

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 15, 2017

Diane M. Fremgen
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP554

**Cir. Ct. Nos. 2015TR801
2015TR868**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

WAUKESHA COUNTY,

PLAINTIFF-RESPONDENT,

V.

KIMBERLY A. RIDL,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Waukesha County:
MICHAEL J. APRAHAMIAN, Judge. *Affirmed.*

¶1 HAGEDORN, J.¹ Kimberly A. Ridl appeals from judgments convicting her of operating a motor vehicle while intoxicated (OWI) and refusing to take a test for intoxication as required by WIS. STAT. § 343.305. She contends

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

that the evidence was insufficient to support the court's conclusion that she was intoxicated. We disagree and affirm.

Background

¶2 Ridl was charged with OWI, first offense, and refusing to submit to a test for intoxication.² During the bench trial, the following testimony was offered.

¶3 Lieutenant Marc Moonen testified that on January 27, 2015, at 12:41 a.m., he was called out to the scene of an accident in Delafield. The road was covered with about one-half inch of snow, and the temperature was around twenty-five degrees. He observed an SUV in the ditch on the side of the road. He testified that it appeared that the driver attempted a left turn and instead slid into the ditch. Moonen knocked on the window and was able to identify the driver as Ridl. When Ridl opened the door, Moonen immediately smelled “the odor of consumed intoxicants” coming from “the passenger’s compartment of the vehicle.” Moonen explained that Ridl was “very upset” and “heavily crying,” and she spoke in “incoherent sentences” that were not “logically put together.” He also noted that Ridl exhibited “thick and slurred speech.” Upon being asked, Ridl admitted that she started drinking around 7:00 p.m., had two drinks, and stopped drinking about “[o]ne to two hours prior.”

¶4 Suspecting Ridl might be intoxicated, Moonen asked her to exit the SUV to perform the standard field sobriety tests. On account of the slippery conditions, Moonen offered to take Ridl elsewhere to complete the tests, but Ridl

² Ridl was also cited for driving too fast for conditions.

declined and “stated she wanted to stay there.” Moonen took Ridl in front of his squad car to perform the required tests, and he observed that Ridl had a “very unsteady gait,” and Moonen had to stop her from falling when she lost her balance. As Moonen prepared to administer the horizontal gaze nystagmus (HGN) test, Ridl advised Moonen that she was a physician and “takes care of ... cops” like Moonen. Moonen testified that “[t]here was a conversation about whether she was asking me to show her favoritism.” During the HGN test, Moonen observed no resting nystagmus, but did observe a lack of smooth pursuit in Ridl’s pupils and “distinct and sustained nystagmus at maximum deviation,” signs of intoxication.³ However, Moonen testified he was unable to complete the test because Ridl “was not directly following my stimulus and on multiple occasions I had to actually restart the portion of the test she could not follow.” Moonen attempted to complete the walk-and-turn test, but was unable to do so because Ridl attempted to walk away and had to be physically stopped. At this point, Moonen concluded that Ridl was intoxicated and placed her under arrest for OWI.

¶5 Ridl also testified in her own defense at trial. She explained that she had suffered from a migraine for four days prior and had been taking several medications—Toradol, Benadryl, Compazine, Zofran, and dexamethasone. The court asked her whether she should be drinking while taking these medications and she responded that she assumed the medications should not be mixed with alcohol. She also claimed that she informed Moonen that she had nystagmus in her eyes naturally when she had migraines and had numbness in her foot.

³ Nystagmus refers to an inability to smoothly track with the eyes.

¶6 After the close of evidence, the court found Ridl guilty of OWI.⁴ Although the court generally found Ridl credible, it found Moonen more credible to the extent his testimony diverged from Ridl's. The court noted that Moonen smelled intoxicants when he opened the door of Ridl's SUV. It considered that Ridl spoke with "thick and slurred speech," behaved "erratically," and admitted to drinking.⁵ Additionally, the HGN test supported "a level of intoxication." Based on these factors, the court concluded that Ridl was intoxicated and added the following observation:

She testified she had been sick for four days, vomiting. I can imagine how maybe in a typical day that would not have affected as it would on this day but having gone through that level of stress in her life, that level of her physical stress from the migraines she was having, taking the medications that she was taking, being under the emotional stress of what was going on through her father, alcohol impacted her in a way that maybe she wasn't expecting and I think she was intoxicated as a result

The court also concluded Ridl inappropriately refused to submit to the breath test. Ridl appeals.

