COURT OF APPEALS
DECISION
DATED AND FILED

June 7, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2131

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

TOWN OF DELAVAN,

PLAINTIFF-RESPONDENT,

V.

STUART G. LENHOFF,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

¶1 BROWN, P.J.[1] Stuart G. Lenhoff appeals from a judgment of conviction for first offense operating a motor vehicle while intoxicated (OWI). Lenhoff raises three arguments. First, he claims that the trial court erred by not conducting a hearing to investigate whether a juror was sleeping during the trial.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (1997-98). All further references to the Wisconsin Statutes are to the 1997-98 version.

We conclude that this objection was untimely. Second, Lenhoff claims that his conviction was based in part on perjured testimony by the arresting officer. Lenhoff has not shown that the officer perjured himself. Third, Lenhoff claims it was error for the trial court to allow the prosecution to question the officer regarding his OWI arrest practices. The admission of the testimony was not an erroneous exercise of discretion. We affirm.

¶2 Lenhoff was arrested for OWI by Town of Delavan Police Officer Anthony Ambach. Ambach first noticed Lenhoff because his headlights switched off and on. When he turned around to follow Lenhoff, he saw Lenhoff veer towards the center line. When he stopped Lenhoff, he noticed he had slurred speech and smelled of intoxicants. After administering three field sobriety tests, one of which Lenhoff failed, Ambach placed him under arrest for OWI. At the hospital, Lenhoff's breath showed a .10 alcohol concentration. After a jury trial, Lenhoff was convicted of OWI.

¶3 Lenhoff's first argument concerns a juror who was inattentive during the trial. At the end of the trial, Lenhoff's counsel informed the court that he had noticed that one of the jurors had been asleep during parts of the trial, especially during counsel's closing argument. The prosecutor agreed that the juror in question "was drifting off," but did not concede that the juror was ever asleep. The trial court stated, "That's not an evidentiary portion of the trial and I didn't notice it nor did you bring it to the Court's attention." Defense counsel replied, "There were points during the trial, but then she would pop awake, but I really noticed it during my closing." The trial court refused to conduct a hearing into the extent of the juror's inattentiveness.

¶4 The Wisconsin law on sleeping jurors is expressed in ***State v. Hampton***, 201 Wis. 2d 662, 549 N.W.2d 756 (Ct. App. 1996). There, Hampton's counsel sent a note to the trial court alerting it to the sleeping juror. The trial court acknowledged that it had noticed that the juror "was drowsy" during testimony, yet refused to conduct a hearing to inquire about how much of the testimony the juror had missed. *See* ***id.*** at 666-67. This court noted that the objection was both timely and specific. *See* ***id.*** at 670-71. Furthermore, it was conceded that the juror was sleeping. *See* ***id.*** at 673. While holding that the manner with which to deal with juror inattentiveness is within the discretion of the trial court, *see* ***id.*** at 670, we concluded that, under the circumstances in ***Hampton***, it was an erroneous exercise of the trial court's discretion not to inquire further into the juror's lack of attention. *See* ***id.***

¶5 The circumstances in this case do not demonstrate the erroneous exercise of discretion that required remand in ***Hampton*** because the trial court was not timely alerted to the allegedly sleeping juror. Defense counsel did not alert the trial court to the juror's inattention until the very end of trial. "Counsel may not permit juror misconduct or inattentiveness to go unnoticed, thereby sewing a defect into the trial, and later claim its benefit." ***United States v. Curry***, 471 F.2d 419, 422 (5th Cir. 1973) (holding objections to a sleeping juror came too late). The sleeping juror objection was waived.

¶6 Lenhoff's second argument concerns Ambach's supposedly perjurious testimony. According to Lenhoff, Ambach first testified that Lenhoff's headlights were "off and that they were not turned on until just as the squad car passed," but then "completely changed his story and instead told the jury that the lights were on, then off, then on again." In support of his perjury argument,

Lenhoff points to his demonstration to the jury that his headlights will not go off as long as the engine is running.

¶7 We are not persuaded that Ambach "completely changed his story," much less that he made assertions he knew to be false. We acknowledge that the status of the headlights for the entire period in question is not clear from the record. However, part of the confusion stems from the fact that there was testimony about both the taillights and the headlights, as well as generic references to lights. Furthermore, Lenhoff failed to challenge the basis for the traffic stop below. *See* ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983) ("We normally will not review an issue raised for the first time on appeal."). Since Lenhoff never challenged probable cause, we view his argument concerning Ambach's testimony as a challenge to Ambach's credibility. The jury is the arbiter of witness credibility. *See* ***Lellman v. Mott***, 204 Wis. 2d 166, 172, 554 N.W.2d 525 (Ct. App. 1996). Finally, there was ample other evidence to support Lenhoff's conviction. *See* ***State v. Nerison***, 136 Wis. 2d 37, 54, 401 N.W.2d 1 (1987) ("Due process requires a new trial if the prosecutor in fact used false testimony which, in any reasonable likelihood, could have affected the judgment of the jury.").

¶8 In Lenhoff's final argument, he contends that the trial court impermissibly allowed the prosecution to introduce evidence of Ambach's truthfulness when his character had not been challenged. On direct examination, the prosecutor asked Ambach, "Do you arrest everybody whom you feel to be … for those people who you stop suspected of operating while intoxicated, do you arrest them all?" Defense counsel objected to the relevancy of the question and the trial court stated, "You may answer." According to Lenhoff, the solicited testimony was irrelevant. Anticipating a response that the evidence goes to the

credibility of the witness, Lenhoff claims that WIS. STAT. § 906.08(1) "provides that evidence of a witness' truthful character may not be offered unless the witness' character has been attacked."

¶9 The trial court allowed the question over an objection to its relevance. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01. The relevance of particular evidence is left to the discretion of the trial court. *See* ***State v. Denny***, 120 Wis. 2d 614, 626, 357 N.W.2d 12 (Ct. App. 1984). We will uphold the trial court's decision as long as it has a reasonable basis. *See* ***id.***

¶10 Here, there was a reasonable basis to consider the question relevant. The extent of Ambach's experience and ability to assess drivers' intoxication sheds light upon the accuracy of his determination that Lenhoff was intoxicated. It was not error for the court to overrule defense counsel's objection. Furthermore, even if admission of the testimony were error, it would be harmless. Lenhoff had ample opportunity to cross-examine Ambach and there was ample other evidence upon which to convict Lenhoff. Any objection to the evidence under WIS. STAT. § 906.08(1) was waived.

By the Court.—Judgment affirmed.

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