COURT OF APPEALS
DECISION
DATED AND FILED

August 21, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0054-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEROY W. SENN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marinette County: TIM A. DUKET, Judge. *Affirmed*.

¶1 PETERSON, J.[1] LeRoy Senn 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). Senn argues that: (1) the trial court erred by denying Senn's motion to dismiss at the conclusion of the State's case; and

[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.

(2) the evidence presented at trial was insufficient for the jury to find Senn guilty beyond a reasonable doubt. We disagree and affirm the conviction.

BACKGROUND

¶2 Around noon on February 20, 2000, Senn was snowplowing a driveway with several friends. At some point, his truck caught on fire after getting stuck in a snow bank. At 2:32 p.m., Marinette County Sheriff's deputy Brian Witt arrived at the scene of the fire and interviewed Senn.

¶3 During the interview, Witt detected an odor of intoxicants on Senn's breath. Witt also noticed that Senn's speech was slurred and his eyes were bloodshot. Senn told Witt that he had consumed three to four beers with his friends after the fire. Senn later signed a written statement prepared by Witt indicating that Edward Spohn, who lived in the area, had provided the beer and was drinking with him after the fire.[2]

¶4 After failing several field sobriety tests, Witt placed Senn under arrest. Senn was transported to a local hospital where a blood sample was drawn. A blood test revealed that Senn's blood alcohol content was .16%.

¶5 After the arrest, Witt interviewed Spohn. Spohn stated that he had not provided Senn with any alcohol after the fire. Witt then interviewed several of Senn's friends: Steve Rudnick, Thomas Koslowski, Albert Pienta, and Kevin DeGroot. All signed written statements prepared by Witt indicating that Senn did

[2] Spohn was a neighbor who arrived at the scene shortly before the fire started.

not have anything to drink after the fire and that Senn was drinking prior to the fire.

¶6 At the jury trial, the State called Spohn and Rudnick as witnesses. Spohn testified that he did not drink beer with Senn and that he did not see Senn drink any beer after the fire. He also testified that Senn told him to tell Witt that they had three or four beers together.

¶7 Rudnick testified that he could not recall whether Senn had consumed alcohol before the fire, but that he did see Senn drink after the fire. The State introduced Rudnick's written statement which stated that Senn was drinking before the fire, not after.

¶8 At the close of the State's case in chief, Senn moved to dismiss. He argued that the State had failed to prove the elements of the offense. According to Senn, the State did not present evidence proving that Senn was drinking before the fire because, despite his written statement, Rudnick had testified that Senn had been drinking after the fire. The trial court concluded that a reasonable jury could convict Senn based upon the evidence and denied the motion.

¶9 Senn called Koslowski, Pienta, and DeGroot as witnesses. All of them testified that they had not seen Senn drink before the fire, but that he was drinking after the fire. As with Rudnick, the State introduced each of the witnesses' written statements indicating that Senn was drinking before the fire.

¶10 Senn testified and stated that he had nothing to drink before the fire. He testified that his signed written statement indicating that Spohn had provided the alcohol was wrong and that he was unable to catch the mistake because his

glasses had burned in the truck, making it difficult to read the statement. Senn was subsequently convicted. This appeal followed.

DISCUSSION

I. MOTION TO DISMISS

¶11 Senn argues that the trial court erred by failing to dismiss the case at the conclusion of the State's case in chief. He argues that because a conviction cannot be based solely on an uncorroborated confession, by analogy a conviction cannot be based solely on the uncorroborated prior inconsistent statement of a witness. *See* ***State v. Verhasselt***, 83 Wis. 2d 647, 661-63, 266 N.W.2d 342 (1978). Therefore, according to Senn, the State cannot rely solely on Rudnick's uncorroborated prior inconsistent statement to convict.

¶12 The evidence presented at trial is sufficient to sustain a conviction if the evidence taken most favorably to the prosecution is sufficient to support a finding of guilt beyond a reasonable doubt. ***Bere v. State***, 76 Wis. 2d 514, 523, 251 N.W.2d 814 (1977). "Since the motion to dismiss comes at the conclusion of the State's case, it is the obligation of the trial court to determine whether the jury, acting reasonably and construing the evidence then available in favor of the prosecution, could find guilt beyond a reasonable doubt." ***Id.***

¶13 Here, the elements the State had to prove in order to convict Senn of operating while intoxicated were: (1) Senn drove a motor vehicle on a highway; and (2) Senn was under the influence of an intoxicant at the time he drove. WIS JI—CRIMINAL 2663. It is uncontested that Senn was driving the truck and that he was intoxicated when the blood sample was taken. The only question before the jury was whether Senn was intoxicated when he drove the truck.

