COURT OF APPEALS
DECISION
DATED AND FILED

December 15, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1793-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT J. EHMKE, II,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: LEO F. SCHLAEFER, Judge. *Affirmed.*

¶1 ANDERSON, J. Robert J. Ehmke, II, appeals from a judgment convicting him of operating a motor vehicle while intoxicated, fourth offense, contrary to § 346.63(1)(a), STATS. Ehmke argues that the State presented insufficient evidence to support his conviction. More specifically, he contends that the State's evidence was insufficient because it lacked proof regarding the

time of vehicle operation. Additionally, he objects to the trial court permitting a State's expert witness to testify to a hypothetical question about Ehmke's blood alcohol level at the time he operated the vehicle and admitting his blood test results into evidence. Because the evidence presented at trial would allow a reasonable jury to find Ehmke guilty beyond a reasonable doubt of operating his vehicle while intoxicated, this court affirms the judgment.

¶2 At 10:54 p.m. on April 8, 1998, Deputy Daniel Brawn went to investigate a vehicle that had been driven into a ditch along the side of a road. Brawn arrived at the scene and saw the unoccupied vehicle in the ditch. A few moments later, Ehmke walked out of the ditch on the opposite side of the road and admitted that the vehicle was his. Ehmke told Brawn that he was "farting around … and had lost control of his car, and that's how he ended up in the ditch."

¶3 During the conversation, Brawn noticed a strong odor of intoxicants on Ehmke's breath, his speech was slurred, and his eye appeared bloodshot and glassed over.[1] Brawn asked Ehmke if he had been drinking. Ehmke replied that he "had a couple earlier" and "knew he shouldn't have been driving but he did anyway." Brawn asked Ehmke to perform field sobriety tests. Ehmke performed the heel-to-toe test, the alphabet test, the backwards counting test and the fingertip counting test. Brawn determined that Ehmke failed to satisfactorily perform all of the tests except the fingertip counting test. Based on his training and experience, Brawn believed that Ehmke was intoxicated and, after administering a preliminary breath test, placed Ehmke under arrest for operating a motor vehicle while intoxicated.

[1] Ehmke informed Brawn that he has one artificial eye.

¶4 Ehmke was transported to a hospital. He was read an Informing the Accused form, and an evidentiary chemical test of his blood was taken at 1:13 a.m. on April 9, 1998.

¶5 After Ehmke pled not guilty, a trial to the court was held. Brawn testified about the circumstances leading to Ehmke's arrest. Brawn added that Ehmke had not consumed alcohol between the time of their initial contact and his release from custody. Also, Brawn noted that no cans or bottles were found at the scene or in the vehicle driven into the ditch, which indicated that Ehmke had not consumed alcohol at the scene after running the car off the road.

¶6 The State also presented testimony from Noel Stanton, a chemist at the State Laboratory of Hygiene, who conducted the analysis of Ehmke's blood sample. Stanton testified that the blood test results revealed that Ehmke had 0.194 grams of alcohol per 100 milliliters of blood. This test was performed at 1:13 a.m. Stanton theorized that if the test had been performed at 10:30 p.m., the time that the State estimated that Ehmke drove the car into the ditch, a person of his size, who did not consume any additional alcohol, would have had a blood alcohol concentration of 0.22 grams per 100 milliliters of blood.

¶7 At the close of the State's case, Ehmke moved the court to dismiss the charge. The court denied the motion and found Ehmke guilty of fourth offense operating while intoxicated.[2] Ehmke appeals.

[2] In addition to the operating a motor vehicle while intoxicated count, Ehmke was charged with operating a motor vehicle with a prohibited alcohol concentration, fourth offense, pursuant to § 346.63(1)(b), STATS. This charge was dismissed by the court.

¶8 We now turn to Ehmke's allegation that there was insufficient evidence to convict him of operating a motor vehicle while intoxicated. Ehmke argues that the State failed to present "credible evidence upon which anyone could establish what … Ehmke's condition was at the time of his alleged driving." We cannot agree.

¶9 The two basic elements that the State must prove to obtain a conviction on this charge are that the defendant was driving a motor vehicle and that the defendant was "under the influence of an intoxicant" at that time. *See* ***State v. Burkman***, 96 Wis.2d 630, 644, 292 N.W.2d 641, 647-48 (1980), *overruled on other grounds by* ***State v. Poellinger***, 153 Wis.2d 493, 451 N.W.2d 752 (1990). The phrase "under the influence" means that alcohol impaired the driver's ability to operate his or her vehicle. *See* WIS J I—CRIMINAL 2663.

¶10 When we review whether the evidence sufficiently established the elements of a charge, we test whether the evidence was so lacking in probative value that no reasonable juror could have found guilt beyond a reasonable doubt; otherwise, we affirm. *See* ***State v. Wagner***, 191 Wis.2d 322, 331-32, 528 N.W.2d 85, 89 (Ct. App. 1995).

¶11 We conclude that there was sufficient evidence to support this verdict. Ehmke's admissions provided two basic facts about that night to the fact finder: one, that he consumed alcohol, and two, that he operated the vehicle driven into the ditch. Although the State did not present direct evidence as to the time Ehmke operated his motor vehicle, it is permissible for the fact finder to rely upon circumstantial evidence in a criminal case. *See* ***State v. Johnson***, 11 Wis.2d 130, 134-35, 104 N.W.2d 379, 381-82 (1960). "Circumstantial evidence is the proof of certain facts from which a [fact finder] may logically infer the existence

of other facts according to the knowledge or common experience of mankind." WIS J I—CRIMINAL 170.

¶12 Here, the evidence established that the police officer, responding promptly to the report of a vehicle lodged in a ditch, encountered Ehmke coming out of a ditch at the accident scene. It was further established that Ehmke had driven his vehicle off the road, that he had been drinking, that he failed three out of four field sobriety tests and that a blood test revealed a blood alcohol concentration of 0.194 grams of alcohol per 100 milliliters of blood. Although there is no direct evidence as to the time Ehmke operated his motor vehicle, given all the evidence presented, a reasonable jury could infer that the police officer encountered Ehmke shortly after he drove his car off the road and consequently find Ehmke guilty beyond a reasonable doubt of operating his vehicle while intoxicated.

¶13 The trial court admitted into evidence Ehmke's blood test results and permitted Stanton, the State's expert witness, to testify to a hypothetical question about Ehmke's blood alcohol level at the time he operated the vehicle. Ehmke contends that the court erred in doing so, but he does not argue that the admission of this evidence tarnished the verdict.

¶14 We choose not to address these issues on the merits. Even assuming that this evidence was erroneously admitted, it does not affect Ehmke's conviction. As we have previously discussed, the State presented sufficient evidence for a reasonable juror to find guilt beyond a reasonable doubt. Even if Stanton's hypothetical testimony and the blood test results were excluded from this evidence, we determine that the fact finder could still find that Ehmke had

driven the vehicle and was under the influence of an intoxicant at that time. Accordingly, we affirm the judgment.

By the Court.—Judgment affirmed.

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