COURT OF APPEALS
DECISION
DATED AND FILED

SEPTEMBER 16, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-0424-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY S. AMERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: NICK SCHAEFER, Judge. *Affirmed.*

CANE, P.J. Jeffrey S. Amerson appeals from a judgment entered on a jury verdict convicting him of operating a motor vehicle while under the influence of an intoxicant as a third offense. *See* §§ 346.63(1)(b) and 346.65(2), STATS., and operating a motor vehicle with a prohibited alcohol concentration of .08% or more. Amerson contends the trial court erred when it: (1) found his right to an alternative test had not been violated; (2) allowed the medical technician and

the blood analyst to testify absent any independent recollection of the event; (3) failed to accept his offer to stipulate to his prior OWI convictions thereby allowing the jury to learn that he had been twice convicted of drunk driving; and (4) refused to grant his theory of defense instruction. This court rejects his contentions and affirms the judgment.

Following Amerson's arrest, officer Jeffrey Gleason read the "informing the accused" form to Amerson who wanted to take a breath test instead of the blood test. However, when the officer informed him that the blood test was the primary test, Amerson agreed to take the blood test. The blood test result was .193% alcohol by weight. According to Gleason, Amerson never requested to take an alternative test. On the other hand, Amerson testified that he requested the breath test as an alternative test on several occasions, but the officer refused to provide one. The trial court rejected Amerson's testimony and concluded that the officer's testimony was more credible.

Amerson relies on ***State v. Renard***, 123 Wis.2d 458, 367 N.W.2d 237 (Ct. App. 1985), for the proposition that Gleason was required to provide the breath test as an alternative test. This court is not persuaded. In ***Renard,*** the trial court found that the defendant had requested a breath test as an *additional* test to the blood test. Because the officer failed to make a diligent effort to comply with Renard's request for the *additional* alternative test, we agreed that the evidence from the primary test had to be suppressed. *See* ***id.*** at 461-62, 367 N.W.2d at 239. Here, however, the trial court found the officer's testimony more credible that Amerson did not request an alternative test but, rather, wanted to substitute the breath test for the primary test, namely the blood test. This court will not upset the trial court's factual findings unless they are clearly erroneous, and here they are

not. *See* § 805.17(2), STATS. Therefore, because Amerson did not request an alternative test, the trial court correctly denied the suppression motion.

Next, Amerson contends the trial court should not have permitted the medical technologist and blood analyst to testify because they had no independent recollection of performing the tests or observing the results indicated in their reports. He also contends that because the witnesses had no independent recollection of the test, the report showing Amerson's blood test result should not have been admitted. This court is not persuaded. Whether an item of evidence should be admitted is addressed to the trial court's discretion. ***State v. City of La Crosse***, 120 Wis.2d 263, 268, 354 N.W.2d 738, 740 (Ct. App. 1984). This court sees no erroneous exercise of discretion. Section 343.305(5)(d), STATS., provides that at an OWI trial, the results of a test administered in accordance with

the statutes are admissible on the issue of whether the person was under the influence of an intoxicant.[1] The State presented evidence that the test results were made as a result of following the required procedures and Amerson does not challenge the procedures. Notably, as the State suggests, the statute does not require independent recollection of the technicians, but rather provides that if the procedures are followed, the test results are admissible. Additionally, this court agrees with the State that the testimony was admissible under § 908.03(5), STATS., which provides that a witness can testify about a matter in which a record was

---

[1] Section 343.305(5)(d), STATS., provides:

> (d) At the trial of any civil or criminal action or proceeding arising out of the acts committed by a person alleged to have been driving or operating a motor vehicle while under the influence of an intoxicant, a controlled substance, a controlled substance analog or any other drug, or under the influence of any combination of alcohol, a controlled substance, a controlled substance analog and any other drug, to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving, or having a prohibited alcohol concentration, or alleged to have been driving or operating or on duty time with respect to a commercial motor vehicle while having an alcohol concentration above 0.0 or possessing an intoxicating beverage, regardless of its alcohol content, or within 4 hours of having consumed or having been under the influence of an intoxicating beverage, regardless of its alcohol content, or of having an alcohol concentration of 0.04 or more, the results of a test administered in accordance with this section are admissible on the issue of whether the person was under the influence of an intoxicant, a controlled substance, a controlled substance analog or any other drug, or under the influence of any combination of alcohol, a controlled substance, a controlled substance analog and any other drug, to a degree which renders him or her incapable of safely driving or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving or any issue relating to the person's alcohol concentration. Test results shall be given the effect required under s. 885.235.

