COURT OF APPEALS
DECISION
DATED AND FILED

May 16, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2893-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOHN F. GORALSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Reversed and cause remanded with directions.*

¶1 ANDERSON, J.[1] John F. Goralski insists that the State failed to produce any evidence that the can of Budweiser he sold was a fermented malt beverage containing 0.5% or more of alcohol by volume; therefore, he contends

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

there is insufficient evidence to support his conviction for selling a fermented malt beverage without a license in violation of WIS. STAT. § 125.04(1). We reverse because there was no evidence presented to the jury as to the alcohol content of the can of Budweiser and the alcohol content of a beverage is beyond the experience and everyday knowledge of jurors from which they could draw a reasonable inference on the issue.

¶2 In the summer of 1998, the Town of Bloomfield Police Department began to receive anonymous complaints that a tavern was being operated in a barn on Degnan Road in the town. The town's police department enlisted the assistance of the Walworth County Sheriff's Department to send in an undercover officer to attempt to purchase alcohol. During the early morning hours of August 15, 1998, Deputy Sheriff Gilbert H. Maas was successful in purchasing a can of Budweiser from Goralski in a shed that served as a tavern. Goralski was charged with three counts: Count 1, selling an intoxicating liquor without a license in violation of WIS. STAT. § 125.66(1);[2] Count 2, possession with intent to sell intoxicating liquor without a license in violation of § 125.66(1); and Count 3, obstructing an officer in violation of WIS. STAT. § 946.41(1). During the jury instruction conference, the State successfully moved to amend the first count to selling a fermented malt beverage in violation of WIS. STAT. § 125.04(1). After a jury trial, Goralski was convicted on Count 1, as amended, and the remaining counts.

[2] WISCONSIN STAT. § 125.66(1) provides: "No person may sell, or possess with intent to sell, intoxicating liquor unless that person holds the appropriate license or permit. Whoever violates this subsection may be fined not more than $10,000 or imprisoned for not more than 9 months or both." WISCONSIN STAT. § 125.02(8) defines "intoxicating liquor" as "all ardent, spirituous, distilled or vinous liquors, liquids or compounds, whether medicated, proprietary, patented or not, and by whatever name called, containing 0.5% or more of alcohol by volume, which are beverages, but does not include 'fermented malt beverages.'"

¶3 In this appeal, Goralski focuses on amended Count 1 and argues that the evidence was insufficient to prove beyond a reasonable doubt that he sold a fermented malt beverage that contained 0.5% or more of alcohol by volume. Goralski insists that the alcoholic content of the beverage he sold was not within the realm of ordinary experience and knowledge of the jurors, and the State failed to present any expert testimony establishing the alcohol content of the beverage. The State counters that it is a matter of common knowledge that beer is intoxicating and that Budweiser is a beer. The State asserts that the testimony of the undercover officer that Goralski handed the officer a can of Budweiser and the officer sampled the contents of the can and was able to identify it as beer is sufficient proof.

¶4 It is elementary that the State must prove every essential element of the particular crime charged beyond a reasonable doubt. ***Galarza v. State***, 66 Wis. 2d 611, 616, 225 N.W.2d 450 (1975). As the Wisconsin Supreme Court has frequently noted, the question on appeal is not whether this court is convinced of the defendant's guilt beyond a reasonable doubt, but whether we "can conclude the trier of facts could, acting reasonably, be so convinced." ***Id.*** (quoting ***Bautista v. State***, 53 Wis. 2d 218, 223, 191 N.W.2d 725 (1971)).

¶5 Either direct evidence or circumstantial evidence can establish evidence of guilt. It is elementary that a finding of guilt may rest upon evidence that is entirely circumstantial and that such evidence is often much stronger and more satisfactory than direct evidence. ***State v. Poellinger***, 153 Wis. 2d 493, 501-02, 451 N.W.2d 752 (1990). The jury may base its findings on circumstantial evidence and the reasonable inferences such evidence permits. ***Priske v. Gen. Motors Corp.***, 89 Wis. 2d 642, 654, 279 N.W.2d 227 (1979). In drawing reasonable inferences, jurors may apply matters of common knowledge or their

own observation and experience in the affairs of life to the circumstantial evidence. ***De Keuster v. Green Bay & W.R. Co.***, 264 Wis. 476, 479, 59 N.W.2d 452 (1953).

