**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**August 23, 2016**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2015AP1415** **Cir. Ct. No. 2014TR1988**

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

**OCONTO COUNTY,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JONATHAN E. VAN ARK,**

**DEFENDANT-APPELLANT.**

APPEAL from a judgment of the circuit court for Oconto County: MICHAEL T. JUDGE, Judge. *Reversed and cause remanded.*

¶1 SEIDL, J.[1] Jonathan Van Ark appeals a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration (PAC). We

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

conclude the circuit court erroneously entered a directed verdict and we therefore reverse the judgment and remand for a new trial.

## BACKGROUND

¶2 On September 27, 2014, at approximately 11:25 p.m., Oconto County sheriff's deputy Adam Zahn observed a pickup truck parked behind a closed gas station. Van Ark was in the driver's seat of the vehicle, which was not running. James Van Rixel, the vehicle's owner, was in the passenger seat.

¶3 Zahn approached the vehicle and detected a strong odor of alcohol. Zahn observed Van Ark's "eyes were glossy and bloodshot, and his speech was pretty slow and slurred." Van Ark informed Zahn that he drove to that location several minutes prior to Zahn's arrival and intended to drive away. Zahn was concerned that Van Ark might be impaired and administered field sobriety tests. After failing the field sobriety tests, Van Ark was placed under arrest for operating while intoxicated (OWI). Zahn then transported Van Ark to a local hospital for a blood draw, which was performed at 12:15 a.m. After the test results indicated a .237 blood alcohol content (BAC), Van Ark was additionally charged with PAC.

¶4 A jury trial was held. James Blum, a medical technologist for thirty-three years, testified regarding Van Ark's blood draw. Blum identified Van Ark's alcohol/drug influence report and affirmed his signature on the document. He testified, "When I draw a person that's been accused of OWI, then I draw their blood, and I put the time and date that I drew it along with my printed name and my signature." Blum answered affirmatively when asked if he put the date and time when the blood was drawn on the form for Van Ark.

¶5 Blum testified he drew Van Ark's blood at 12:15 a.m. He also established that when he drew blood he used particular equipment, as follows:

> Q: Now, when you draw blood for situations like this, do you use some particular equipment?
>
> A: Yes, the State of Wisconsin provides us with a kit that is sealed. It has a nonalcoholic wipe in there with two tubes that we fill up, and there's also a document in there which matches the other side of this one.

Blum further testified that he followed the provided instructions when drawing blood samples and that he followed "the same procedures when he drew blood on everybody." Blum also stated:

> Q: After you draw the blood, who do you give it to?
>
> A: When I draw the blood, I label the tubes myself. There's a seal for the tube, and then the patient's name is written on the tube with a date that goes over the seal. I wrap that up with a document, and I hand that to the deputy.

¶6 Stephanie Weber, a chemist at the state laboratory of hygiene, identified Van Ark's laboratory report. She testified regarding her qualifications for measuring the alcohol concentration of an individual, and also discussed the procedure used to analyze blood samples for alcohol content. Weber testified she employed the same procedure for analyzing Van Ark's blood, and her analysis in this case yielded a (BAC) of .237. She further testified the test results were accurate to a reasonable degree of scientific certainty.

¶7 After resting its case and confirming the defense did not intend to call any additional witnesses, the State moved for a directed verdict. The circuit court rejected the State's motion as to the OWI charge, based on Van Ark's and

James Van Rixel's testimony regarding their opinions of Van Ark's lack of impairment.[2] However, the court granted the motion for directed verdict on the PAC charge. The court stated that it was undisputed Van Ark was driving just before the encounter with deputy Zahn and there was "no testimony from the defense to question the blood draw … or … analysis …." The court then indicated, "So what the Court is looking at, of course, is … there any evidence that I can consider in dispute of what the Court has just recited as to the [BAC]." The court found there was no such evidence. Van Ark now appeals.

## DISCUSSION

¶8 A directed verdict is subject to de novo review. *See* ***Millonig v. Bakken***, 112 Wis. 2d 445, 450, 334 N.W.2d 80 (1983). "[A] verdict should be directed only where there is no conflicting evidence as to any material issue and the evidence permits only one reasonable inference or conclusion." ***Id.*** at 451.

¶9 In ***City of Omro v. Brooks***, 104 Wis. 2d 351, 311 N.W.2d 620 (1981), our supreme court discussed the propriety of directing a verdict against a defendant in an OWI forfeiture matter. The fact of intoxication and operation of a vehicle were the only essential elements in that case, and it was undisputed that Brooks was operating a motor vehicle just prior to his apprehension. The court stated:

> Whether we choose to believe the testimony of the arresting officer in toto, that element is not at issue. The

[2] Weber refuted Van Ark's adverse trial testimony that he drank six beers in six hours between 5:00 p.m. and 11:00 p.m. Weber indicated that Van Ark would have had to consume 7.9 drinks at a minimum to arrive at a .237 BAC. She further explained, "And that isn't taking into account elimination over that time period of drinking which would result in more drinks required."

> defendant admitted he was driving the vehicle. Moreover, aside from the uncontested admission of the alcohol test, once a proper foundation was provided, the defendant admitted that he had upwards of 12 beers and that he was intoxicated at the time. There was no evidence that tended to controvert the clear evidence of intoxication. The defendant admitted the essential elements of the offense.

***Id.*** 356-57.

¶10 However, ***Brooks*** dealt with an OWI charge under a municipal ordinance in conformity with Wisconsin statutes, which at the time did not include a prohibited alcohol concentration offense. Major changes in Wisconsin's "drunk driving" law were made by chapters 20 and 184, Laws of 1981, including the creation of offenses based on the alcohol concentration of the driver. WIS JI—CRIMINAL 2660A, originally published in 1982, states that if a blood sample is taken within three hours of a defendant operating a motor vehicle, a jury may conclude that BAC results at the time of testing are proof of BAC at the time of operating, but the jury is not required to do so.[3] The pattern jury instruction provides in pertinent part:

> The law states that the alcohol concentration in a defendant's … blood … sample taken within three hours of … operating a motor vehicle is evidence of the defendant's alcohol concentration at the time of the … operating. If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that there was .08 grams or more of alcohol in 100 milliliters of the defendant's blood … at the time the test was taken, you may find from that fact alone that the defendant had a prohibited alcohol concentration at the time of the alleged … operating, but you are not required to do so.

[3] *See also* WIS. STAT. § 885.235(1g)(c).

Importantly, WIS JI—CRIMINAL 2660A creates a permissive presumption, which places no burden of any kind on the defendant. *See* ***State v. Vick***, 104 Wis. 2d 678, 694-95, 312 N.W.2d 489 (1981).

¶11 Here, the circuit court concluded the defense presented no evidence disputing the State's proof, but WIS JI—CRIMINAL 2660A instructs that a jury "may find" an elemental fact (BAC of .08 or more at the time of operating) if the prosecutor proves a basic fact (BAC of .08 or more at the time of blood test). This leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof. Furthermore, although the jury heard Weber's uncontroverted testimony concerning Van Ark's BAC, a jury is not bound by the testimony of an expert, even if uncontroverted. *See* ***Krueger v. Tappan Co.***, 104 Wis. 2d 199, 203, 311 N.W.2d 219 (Ct. App. 1981). Accordingly, the court erred by taking the case from the jury. Because this issue is dispositive of the appeal, we need not reach other issues raised by Van Ark. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W.2d 663 (1938).

*By the Court*.—Judgment reversed and cause remanded.

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