COURT OF APPEALS
DECISION
DATED AND FILED

April 17, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2086-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KENNETH W. MICKELSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Lincoln County: J. MICHAEL NOLAN, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Kenneth Mickelson appeals his judgment of conviction for homicide by intoxicated use of a vehicle, contrary to WIS. STAT.

§ 940.09(1)(a),[1] and an order denying him postconviction relief. Mickelson argues that: (1) the blood alcohol concentration (BAC) evidence was privileged information, pursuant to WIS. STAT. § 905.04(2), and should have been suppressed; (2) the jury was improperly instructed regarding evidence of intoxication or impaired ability to operate a motor vehicle; and (3) a new trial should be granted in the interests of justice. We disagree and affirm the conviction.

BACKGROUND

¶2 On September 19, 1998, at approximately 1:04 a.m., deputy Mark Vander Bloomen was dispatched to an accident scene. Upon arrival, Vander Bloomen found two injured persons, Mickelson, later identified as the motorcycle operator, and Andrea Cahala, who later died.

¶3 Vander Bloomen questioned Mickelson. Mickelson explained that he had taken a curve in the road too fast and his motorcycle veered off the road. Vander Bloomen did not smell alcohol but he did ask Mickelson if he had been drinking. Mickelson told Vander Bloomen that he had not. No field sobriety tests were given.

¶4 Mickelson was transported to a local hospital due to injuries. His stomach was pumped and a blood sample was taken by the hospital for medical purposes. The contents of Mickelson's stomach looked and smelled like beer. An unidentified hospital staff member relayed this information to the police. A search

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

warrant was later obtained and the blood sample was tested for alcohol. The result indicated a BAC of .11%.

¶5 Mickelson was charged with homicide by intoxicated use of a vehicle, contrary to WIS. STAT. § 940.09(1)(a), homicide by operation of a vehicle with a prohibited alcohol concentration, contrary to WIS. STAT. § 940.09(1)(b), and causing the death of another human being by negligent operation or handling of a vehicle, contrary to WIS. STAT. § 940.10(1). Mickelson moved to suppress the blood sample evidence because it was procured by a search warrant issued through the use of medically privileged information protected by WIS. STAT. §§ 905.04(1) and (2). The trial court denied the motion.

¶6 At the conclusion of the trial, the court stated that it was instructing the jury according to WIS JI—CRIMINAL 1185. At the State's request, the trial court modified the instruction and Mickelson objected. The trial court overruled the objection.

¶7 Mickelson was subsequently found guilty of homicide by intoxicated use of a vehicle and was acquitted on the other charges. He moved for postconviction relief. The trial court denied the motion. This appeal followed.

STANDARD OF REVIEW

¶8 In reviewing a trial court's order denying the suppression of evidence, we will uphold findings of fact unless they are against the great weight and clear preponderance of the evidence. ***State v. Williams***, 225 Wis. 2d 159, ¶18, 591 N.W.2d 823 (1999). However, whether the trial court's findings of fact pass statutory or constitutional muster is a question of law that this court reviews independently. ***Id.***

DISCUSSION

I. PRIVILEGED INFORMATION

¶9 Mickelson argues that the search warrant used to seize the blood sample relied on medically privileged information pursuant to WIS. STAT. § 905.04(2). Mickelson contends that the homicide exception to the privilege does not apply pre-trial. WIS. STAT. § 905.04(4)(d). As a result, he concludes the information received by the police from a hospital staff member was privileged. We disagree.

¶10 WISCONSIN STAT. § 905.04(2) provides:

> (2) GENERAL RULE OF PRIVILEGE. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental or emotional condition, among the patient, the patient's physician, the patient's registered nurse, the patient's chiropractor, the patient's psychologist, the patient's social worker, the patient's marriage and family therapist, the patient's professional counselor or persons, including members of the patient's family, who are participating in the diagnosis or treatment under the direction of the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor.

The statute's purpose is to prevent the unnecessary disclosure of "confidential" information. *See* ***Steinberg v. Jensen***, 194 Wis. 2d 439, 464-65, 534 N.W.2d 361 (1995).

¶11 However, WIS. STAT. § 905.04(4)(d) contains an exception to § 905.04(2). WISCONSIN STAT. § 905.04(4)(d) provides that "[t]here is no privilege in trials for homicide when the disclosure relates directly to the facts or

immediate circumstances of the homicide." The issue is whether the homicide exception applies pre-trial when the blood sample was seized.

¶12 In ***State v. Jenkins***, 80 Wis. 2d 426, 259 N.W.2d 109 (1977), the defendant was one of the drivers involved in a two-vehicle accident that resulted in a death. The defendant was taken to a hospital. The attending physician ordered a blood alcohol test. The State obtained the test results, and the defendant moved that the blood test be suppressed.

¶13 Our supreme court addressed whether the blood test results were admissible or whether the defendant had a reasonable expectation of privacy under the physician-patient privilege. ***Id.*** at 434. In ***Jenkins***, the court read WIS. STAT. § 905.04(4)(d) in connection with WIS. STAT. § 911.01(3), which reads, "Chapter 905 with respect to privileges applies at all stages of all actions, cases and proceedings …." ***Id.*** The court concluded that the defendant had no reasonable expectation of privacy concerning the blood test results.