¶6 However, where a matter involves special knowledge, skill or experience on subjects not within the realm of the ordinary experience or knowledge of the jurors, the jurors require the assistance of expert testimony. ***Cramer v. Theda Clark Mem'l Hosp.***, 45 Wis. 2d 147, 150, 172 N.W.2d 427 (1969). In complex and technical situations, the jury, without the assistance of expert testimony, would be speculating, and the lack of expert testimony in such cases constitutes an insufficiency of proof. ***State v. Doerr***, 229 Wis. 2d 616, 623-24, 599 N.W.2d 897 (Ct. App. 1999).

¶7 Goralski was convicted of selling a fermented malt beverage without a license in violation of WIS. STAT. § 125.04(1), which provides:

> No person may sell, manufacture, rectify, brew or engage in any other activity for which this chapter provides a license, permit, or other type of authorization without holding the appropriate license, permit or authorization issued under this chapter.[3]

A "fermented malt beverage" is defined as

> any beverage made by the alcohol fermentation of an infusion in potable water of barley malt and hops, with or without unmalted grains or decorticated and degerminated grains or sugar containing 0.5% or more of alcohol by volume.

WIS. STAT. § 125.02(6).

[3] The penalty for violating WIS. STAT. § 125.04(1) is a fine of not more than $10,000 or imprisonment for not more than nine months or both. Sec. 125.04(13).

¶8 There are two elements that the State must prove beyond a reasonable doubt to secure a conviction for violating WIS. STAT. § 125.04(1):

> 1. Goralski sold a fermented malt beverage containing 0.5% or more of alcohol by volume.
> 2. Goralski did not hold an appropriate license for the sale of a fermented malt beverage.

WIS JI—CRIMINAL 5035.[4]

¶9 Maas, an undercover drug officer, went to the location on Degnan Road in the town of Bloomfield at approximately 3:30 a.m. on August 15, 1998, with instructions to attempt to purchase "an alcohol substance." As he approached a shed, an unidentified person told him to be careful because there was a beer fight going on inside. As he entered the shed, he saw a young man on a barstool drinking a can of Budweiser. Maas testified, "I pointed to him with a hand gesture, where do I get the beer, and he gave me the gesture back, pointing to the bar." Maas walked up to the bar, and a man, later identified as Goralski, asked, "What can I get you?" Maas replied that he wanted a Budweiser. Goralski reached behind the bar, pulled out a cold can of Budweiser and handed it to Maas. Maas asked how much he owed and Goralski replied two dollars; Maas used "buy money" to pay Goralski. Maas took a couple of sips from the can, identified the beverage as beer and left the shed. He entered a portable lavatory and dumped the contents, saving the empty can for evidence.

¶10 During his testimony, Maas described the entire scene. Outside of the shed was an aboveground swimming pool. Inside, he observed eight to ten

[4] In a note to the jury instruction, the Criminal Jury Instructions Committee commented, "[D]efining the first element to require selling a fermented malt beverage containing 0.5% or more alcohol captured the significant aspects of the statutory definition." WIS JI—CRIMINAL 5035.

people. There was a strobe light on the ceiling spinning around. Near the bar was a DJ booth; there was music playing and people dancing. Behind the bar were shelves that had bottles of hard liquor with pour spouts. Looking around the interior of the shed, Maas saw eight to ten beer signs and over the door he had come through was an "exit" sign. After he left the shed and headed toward the portable lavatory, a motion light came on, and when he opened the door of the lavatory, there was a light on inside.

¶11 The sole witness called by Goralski, Jason Weber, testified that friends invited to the shed would bring alcohol, such as Miller High Life, peach schnapps and a variety of "stuff," and leave it in the shed. He testified that beer would be iced down in big garbage cans.

¶12 A large quantity of alcoholic beverages were confiscated from the shed. Included in the contraband were peppermint schnapps, Jack Daniels Whiskey, Southern Comfort, Captain Morgan Rum and peach schnapps. Brands of beer that were confiscated included Budweiser, Red Dog, Miller Lite, Miller Genuine Draft and Special Export.[5]

¶13 At the start of the jury instruction conference, Goralski's attorney commented that he was willing to stipulate that beer is intoxicating. He also said that "the jury can use [its] common sense and say that beer is [intoxicating] and (sic) alcoholic beverage and so is hard liquor." However, during discussions about the State's proposed instructions it became obvious that Count 1—charging the sale of an intoxicating beverage—was the wrong charge because the only evidence

[5] During the trial, the prosecutor invited members of the jury to step out of the jury box and view the confiscated alcoholic beverages. There is no indication in the transcript that any jurors took the opportunity.

the State presented was the sale of a fermented malt beverage. Upon the motion of the State, the trial court amended Count 1 to conform to the proof. After Count 1 was amended, the State requested the standard jury instruction for a violation of WIS. STAT. § 125.04(1): WIS JI—CRIMINAL 5035. During the remainder of the conference, Goralski's early offers to stipulate or to permit the jurors to use their common sense was never revisited.

