

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 9, 2001

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-1172-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH P. SUTHERLAND,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Burnett County:
EUGENE C. HARRINGTON, Judge. *Affirmed.*

¶1 PETERSON, J.¹ Joseph Sutherland appeals his judgment of conviction for operating a motor vehicle while under the influence of an intoxicant, third offense, contrary to WIS. STAT. § 346.63(1)(a). Sutherland argues

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

that: (1) the evidence presented by the State was insufficient to support his conviction; (2) the trial court erred by allowing the jury to hear opinion testimony given by the state trooper; and (3) irregularities at trial prejudiced his defense. We disagree and affirm the conviction.

BACKGROUND

¶2 Wisconsin State Trooper Anthony Destefano was dispatched to investigate a single vehicle accident near Grantsburg at approximately 6:42 p.m. on August 28, 1998. He arrived at the scene at approximately 7:32 p.m. and observed a black Ford pickup truck that appeared to have been involved in a rollover accident. Destefano spoke with several people at the scene, one of whom was Sutherland who admitted he was driving and that the accident occurred at approximately 6:45 p.m.

¶3 During the conversation, Destefano noticed a strong odor of intoxicants coming from Sutherland. He also noticed that Sutherland's eyes were bloodshot and that he was "moody." Destefano administered field sobriety tests, placed Sutherland under arrest, and questioned him further. Sutherland stated that he had four whiskey and Cokes at a bar before the accident.

¶4 Sutherland was later transported to the Burnett County Sheriff's Department for further questioning. At the sheriff's department, Sutherland stated that he had consumed three whiskey and Cokes and two beers before the accident. Sutherland also stated that he had not had anything to drink since the accident. A breath test indicated Sutherland had a blood alcohol concentration of .14%. Sutherland was charged with operating a motor vehicle while under the influence of an intoxicant, third offense, and operating a motor vehicle with a prohibited blood alcohol concentration, third offense, contrary to WIS. STAT. § 346.63(1)(b).

¶5 The jury found Sutherland guilty of operating a motor vehicle while under the influence of an intoxicant, third offense, and not guilty of operating a motor vehicle with a prohibited blood alcohol concentration, third offense.

¶6 Sutherland brought postconviction motions. The trial court denied the motions and this appeal followed.

STANDARD OF REVIEW

¶7 Our review of the sufficiency of the evidence is to determine whether the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *See State v. Ray*, 166 Wis. 2d 855, 861, 481 N.W.2d 288 (Ct. App. 1992). In examining the sufficiency of the evidence, we will only substitute our judgment for that of the jury when the evidence relied on by the jury is inherently incredible. Where the testimony of the various witnesses is only contradictory and not inherently incredible, the jury's verdict should stand. *See Brain v. Mann*, 129 Wis. 2d 447, 453, 385 N.W.2d 227 (Ct. App. 1986).

¶8 The jury may reject a theory of innocence, and we may not substitute our judgment for the jury's overall evaluation of the evidence. *See State v. Poellinger*, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990). An appellate court need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence. *See id.* at 508.

DISCUSSION

I. Sufficiency of the Evidence

¶9 Sutherland argues that the evidence presented at trial was not sufficient to support a conviction for operating a motor vehicle while under the influence of an intoxicant. Sutherland contends that: (1) the jury's finding that he was not guilty on the blood alcohol concentration charge precludes it from finding him guilty on the operating a motor vehicle while under the influence of an intoxicant charge; (2) there was uncontroverted testimony that he was not driving while under the influence of an intoxicant; and (3) the accident was caused by a blowout from his tire striking an exposed manhole cover. We are not persuaded.

¶10 To find a defendant guilty of operating a motor vehicle while under the influence of an intoxicant, the State must prove beyond a reasonable doubt that (1) the defendant operated a motor vehicle, and (2) the defendant was under the influence of an intoxicant at the time of the operation. *See* WIS J I—CRIMINAL 2663. To find a defendant guilty of a prohibited blood alcohol concentration charge, the jury must find that (1) the defendant operated a motor vehicle, and (2) the defendant had a prohibited alcohol concentration at the time. *See* WIS J I—CRIMINAL 2660B.

