

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 17, 1998

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. 97-3370-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JACK SCHILLING,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

FINE, J. Jack Schilling appeals from his jury-trial conviction of operating a motor vehicle while under the influence of an intoxicant. *See* §§ 346.63(1)(a) and 346.65(2), STATS. We affirm.

I.

Two Milwaukee police officers found Schilling slumped over the steering wheel of a running car. The officers had difficulty arousing him from his stupor. Schilling was unsteady as he got out of the car, and there was the odor of an alcoholic beverage on Schilling's breath. His speech was slurred and his eyes were glazed. Indeed, one of the officers testified that Schilling "could barely speak." Schilling told the officers that he had consumed a six-pack of beer. According to the testimony of one of the officers, Schilling performed "very poorly" on field sobriety tests. Schilling was then arrested.

Although given an Intoxilyzer test, the results of the test were suppressed. Nevertheless, over Schilling's objection, the Intoxilyzer officer testified that Schilling appeared to him to be intoxicated. The trial court instructed the jury to disregard testimony about the results of Schilling's Intoxilyzer test, but rejected Schilling's request to strike all of the Intoxilyzer officer's testimony. Schilling claims that this was error. We disagree.

II.

A trial court's decision to admit or exclude evidence is a discretionary determination and will not be upset on appeal if it has "a reasonable basis" and was made "in accordance with accepted legal standards and in accordance with the facts of record." *State v. Pharr*, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983) (citation omitted). In ruling on Schilling's request to strike all of the Intoxilyzer officer's testimony, the trial court noted that the officer based his opinion on his experience.

The Intoxilyzer officer testified that when he spoke to Schilling in the Intoxilyzer room, Schilling “had a moderate odor of an alcoholic beverage on his breath, and that his speech was slow and deliberate, and that his eyes were red rimmed.” The officer also told the jury that Schilling “was a little unsteady on his feet, and that as he stood before the machine, preparing to take the test, that he had his feet planted somewhat far apart as if he was trying to keep from swaying.” He further testified that based on his training and experience, which included “many dozens, possibly a couple of hundred” of arrests of persons suspected of drunk driving, as well as “several hundred” contacts with suspected drunk drivers, as either an Intoxilyzer officer or as an officer assisting in drunk-driving arrests, Schilling “was, in fact intoxicated” when the officer saw him.

The Intoxilyzer officer's testimony that Schilling appeared to be under the influence of an intoxicant was both within the ambit of the officer's experience, *see* RULE 907.02, STATS. (scope of expert testimony), and was relevant as to whether, in the words of § 346.63(1)(a), STATS., Schilling had been operating a motor vehicle while “[u]nder the influence of an intoxicant,” *see* RULE 904.01, STATS. (relevant evidence defined). The trial court did not erroneously exercise its discretion in refusing to strike the officer's testimony.

By the Court.—Judgment affirmed.

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

