miles per hour. The squad car was responding to a police call, but its lights and siren were not activated.

¶6 Rohde failed the field sobriety tests at the scene and was placed under arrest. Rohde's blood-alcohol concentration at the time of the collision was 0.258%—well above the 0.02% legal limit for a driver with his record of past drunk driving offenses.

¶7 The State's toxicology expert explained how alcohol consumption, particularly at high levels, can adversely impact one's ability to safely operate a motor vehicle. The State's accident reconstruction expert testified that the "overriding" causal factors in the crash were Rohde's impaired judgment due to alcohol consumption and his failure to yield the right of way to oncoming traffic.

¶8 The court found Rohde guilty beyond a reasonable doubt of all six counts.

¶9 Rohde was sentenced on counts two and three of the amended information. The trial court imposed concurrent terms consisting of five years of initial confinement in prison followed by three years of extended supervision on count two, and one year of initial confinement followed by one year of extended supervision on count three.

II. DISCUSSION

¶10 Rohde argues that the evidence was insufficient to prove beyond a reasonable doubt that his operation of the motor vehicle caused bodily harm and great bodily harm. According to Rohde:

> [T]he officer[']s speeding was a substantial contributing factor to the crash and the injuries subsequently suffered. Additionally, if the officers had their lights and sirens on, R[oh]de would have had an opportunity to see the emergency vehicle, recognize what it was and what it was doing, and given him an opportunity to respond to it. If R[oh]de did not have proper notice that the officers were driving in excess of the posted speed limit, then he could not be expected to respond properly.

Alternatively, Rohde submits that the State did not prove beyond a reasonable doubt that the accident would not have occurred even if Rohde had been exercising due care and had not been intoxicated.

¶11 Whether trial evidence is sufficient to sustain a verdict is a question of law we review *de novo*. ***State v. Booker***, 2006 WI 79, ¶12, 292 Wis. 2d 43, 717 N.W.2d 676.

¶12 In considering the sufficiency of the evidence,

> [w]e cannot reverse a criminal conviction unless 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.'"

State v. Bohannon, 2013 WI App 87, ¶30, 349 Wis. 2d 368, 835 N.W.2d 262 (citation omitted). The test is the same "'whether the trier of the facts is a court or a jury.'" ***Krueger v. State***, 84 Wis. 2d 272, 282, 267 N.W.2d 602 (1978) (citation omitted). An appellate court "must examine the record to find facts that support upholding the [fact finder's] decision to convict." ***State v. Hayes***, 2004 WI 80, ¶57, 273 Wis. 2d 1, 681 N.W.2d 203.

¶13 Here, with the exception of causation, Rohde stipulated to all of the elements for the crimes of causing great bodily harm by the intoxicated use of a motor vehicle and operating a motor vehicle while intoxicated, causing injury. *See* WIS JI—CRIMINAL 1262 & WIS JI—CRIMINAL 2665. To establish causation, the State had to show that Rohde's operation of a vehicle was a substantial factor in producing great bodily harm/injury. *See* WIS JI—CRIMINAL 1262 & WIS JI—CRIMINAL 2665. "[A] substantial factor 'need not be the sole or primary factor'" in causing the harm to establish the causation element in a criminal case. *See* ***State v. Miller***, 231 Wis. 2d 447, 458, 605 N.W.2d 567 (citation omitted); *see also* WIS JI—CRIMINAL 901 ("There may be more than one cause of [bodily harm/injury]. The act of one person alone might produce it, or the acts of two more persons might jointly produce it.").

¶14 If the trial court found that Rohde caused great bodily harm by the intoxicated use of a motor vehicle, he argued the affirmative defense found at WIS. STAT. § 940.25(2)(a) would apply. It provides: "The defendant has a defense if he or she proves by a preponderance of the evidence that the great bodily harm

would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant." ***Id.***

¶15 Similarly, if the trial court found Rohde caused injury by the intoxicated use of a motor vehicle, he argued the affirmative defense found at WIS. STAT. § 346.63(2)(b)1. would apply. It provides: "[T]he defendant has a defense if he or she proves by a preponderance of the evidence that the injury would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant."

¶16 "Clearly, situations can arise where, because of the victim's conduct, an accident would have been unavoidable even if the defendant had been driving with due care and had not been under the influence"—"[t]he 'dart-out' fact pattern," for instance. ***State v. Lohmeier***, 205 Wis. 2d 183, 195 & n.9, 556 N.W.2d 90 (1996) (discussing analogous affirmative defense found in WIS. STAT. § 940.09). A defendant is not, however, "immune from criminal liability simply because the victim may have been negligent as well." ***Id.*** at 196. Instead, a victim's negligence is relevant to the affirmative defense and is often relevant on the issue of causation. ***Id.***

¶17 Having considered the evidence presented at Rohde's trial, we conclude it was sufficient to support the trial court's finding that Rohde's operation of his motor vehicle was a substantial factor—even if the excessive speed of the squad car was also a substantial factor. This evidence included testimony from the State's toxicology expert as to the impact of alcohol on the vision and motor coordination necessary to safely operate a vehicle. Namely, the resulting increase in visual disturbances "such as double vision, reduced glare recovery, misperception of color, motion, shapes, size. You have a reduced

peripheral vision, which means the vision to the side of your head." Additionally, the toxicology expert testified to the impaired motor coordination as an effect of alcohol consumption, which includes "a reduced reaction time." She confirmed that these symptoms would be consistent with someone who had a blood-alcohol concentration of 0.258%, like Rohde.

¶18 According to the accident reconstruction expert called by the State, no environmental or vehicle factors contributed to the accident. Instead, he concluded: "I believe that Mr. Rohde was unable to process adequately the speed which the oncoming traffic was coming. I believe that he failed to yield the right of way as he made his left turn in front of the squad car." There was, as the State put it, "ample evidence to support the trial court's factual finding that Rohde's alcohol consumption impaired his judgment to such a degree that it caused him to make an unsafe left turn in front of the speeding squad car rather than wait for it to clear the intersection."

¶19 Rohde asserts that "it is not clear from the record exactly how the court evaluated R[oh]de's affirmative defense at trial or whether the court even considered the affirmative defense at all." On this point, however, we are persuaded by the State's logic, to which there is no reply:[2]

> Simply put, the trial court properly found that the evidence of Rohde's impaired judgment brought about by his high level of intoxication both proved the [S]tate's case on the element of causation ("substantial factor") beyond a reasonable doubt and, it necessarily follows, defeated the affirmative defense that his impaired judgment played no part.

[2] *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶20 We further conclude Rohde has not demonstrated that he is entitled to a new trial because the real controversy was not fully tried. *See* WIS. STAT. § 752.35. This is not a case that warrants discretionary reversal. *See* ***Vollmer v. Leuty***, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990) (emphasizing that our power of discretionary reversal is reserved for only the exceptional case).

By the Court.—Judgment affirmed.

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