¶11 The prohibited alcohol concentration acquittal has no bearing on the operating while under the influence of an intoxicant conviction. Both charges contain different elements. Blood alcohol concentration is only one of many factors a jury may consider in determining whether a defendant was under the influence of an intoxicant. *See* WIS J I—CIVIL 2663. The jury may also consider the observations of the arresting officer, other witnesses, the results of field sobriety tests, and the fact that there was an accident. *See id.*

¶12 The jury in this case may have concluded that the breath test was too unreliable, standing by itself, to warrant a guilty verdict on the prohibited alcohol concentration charge. In fact, Sutherland's defense went to great lengths to raise doubt about the reliability of the breath test. Because the two charges contain different elements, we reject Sutherland's argument.

¶13 Sutherland next argues that he presented uncontroverted evidence that was not challenged by the State and which proves his innocence. At trial, Sutherland testified that the accident occurred at 5:15 p.m. after leaving a bar, contrary to what he told Destefano. He testified that his left front tire struck an exposed manhole cover, causing the vehicle to flip. He then went home and consumed four beers. Sutherland also presented several witnesses who verified the time of the accident and who testified that Sutherland was sober when he left the bar.

¶14 Unfortunately for Sutherland, however, there is evidence in the record to support the jury's verdict. Destefano testified that he was dispatched to the accident scene at approximately 6:42 p.m. and also testified that Sutherland told him that the accident occurred at approximately 6:45 p.m. Additionally, April Johnson testified that she observed Sutherland at approximately 6:35 leaving a gas station three blocks from the accident scene. This is consistent with the timing of the accident being reported at approximately 6:42 p.m.

¶15 The record also contains evidence that contradicts Sutherland's explanation of the accident. Sutherland claims to have struck an exposed manhole cover causing a blowout. However, photos of the accident scene show no indication of any depression or object that could have caused a blowout. In

addition, photos taken of the vehicle do not indicate a blown tire.² Destefano testified that he observed no road conditions at the scene that would have contributed to the accident other than some loose gravel. It was Destefano's opinion that the accident resulted from Sutherland taking the corner at an excessive rate of speed.

¶16 We conclude that the theory of guilt accepted by the jury is supported by the evidence and is sufficient to sustain a guilty verdict on the charge of operating a motor vehicle while under the influence of an intoxicant.

II. Destefano's Testimony

¶17 Sutherland argues that the trial court erred by allowing Destefano to offer his opinion regarding the cause of the accident. Sutherland contends that the trial court never inquired into Destefano's qualifications. We disagree.

¶18 In *Brain*, a police officer was asked his opinion regarding whether a vehicle involved in an accident in a construction zone was traveling at a safe speed. We noted that the admission of expert testimony lies within the discretion of the trial court, subject to the limitation that the expert may only testify in areas where the expert is qualified. *See Brain*, 129 Wis. 2d at 454. We further noted that qualifications may be based on training and experience, rather than formal licensure. Police officers may be qualified to testify as experts on issues such as safe speed. *See id.*

² Sutherland testified that he still possessed the tire. However, the tire was never produced at trial.

¶19 In the present case, Destefano testified that he had investigated numerous accidents in the course of his seventeen-year career with the Wisconsin State Patrol. He also testified that he had been trained as an accident reconstructionist and teaches classes in that field.

¶20 Given those qualifications, we conclude that the trial court did not abuse its discretion by deciding that the trooper was qualified to render an opinion on the cause of the accident.

III. IRREGULARITIES AT TRIAL

¶21 Next, Sutherland argues that irregularities at trial resulted in an unfair verdict. Sutherland contends that: (1) there was hostility at trial because a juror who “was recognized as deaf” was allowed to sit on the jury causing participants in the trial to yell, thus creating a hostile environment; (2) biased jurors were allowed to remain on the jury; (3) a conversation between the bailiff, Destefano, and a juror compromised the fairness of the trial; (4) the trial court erred by refusing to allow Sutherland’s father-in-law to testify as an expert regarding the estimation of speed; (5) the trial court was biased because of its comments during the testimony of Sutherland’s expert witness; and (6) the trial court erred by refusing to allow the jury to view a portion of videotape of the accident scene. We disagree.