¶14 Like ***Jenkins***, the present case involves a motion to suppress evidence of blood alcohol test results where negligent homicide by use of a vehicle was charged. In ***Jenkins***, the defendant was not under arrest at the time the blood was drawn, and the prosecution obtained the results of the test from the doctor before the issuance of the complaint. ***Id.*** at 428. Similarly, Mickelson was not under arrest when a blood sample was taken from him, and the complaint was not issued until after the blood alcohol test was conducted pursuant to the warrant. Also, the record in ***Jenkins*** lacked any explanation of how the prosecution obtained the test results from the doctor. Here, the record is ambiguous as to the identity of the hospital staff member who gave information to the police.

¶15 Mickelson argues that WIS. STAT. § 905.04(4)(d) removes the privilege only during trials for homicide, not when a search warrant is applied for because § 905.04(4)(d) employs the term "in trials" as opposed to the words, "in all stages of homicide proceedings."

¶16 However, as noted in ***Jenkins***, WIS. STAT. § 911.01(3) applies WIS. STAT. ch. 905 in its entirety to all stages of a criminal proceeding. Chapter 905 includes both a medical privilege and a homicide trial exception to that privilege. Mickelson would have this court overturn the holding in ***Jenkins***. "The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case." ***Cook v. Cook***, 208 Wis. 2d 166, ¶51, 560 N.W.2d 246 (1997).

¶17 Therefore, application of WIS. STAT. ch. 905 at all stages of a criminal proceeding means that the privilege, and the homicide trial exception to that medical privilege, apply at all stages of a homicide proceeding. Accordingly, Mickelson had no reasonable expectation of privacy.

II. JURY INSTRUCTION

¶18 Mickelson argues that the jury was improperly instructed regarding his BAC. He contends the jury was not provided with expert testimony indicating why evidence of a BAC below .10% was relevant. According to Mickelson, the lack of an explanation regarding a BAC level below .10% improperly emphasized the relevancy of the evidence and implied that special weight should be given to the evidence. We disagree.

¶19 Trial courts have broad discretion in determining what instructions to give jurors and what language to use in those instructions. ***State v. Boshcka***,

178 Wis. 2d 628, 636, 496 N.W.2d 627 (Ct. App. 1992). A court does not erroneously exercise that discretion if it gives an instruction that adequately covers the applicable law. ***State v. Lenarchick***, 74 Wis. 2d 425, 455, 247 N.W.2d 80 (1976).

¶20 The State requested a modification to WIS JI—CRIMINAL 1185 to inform the jury that it could convict Mickelson even if it believed his BAC was below .10%. The trial court then added the following language to jury instruction 1185:

> The law provides that an analysis showing that there was .04 grams or more but less than .10 grams of alcohol by weight in the defendant's blood at the time of the defendant's alleged operating may be considered by you in determining whether the defendant was under the influence of an intoxicant at the time of the alleged operating. However, by itself, it is not a sufficient basis for a finding that a person was under the influence of an intoxicant at the time of the alleged driving.

¶21 We conclude that the trial court properly exercised its discretion because the added language merely reflects WIS. STAT. § 885.235(1g)(b):

> (1g) In any action or proceeding in which it is material to prove that a person was under the influence of an intoxicant … while operating or driving a motor vehicle … evidence of the amount of alcohol in the person's blood … is admissible on the issue of whether he or she was under the influence of an intoxicant … if the sample was taken within 3 hours after the event to be proved. The chemical analysis shall be given effect as follows without requiring any expert testimony as to its effect:
>
> ….
>
> (b) … the fact that the analysis shows that the person had an alcohol concentration of more than 0.04 but less than 0.1 is relevant evidence on the issue of intoxication or an alcohol concentration of 0.1 or more but is not to be given any prima facie effect.

¶22 Accordingly, there is no prohibition against finding a driver under the influence of an intoxicant even if the driver's BAC is under the legal limit. As noted in comment 7 to WIS JI—CRIMINAL 1185:

> It may be that some cases will be charged under WIS. STAT. § 940.09(1)(a) where a test has shown a blood alcohol concentration of more than 0.05% but less than 0.10%. If such test results are admitted, WIS. STATS. § 885.235(1)(b) provides that the results are relevant evidence on the issue of "under the influence" but are not to be given any prima facie effect.

See also WIS JI—CRIMINAL 232. This is precisely what the modified instruction told the jury. Therefore, we reject Mickelson's argument.

¶23 Mickelson further contends that the jury was misled because the instruction overemphasized evidence of a BAC below .10%. We choose not to address this argument. Mickelson does not state any authority. Arguments unsupported by legal authority will not be considered. ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1981).

III. A NEW TRIAL

¶24 Mickelson argues he is entitled to a new trial in the interest of justice. He asserts that had the trial court allowed him to know the identity of the hospital staff member, he would have been able to prove a conspiracy to violate his medical privilege.

¶25 However, Mickelson did not have a right to know the identity of the informant. Additionally, the identity of the informant in this case is irrelevant. The issue is whether the information relayed to the police was privileged, not

whether there was a conspiracy against Mickelson. Accordingly, we reject Mickelson's arguments.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.