made and reflects that knowledge correctly,[2] and also under § 908.03(6), STATS., which covers records of regularly conducted activities.[3]

Next, Amerson contends the trial court should not have permitted the State to introduce evidence of his two prior OWI convictions in light of his offer to stipulate to their existence. Amerson's status as a two-time convicted drunk driver made it illegal for him to drive if his blood alcohol concentration exceeded .08%. *See* §§ 340.01(46m)(b) and 346.63(1)(b), STATS. Without deciding whether it was error to admit evidence of Amerson's prior OWI convictions in light of his offer to stipulate to these convictions, this court concludes that even if it was error, it was harmless.[4] The trial court instructed the jury that this evidence was received because it bears upon the second element the State must prove for the offense of driving with a prohibited alcohol concentration, namely that at the

---

[2] Section 908.03(5), STATS., provides:

> (5) RECORDED RECOLLECTION. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made when the matter was fresh in the witness's memory and to reflect that knowledge correctly.

[3] Section 908.03(6), STATS., provides:

> (6) RECORDS OF REGULARLY CONDUCTED ACTIVITY. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances indicate lack of trustworthiness.

[4] Amerson requests this court to stay the appeal because this issue is presently pending before the Wisconsin Supreme Court in ***State v. Alexander***, No. 96-1973-CR. However, because this court concludes that even if it was error, it was harmless, it is unnecessary to wait until the Supreme Court decides ***Alexander.***

time Amerson drove the vehicle, he had two or more OWI convictions. The trial court also cautioned the jury that this evidence was received as relevant to the status of Amerson's driving record and that it was not to use the evidence for any other purpose. This court presumes that juries comply with the trial court's instructions. ***State v. Truax***, 151 Wis.2d 354, 362, 444 N.W.2d 432, 436 (Ct. App. 1989). Additionally, at trial, Amerson's defense focused on his two prior OWI convictions as the reason he carefully limited his alcohol consumption to avoid any further violations and, therefore, he should be believed. Consequently, this court is satisfied that even if there was error, it did not contribute to Amerson's conviction.

Finally, Amerson contends the trial court erred by not giving a special theory-of-defense instruction. Specifically, he argues the trial court erred by not giving the following proposed instruction.

> It is the theory of defense in this case that Jeffrey S. Amerson had not consumed an amount of alcohol sufficient to render him incapable of safely driving. It is claimed that the amount of alcohol consumed by Mr. Amerson did not cause him to be impaired. It is further the theory of defense that the observations of the police officers involved were consistent with innocence.
>
> It is further the theory of defense that the blood test result introduced in this case does not accurately reflect Mr. Amerson's alcohol concentration at either the time of driving or at the time the blood sample was taken from him.
>
> If you disagree with all theories of defense in light of the State's burden to prove the defendant guilty, you may find the defendant guilty as charged.
>
> If you agree with the theory of defense as it relates to the particular charge, you must find the defendant not guilty of such charge.

A trial court has wide discretion in determining what jury instructions will be given and if the given instructions adequately explain the law applicable to the facts, that is sufficient and there is no error in the trial court's refusal to use the specific language Amerson requested. *See* ***State v. Herriges***, 155 Wis.2d 297, 300, 455 N.W.2d 635, 637 (Ct. App.1990). The trial court need not reiterate for the jury a defendant's contentions. *See* ***State v. Davidson***, 44 Wis.2d 177, 191-92, 170 N.W.2d 755, 763 (1969) (in Wisconsin, trial judges are not to comment on the evidence). A theory of defense instruction should be granted when the instruction relates to a legal theory of defense supported by the evidence as opposed to the interpretation of the evidence urged by the defense, and the theory is not adequately covered by the other instructions in the case. *See* WIS J I--CRIMINAL 700 (citing ***Davidson***). Amerson does not claim that he was precluded by the trial court from arguing his contentions to the jury or that the jury was not otherwise accurately instructed on the applicable law. His proposed instruction simply presented his argument or position on the evidence. This court concludes that the trial court's refusal to give Amerson's proposed instruction was a reasonable exercise of discretion.

By the Court.—Judgment affirmed.

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