Discussion

¶7 Ridl's sole argument on appeal is that the circuit court improperly opined that "Ridl's medication caused her to be affected by alcohol in an atypical way." According to Ridl, the court lacked the necessary experience to reach any

⁴ The court also found Ridl guilty of driving too fast for conditions, an issue she does not appeal.

⁵ The court mentioned that Ridl fell backwards as she attempted to exit her vehicle but explained that "I'm not putting much stock in that as a basis for the ... alleged intoxication, because [the vehicle] was on an angle."

such conclusion about the interaction between alcohol and her medications. Thus, Ridl contends that the court could not find that she was intoxicated without expert testimony. In other words, Ridl is challenging the sufficiency of the evidence for her conviction. We disagree and affirm.

¶8 When we review the sufficiency of the evidence, we may not substitute our judgment for that of the trier of fact unless “the evidence, viewed most favorably to ... the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt.” *State v. Hayes*, 2003 WI App 99, ¶13, 264 Wis. 2d 377, 663 N.W.2d 351. “If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence at trial to find guilt, the court must uphold the conviction.” *Id.* Additionally, where the evidence supports more than one inference, we must accept the inference drawn by the trier of fact. *Id.*

¶9 The evidence here was sufficient to support the circuit court’s conclusion that Ridl was intoxicated. Moonen smelled intoxicants coming from Ridl’s SUV, and Ridl admitted to drinking. Ridl also exhibited an unsteady gait, almost fell, spoke with slurred speech, and had trouble putting coherent sentences together. Moonen testified that Ridl’s eyes lacked smooth pursuit and had distinct and sustained nystagmus at maximum deviation. Although not specifically mentioned by the circuit court, Ridl told Moonen that she routinely took care of cops, possibly indicating a consciousness of intoxication and a desire for special treatment.

¶10 Contrary to Ridl’s insistence, expert testimony was not required for the court to conclude that Ridl was intoxicated. Although a circuit court may order expert testimony for “unusually complex or esoteric issues,” requiring—as

opposed to merely permitting—expert testimony “represents an extraordinary step.” *Weiss v. United Fire & Cas. Co.*, 197 Wis. 2d 365, 379, 541 N.W.2d 753 (1995). In order for expert testimony to be required, the circuit court must determine that the issue is not within the realm of ordinary experience. *Id.* Whether a person is intoxicated—based on objective indicators like those present here—is a matter well within ordinary experience. See *State v. Powers*, 2004 WI App 143, ¶13, 275 Wis. 2d 456, 685 N.W.2d 869 (explaining that a layperson may testify that he or she believed a person was intoxicated). Expert testimony was not required.

¶11 Furthermore, we think Ridl has mischaracterized the circuit court’s decision. Although the court did speculate that Ridl might have been exhibiting an abnormal response to the alcohol, this statement was hardly the basis for the court’s ruling. The court’s remarks were couched in hypothetical terms. The court explained it could “*imagine how maybe ... taking the medications that she was taking ... alcohol impacted her in a way that maybe she wasn’t expecting.*” This appears to be the circuit court offering a possible (perhaps more charitable) explanation for Ridl’s visibly intoxicated state. It does not, as Ridl suggests, form the sole basis for the court’s conclusion that Ridl was in fact intoxicated. The court made clear that all of the factors it identified—her erratic behavior, visible signs of intoxication, slurred speech, and the results from the HGN test—“support a level of intoxication that would lead to a violation.” The evidence was more than sufficient to support this conclusion.

¶12 Ridl’s notice of appeal indicates that she also appeals from the court’s judgment imposing revocation as a result of her refusal to submit to the evidentiary breath test. However, she did not brief the issue, and we deem it

abandoned. *Reiman Assocs., Inc. v. R/A Advert., Inc.*, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981).

By the Court.—Judgments affirmed.

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