¶14 As we mentioned earlier, the burden of proof is upon the State to prove every essential element of the crime charged beyond reasonable doubt. ***Galarza***, 66 Wis. 2d at 616. The pattern jury instruction for a violation of WIS. STAT. § 125.04(1) provides that the first element the State must prove beyond a reasonable doubt is that the defendant "sold a fermented malt beverage containing 0.5% or more of alcohol by volume." WIS JI—CRIMINAL 5035. The question this case presents is whether the failure to present evidence of the alcohol content of the beer sold to the undercover officer or confiscated after the sale prevented the State from proving Goralski guilty beyond a reasonable doubt of selling a fermented malt beverage without a license.

¶15 Courts that have discussed the evidence the State must present to meet its burden on the charge of selling alcoholic beverages without a license have generally taken two approaches. Where the charge is the sale of beer or fermented malt beverages, the State is not required to provide evidence—expert or lay—that the beverage contained at least 0.5% of alcohol by volume. On the other hand, where the charge is selling beer or a fermented malt beverage with a specific alcoholic content, the State is required to present competent evidence of the alcoholic content.

¶16 This approach was summarized in BLACK ON INTOXICATING LIQUORS (West 1892). Black acknowledges that the decisions in this area are confusing, but he believes that sound and reasonable solutions can be found. When considering the evidence needed to prove that the beverage sold was beer, Black writes:

> [T]he preponderance of authority is to the effect that when the word "beer" is used, without any restrictions or qualifications, it denotes an intoxicating malt liquor; that when thus occurring in an indictment or complaint, or in the evidence, it is presumed to include only that species of beverage; and that, being taken in this sense, it will be sufficient, unless it is shown by evidence that the particular beer so described was non-alcoholic.

Id., §17 at 19. He writes that a different approach is required when the percentage of alcohol of the beverage is included in the statute.

> Where the statute provides that all liquors containing more than a certain proportion of alcohol shall be deemed intoxicating, the proper method of showing the intoxicating character of a particular beverage in question is by the results of a chemical analysis. It is to be presumed that a chemist, employed to analyze liquor, analyzed it on the lines laid down by the statute, and that he understood the purpose for which he analyzed it.

Id., § 522 at 617-18.

¶17 One of the first cases to suggest that testimony about the alcohol content of a beverage was required is ***Nevin v. Ladue***, 3 Denio 437, 1846 WL 4698 (N.Y. 1846). Nevin was charged with selling "fermented beer" without a license and the question before the New York Supreme Court was "whether ale, porter and strong beer are within the prohibitions of the statute as it existed when this offense is alleged to have been committed." ***Id.*** at *1. The chancellor engaged in a lengthy and learned dissertation on the history of fermented and distilled beverages and their treatment in revenue statutes in England and New

York. After reviewing the English revenue statutes, the chancellor concluded, "a distinction was made between ale or beer of a particular strength and value, subsequently called strong beer, or porter, and beer of a less value which assumed the name of small or table beer; both of which, however, were strong and intoxicating liquors." ***Id.*** at *5. The supreme court reversed Nevin's conviction because it could not conclude that Nevin understood that in a charge of selling a "fermented beer" the term was used in the same sense as "ale and strong beer," the sale of which without a license was prohibited. ***Id.*** at *8.

¶18 In a Wisconsin case from the prohibition era, the principal question concerned the chain of custody and whether the State had to present evidence that four bottles of beer remained sealed between their seizure and their analysis. ***Gebaj v. State***, 184 Wis. 289, 199 N.W. 54 (1924). Of interest in this case is that the defendant was charged with selling intoxicating liquor and the evidence presented by the State included an analysis of the amount of alcohol in four bottles of beer. ***Id.*** The supreme court held that the analysis was sufficient evidence—along with the admission that the alcohol content was in excess of 0.5%—to support the defendant's conviction. ***Id***. Another Wisconsin case held that a deputy's testimony that the distilled liquor he purchased was "moonshine," an intoxicating liquor, was not enough to prove that the liquor was a privately manufactured distilled liquor. ***Hoch v. State***, 199 Wis. 63, 66, 225 N.W. 191 (1929). The supreme court affirmed the conviction because the State presented evidence of the alcoholic content of the liquor from a retail druggist who had tested the liquor. ***Id.*** at 67. Another prohibition era appeal resulted in a reversal of a conviction for selling home brew because of a conflict in the testimony over whether an informant actually purchased home brew from the defendant. ***O'Leary v. State***, 196 Wis. 442, 443, 220 N.W. 231 (1928). This case is noteworthy

because the supreme court held that evidence that the home brew contained 2.05% of alcohol would have been "sufficient to sustain a conviction, if believed by the jury." ***Id.***