¶14 At trial, Rudnick testified that Senn was drinking after the fire. The State then introduced Rudnick's written statement, which indicated that Senn was drinking before the fire and not after. However, Rudnick's written statement was the only evidence the State introduced during its case in chief to prove that Senn was drinking before the fire.

¶15 The jury acting reasonably could find that Rudnick's written testimony was true and that his testimony at trial was not truthful. Senn does not cite any authority for the proposition that a conviction cannot be based on an uncorroborated prior inconsistent statement. A prior inconsistent statement used to impeach a witness may be considered substantive evidence of guilt. ***Vogel v. State***, 96 Wis. 2d 372, 384, 291 N.W.2d 838 (1980).

¶16 In addition to Rudnick's statement, the State also presented Spohn's testimony. Spohn testified that Senn attempted to have Spohn cover for him and tell Witt that he and Senn had been drinking after the fire. Spohn also testified that he had not given Senn any alcohol and that he had not seen him consume any alcohol after the fire.

¶17 A jury could further find that Senn had changed his story to deputy Witt. Senn first told Witt that he had been drinking with his friends after the fire. However, after Rudnick gave his written statement that Senn had only been drinking before the fire, Senn changed his story and stated that Spohn had supplied the alcohol. The jury could have believed that Senn knew the importance of having someone claim he was drinking after the fire and that his story had changed because he in fact did not have anything to drink after the fire.

¶18 Even if Senn's legal premise were correct and a conviction could not be based on an uncorroborated prior inconsistent statement, his argument still

fails. Senn's conviction is not based solely on Rudnick's uncorroborated prior inconsistent statement. Spohn testified that Senn tried to have him lie and say that he and Senn were drinking after the fire. This testimony corroborates Rudnick's prior inconsistent statement. Based on Rudnick's prior inconsistent statement and Spohn's testimony, the jury reasonably could conclude that Senn had been drinking before the fire.

¶19 Therefore, construing all the evidence in favor of the State, we conclude the evidence was sufficient to support a finding of guilt beyond a reasonable doubt. The trial court properly denied Senn's motion to dismiss.

II. SUFFICIENCY OF THE EVIDENCE

¶20 Next, Senn argues that the evidence presented at trial was not sufficient to permit the jury to find him guilty beyond a reasonable doubt.

¶21 We will not reverse a conviction based on the insufficiency of the evidence "unless 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." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Further, "viewing evidence which could support contrary inferences, the trier of fact is free to choose among conflicting inferences of the evidence and may, within the bounds of reason, reject that inference which is consistent with the innocence of the accused." ***Id.*** at 506.

¶22 As stated earlier, the only question that was before the jury was whether Senn was intoxicated at the time he drove his truck. We conclude there

was ample evidence for the jury to conclude beyond a reasonable doubt that Senn was under the influence when he drove his truck.

¶23 Witt took written statements from several of Senn's friends. All of them indicated in their written statements that Senn had nothing to drink after the fire. They all indicated that he had started drinking at 9 a.m. and continued to drink during the day prior to the accident. At trial, Senn testified that he consumed alcohol with Tom Koslowski after the fire and that Koslowski had given him the alcohol. This is contrary to his written statement, in which he indicted that he consumed alcohol given to him by Spohn.

¶24 Based on the written statement, the jury reasonably could have concluded that Senn was intoxicated while driving based on the written statements. Further, the jury reasonably could have concluded that Senn attempted to have Spohn lie to Witt and say that the two of them had consumed alcohol after the fire.

¶25 Senn contends that there were more plausible explanations as to why his friends' testimony was inconsistent with their prior written statements. He again argues that a conviction cannot be based on uncorroborated prior inconsistent statements. *See* ***Verhasselt***, 83 Wis. 2d at 661-63.

¶26 However, as we have already determined, a prior inconsistent statement used to impeach a witness may be considered as substantive evidence. ***Vogel***, 96 Wis. 2d at 384. When taken in a light most favorable to the State, a jury reasonably could conclude that the written statements were truthful and that Senn was not credible.

¶27 Senn contends that there was no direct evidence in the form of eye witness testimony that he consumed alcohol prior to the fire and therefore the evidence was insufficient to support a conviction. This argument ignores the fact that circumstantial evidence is often stronger and more convincing than direct evidence. ***Poellinger***, 153 Wis. 2d at 503-04. If Senn's contention were true, then circumstantial evidence would only have the limited purpose of corroborating direct evidence.

¶28 Senn further contends that the jury reasonably could have concluded that the written statements were coerced and not contradictory to the trial testimony because the witnesses were not in a position to observe whether Senn consumed alcohol after the fire. However, the evidence must be viewed in a light most favorable to the State. Under these facts, a reasonable trier of fact could have found Senn guilty of operating under the influence of an intoxicant.

By the Court.—Judgment affirmed.

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