¶22 Juror Gordon Lauder admitted at voir dire that he had difficulty hearing. However, he responded to the trial court’s questioning and stated that he had been able to “hear most of” what was going on up to that point. The trial court asked Lauder if he would be able to hear if everyone talked the way the court was talking. Lauder said that it would not be a problem. The trial court then requested the parties to speak clearly and asked Lauder to inform the trial court if

he had any difficulties hearing. Lauder did so on three occasions. Sutherland's argument that Lauder's hearing problem created tension at the trial is conclusory and has no foundation in the record. Moreover, there is no indication that Lauder's difficulty impaired his ability to fulfill his duties as a juror.

¶23 Sutherland next argues that Lauder was biased and should have been dismissed because of his inability to decide the case solely on the basis of the evidence. Lauder stated that he had alcoholics in his family and that it might influence him. However, Sutherland never requested that Lauder be excused for cause. As a result, we do not address this argument. Failure to raise that objection operates as a waiver on appeal. *See State v. Brunette*, 220 Wis. 2d 431, 441, 583 N.W.2d 174 (Ct. App. 1998).

¶24 Additionally, Sutherland argues that another juror, Kenneth Bly, was influenced by the family of one of the defense witnesses. However, Bly stated that he would have no problem applying the law on the basis of evidence at trial. The trial court refused to excuse Bly for cause. Assuming the trial court erred, any error was harmless. Bly was excused during the peremptory strikes and never sat on the case. Any bias he may have had did not influence the jury.

¶25 Next, Sutherland argues that a conversation between the bailiff, Destefano, and a juror compromised the fairness of the trial. When the trial court became aware of the conversation, it conducted a hearing on the issue outside the jury's presence. The trial court determined that the conversation related to back problems and involved no communication about the case being tried. The trial court gave the jury a cautionary instruction and conducted further questioning to determine if the conversation had influenced the jury. The trial court was satisfied

that the conversation between the bailiff, Destefano, and a juror had not and proceeded with the trial.

¶26 Sutherland additionally argues that the trial court did not properly determine whether the jury had been influenced by the conversation. However, these are merely conclusory allegations that are unsupported by the record. Sutherland fails to cite any authority supporting his position that the conversation tainted the jury or that the trial court's remedy was improper.

¶27 Next, Sutherland argues that the trial court erred by failing to permit Sutherland's father-in-law, Daniel Noland, to give expert testimony as to Sutherland's speed at the time of the accident. As noted, the admission of expert testimony lies within the discretion of the trial court. *See Brain*, 129 Wis. 2d at 454. Noland testified that he had been a truck driver for many years, but he failed to demonstrate how or why that would make him an expert at speed estimation. Noland himself acknowledged that he was not an expert. As a result, the trial court did not abuse its discretion by excluding Noland's testimony.

¶28 Next, Sutherland argues that comments made by the trial court during the testimony of Sutherland's expert witness, Mary McMurray, showed bias. There is simply no indication of bias in the record. The trial court was only attempting to prevent admission of irrelevant evidence pursuant to WIS. STAT. § 904.01. Again, Sutherland's arguments are conclusory, and he cites no authority stating that the remarks could possibly taint the outcome of the trial.

¶29 Last, Sutherland argues that the trial court erred by not allowing the jury to view a videotape in its entirety. Sutherland prepared the video in anticipation of trial. The trial court allowed the first part of the tape that showed the accident scene two days after the accident. It did not allow the second part,

taken several days later, because the road was under construction and the accident scene had changed substantially. The trial court declined to allow the jury to view this portion of the tape because it did not accurately reflect the condition of the accident scene as it existed at the time of the accident.

¶30 The admission of photographs in evidence is a matter within the trial court's discretion. *Simpson v. State*, 83 Wis. 2d 494, 505, 266 N.W.2d 270 (1978). Photographs should be admitted if they will help the jury gain a better understanding of material facts. Photographs should be excluded if they are not substantially necessary to show material facts and will tend to create sympathy or indignation or direct the jury's attention to improper considerations. *Neuenfeldt v. State*, 29 Wis. 2d 20, 33, 138 N.W.2d 252 (1965). The same considerations should apply to videotape.

¶31 The trial court determined that showing the second part of the videotape would not have helped the jury and would have diverted its attention to improper considerations. As a result, we conclude that the trial court did not abuse its discretion.

By the Court.—Judgment affirmed.

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