¶19 There are more recent cases from other jurisdictions. In ***State v. Brown***, 301 So. 2d 605 (La. 1974), the defendant was charged with selling beer with an alcoholic content greater than 0.5% of alcohol by volume. ***Id.*** at 607. Brown was charged after selling a can of Budweiser beer to a police officer, who testified that he had drunk Budweiser before and "I know it'll put a—it'll give you a buzz, if you drink enough of it." ***Id.*** The Louisiana Supreme Court reversed Brown's conviction because the State "produced no evidence of an essential element of the crime charged, i.e., the alcoholic content of the beer sold on September 2, 1973." ***Id.*** at 608. The Court of Criminal Appeals of Alabama reached the same result in ***Yessick v. State***, 364 So. 2d 365 (Ala. Crim. App. 1978). The Alabama statutes defined beer as containing 0.5% or more of alcohol by volume and Yessick was charged with selling beer without a license to agents from the State. ***Id.*** at 366. Yessick's conviction was reversed because the State failed to produce evidence of the alcoholic content of the alleged beer. ***Id.*** at 367.

¶20 The most recent decision to consider what evidence the State must present when the percentage of alcohol by volume is an element of the offense is ***Commonwealth v. Tau Kappa Epsilon***, 609 A.2d 791 (Pa. 1992). In this case, eleven fraternities appealed their conviction for furnishing beer to minors; the statutes under which they were charged included a definition of beer requiring it to have more than 0.5% of alcohol by volume. The issue before the Pennsylvania Supreme Court was "whether the testimony of the investigator and the minors [served] was sufficient to establish the offense of serving" beer to minors. ***Id.*** at 792. The Pennsylvania Supreme Court reversed the convictions:

> The testimonial evidence relating to the type of beverage that was served which was introduced by the Commonwealth was insufficient to sustain the criminal convictions. Familiarity with the taste and appearance of beer does not provide the certitude achieved by proper scientific analysis. The physical experience of drinking beer does not translate itself into an ability to ascertain what percentage of alcohol is contained in a liquid. Without evidence of the percentage of alcohol by volume contained in the beverages served to the minors, the criminal convictions of the Appellants must fail.

Id. at 793-94.

¶21 In contrast to cases where the percentage of alcohol in the beverage is an element of the offense are those cases in which the offense is broadly stated as the sale of beer, fermented malt beverage or intoxicating liquor. In these cases, the State has not been required to prove beyond a reasonable doubt the specific alcohol content of the beverage sold without a license. The first Wisconsin case to address this type of offense was ***Briffitt v. Wisconsin***, 58 Wis. 39, 16 N.W. 39 (1883), in which the defendant was convicted of selling "intoxicating liquors" without a license. The sole question tried in the lower courts and appealed to the supreme court was "whether proof that the defendant had sold *beer* was sufficient proof that he had sold malt of *intoxicating* liquor." ***Id.*** at 41. Relying upon ***Nevin***, the Wisconsin Supreme Court held:

> When asked to take a drink of milk or cup of tea, it would not be necessary to prove what it meant. Why is it more necessary to prove what is meant by a glass or drink of beer? When beer is called for at the bar, in a saloon or hotel, the bar-tender would know at once, from the common use of the word, that strong beer--a spirituous or intoxicating beer--was wanted; and if any other kind was wanted, the word would be qualified, and the particular kind would be named, as root beer or small beer, etc. When, therefore, the word "beer" is used in court by a witness, the court will take judicial notice that it means a malt and an intoxicating liquor, or such meaning will be a presumption of fact, and in the meaning of the word itself

> there will be *prima facie* proof that it is malt or intoxicating liquor that is meant

Briffitt, 58 Wis. at 43.

¶22 Relying upon ***Briffitt***, the supreme court in ***Kannenberg v. State***, 193 Wis. 476, 214 N.W. 365 (1927), held that where the charge was the illegal sale of intoxicating liquor it was not necessary to show the alcoholic content of the beverage where there was testimony from a witness that "he knew 'moonshine' when he drank it, and that the contents of the bottle [purchased from the defendant] was 'moonshine.'" ***Id.*** at 477. In another prohibition era case, where the defendant, when confronted by the sheriff, threw a bottle of liquor to the ground and the sheriff testified that there was a strong odor of alcoholic beverages, the supreme court upheld the conviction for possession of an intoxicating beverage. ***Carver v. State***, 190 Wis. 234, 208 N.W. 874 (1926). The court wrote:

> It is sufficient that one experienced in the detection of such liquor, as was the sheriff, identify the liquor by the sense of smell. The fact that the alcoholic content of the liquor was detected by the sense of smell alone goes to the weight, not to the admissibility of the evidence. The weight of such evidence is for the jury.

Id. at 237 (citations omitted).

¶23 A case from North Dakota bridges the divide between those cases requiring the State to present evidence of the specific alcohol content of the beverage and those cases holding that such specific evidence is not necessary. ***State v. Bohl***, 317 N.W.2d 790 (N.D. 1982). Bohl was charged with furnishing an alcoholic beverage to minors after he purchased two kegs of beer and gave them to a minor. ***Id.*** at 792. The North Dakota statutes defined an "alcoholic beverage" as containing "one-half of one percent or more of alcohol by volume" and "beer" as a "malt beverage containing more than one-half of one percent of alcohol by

volume." ***Id.*** at 794. Bohl contended that the State had to present scientific evidence, such as a chemical test that the beverage contained more than one-half of one percent of alcohol by volume. ***Id.*** The North Dakota Supreme Court rejected Bohl's argument holding that all the State was required to prove was that the beverage was "an alcoholic beverage, defined in essence as containing at *least* one-half of one percent of alcohol by volume." ***Id.*** The court found it sufficient that the beverage was contained in kegs labeled in accordance with the federal Food, Drug and Cosmetic Act and that there was testimony from lay witnesses, based on their senses of sight, smell and taste, that the beverage was beer. ***Id.***

¶24 The State urges us to hold that all that is necessary to prove the beverage sold by Goralski contained 0.5% alcohol or more by volume is the testimony of the undercover officer who purchased and sampled the beverage and the testimony of other witnesses that they observed Goralski selling alcoholic beverages, coupled with judicial notice that beer is intoxicating. We agree with the State that the intoxicating quality of beer is a matter within the common knowledge of lay witnesses and jurors.[6] We also agree with the State and the court in ***Briffitt***, 58 Wis. at 41, that the word "beer" has a commonly accepted meaning of a fermented malt beverage that is intoxicating. However, these general principles do not assist the State in proving beyond a reasonable doubt the elements of the offense because the intoxicating quality of beer is not an element of the offense of selling a fermented malt beverage in violation of WIS. STAT. § 125.04(1).

[6] Annually, United States brewers produce approximately 195 million barrels (6.1 billion gallons) of beer. And annual per capita consumption of beer in the United States is approximately 24 gallons. *Available at* http://www.portsmouthbrewer.com/htmlpages.portsmouth/historyofbeer.html.

¶25 Based upon our analysis of the above authorities, we conclude that the better practice is to require the State to present evidence of the alcoholic content of the beverage sold without a license when an element of the offense requires proof beyond a reasonable doubt that the defendant "sold a fermented malt beverage containing 0.5% or more of alcohol by volume." WIS JI—CRIMINAL 5035. We agree with the Pennsylvania Supreme Court that the testimony of lay witnesses is not enough because "[f]amiliarity with the taste and appearance of beer does not provide the certitude achieved by proper scientific analysis." ***Tau Kappa Epsilon***, 609 A.2d at 793. Likewise, the jurors' personal experience with beer does not provide them with the knowledge or experience needed to determine whether the beverage sold contained 0.5% or more of alcohol by volume. The alcoholic content of the beverage sold by Goralski is beyond the knowledge and general experience common to every member of the community, and expert testimony specifying the alcoholic content of the beverage was required. *See* ***State v. Johnson***, 54 Wis. 2d 561, 564-65, 196 N.W.2d 717 (1972) (expert testimony required to prove that a tablet contained LSD). We conclude that the lack of any evidence of the alcoholic content of the beverage sold to the undercover officer constitutes an insufficiency of proof and requires reversal of Goralski's conviction for sale of a fermented malt beverage without a license. ***Doerr***, 229 Wis. 2d at 623.

¶26 Because we reverse the judgment of conviction as to Count 1, as amended, we remand to the circuit court with directions to enter an amended judgment of conviction for possession with intent to sell intoxicating liquor without a license in violation of WIS. STAT. §125.66(1) and obstructing an officer in violation of WIS. STAT. § 946.41(1) and to resentence Goralski accordingly.

By the Court.—Judgment reversed and cause remanded with directions.

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