COURT OF APPEALS
DECISION
DATED AND FILED

December 4, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0356-CR **Cir. Ct. No. 00-CT-7**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT D. STEWART,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Langlade County: JAMES P. JANSEN, Judge. *Affirmed in part, and cause remanded with directions.*

¶1 CANE, C.J.[1] Robert Stewart, appealing pro se, raises numerous issues challenging his conviction, after a jury trial, for operating a motor vehicle

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

while under the influence of an intoxicant (OWI), fourth offense. The State concedes that the trial court failed to conduct a colloquy to determine whether Stewart voluntarily waived his right to counsel. Consequently, the State suggests that this court remand for an evidentiary hearing to determine if Stewart's waiver of his right to counsel was knowing, intelligent and voluntary. This court agrees and remands the matter on that issue. However, this court rejects Stewart's remaining issues.

BACKGROUND

¶2 Although the trial testimony provided two different accounts of the events (Stewart's and the two officers'), the essential facts relevant to resolution of this appeal, including certain disputed facts viewed most favorably to the verdict, are relatively clear. At approximately 12:30 a.m., officers Mark Westen and John Schunke responded to a dispatch call that a vehicle was in a ditch off a highway. When the officers arrived, they found Stewart sitting behind the steering wheel of a truck that appeared to have crossed the highway and driven into the ditch next to the opposite lane.

¶3 The officers asked Stewart to exit the vehicle and when he did, the officers detected a strong odor of intoxicants. When they asked Stewart what had happened, he initially responded that his wife had been driving and they went into the ditch. He explained that his wife then hitchhiked into Antigo and he was waiting for her to return. However, the officers did not believe him because there was only one set of footprints in the snow around the car and no footprints leaving the car to the road. Stewart then admitted that he had been driving when the car slid into the ditch. The officers then asked him how much he had to drink that night and Stewart said "too many." During this time they also observed Stewart's unsteady gait, slurred speech and bloodshot, glassy eyes. After Stewart failed two field sobriety tests, the officers arrested him for OWI. Stewart refused to submit

to a chemical blood test to measure his level of intoxication, and no test was ever taken.

¶4 After the initial appearance, Stewart retained counsel. He sought a hearing on the administrative revocation of his operating privileges for refusing to submit to a chemical blood test. However, before a refusal hearing was held, he pled guilty. Prior to the sentencing hearing, Stewart filed a pro se motion to withdraw his guilty plea. At the sentencing hearing, Stewart's attorney moved to withdraw as counsel, and the trial court granted the motion. The court also permitted Stewart to withdraw his guilty plea.

¶5 After several attempts to reschedule the refusal hearing, the State ultimately conceded that Stewart's refusal was proper. The case was scheduled for trial. On the day of trial, the trial court heard Stewart's motion to suppress evidence based on lack of probable cause to investigate Stewart's car accident and arrest him. The court concluded there was probable cause to investigate the accident and to arrest Stewart. The court also found that Stewart's statements to the officers made prior to his arrest were voluntary and admissible.

¶6 Stewart represented himself at trial. The jury found Stewart guilty. Prior to sentencing, Stewart filed twenty-six separate motions to dismiss his conviction or for a new trial. At the motions hearing, the trial court heard argument on each motion and, ultimately, rejected all of Stewart's challenges to his conviction. Stewart appeals his conviction.

¶7 On appeal, Stewart presents ten arguments, many of which were addressed by his post-trial motions. This court will address each in turn.

DISCUSSION

I. Probable cause for arrest

¶8 Stewart challenges whether there was probable cause to investigate why his car was in the ditch and to arrest him. He also challenges whether his statements were voluntary. The trial court found that the officers had investigated Stewart's car to determine if he needed assistance and that the results of the officers' field sobriety tests were sufficient to support a probable cause finding. The court also concluded that Stewart's statements were made voluntarily as he responded to the officers' inquiries.

¶9 This court must accept the trial court's findings of fact unless they are clearly erroneous, WIS. STAT. § 805.17(2) (made applicable to criminal proceedings by WIS. STAT. § 972.11(1)). However, whether the facts as found constitute probable cause to conduct an investigatory stop and to arrest are questions of law this court reviews without deference to the trial court. *See* ***State v. Fields***, 2000 WI App 218, ¶9, 239 Wis. 2d 38, 619 N.W.2d 279; ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994).

¶10 This court concludes that there was probable cause to investigate the fact that Stewart's car was in the ditch. Stewart has provided this court with no authority for the proposition that an officer cannot investigate whether the passenger of a car that has veered off a road into a snow-covered ditch is in need of assistance. Once the officers observed Stewart's intoxicated appearance, they had probable cause to further investigate whether he was operating while intoxicated. Based on the results of the field sobriety tests, the officers had probable cause to arrest Stewart.

¶11 Stewart also challenges whether statements he made to officers were voluntary. A finding that a confession was involuntary requires proof that the police engaged in coercive conduct. *See* ***State v. Owen***, 202 Wis. 2d 620, 641-42, 551 N.W.2d 50 (Ct. App. 1996). However, at the probable cause hearing, Stewart did not explain how the officers had engaged in coercive conduct. Because Stewart produced no proof of actual coercive or improper pressures to compel a statement, the voluntariness inquiry ends. *See* ***id.*** The trial court correctly concluded that Stewart's statements to the officers were voluntary.

II. Challenges to discovery

¶12 Stewart contends that the State failed to provide proper discovery in two respects: (1) the State did not inform Stewart that the original call to dispatch came from a towing company; and (2) the State did not provide a written list of witnesses. Stewart first raised his concerns about the origin of the call to dispatch in a post-trial motion. This belated attempt to compel discovery came too late for the trial court to exercise discretion in fashioning a remedy. Furthermore, Stewart has failed to allege how the lack of this information, which he claims was published in a newspaper, prejudiced his case. Accordingly, this court rejects his argument with respect to the dispatch call.

¶13 During trial, Stewart did tell the trial court he was concerned that he never got a written list of witnesses for the State and, therefore, did not know that one of the two officers (the State's only witnesses) would be testifying. The court noted that Stewart's attorney had been told who the two witnesses would be, and that they were the same officers listed in the police report, which was available to Stewart.

¶14 On appeal, Stewart contends, "The case should have been adjourned to allow me time to prepare." This argument fails because the trial court *did* offer Stewart an opportunity to prepare, stating, "If Mr. Stewart feels he needs additional time to prepare to cross examine another witness, I'm prepared to give him that. He can have an hour, two hours, three hours." The transcript reveals that Stewart made no effort to accept the court's offer.

III. Challenges to the criminal complaint

¶15 In a post-trial motion to the court, Stewart argued that the criminal complaint was defective because it misstated the time period during which previous convictions for operating while intoxicated are considered and was not properly authenticated. WISCONSIN STAT. § 971.31(2) provides in part:

> [D]efenses and objections based on defects in the institution of the proceedings, insufficiency of the complaint, information or indictment, invalidity in whole or in part of the statute on which the prosecution is founded, or the use of illegal means to secure evidence shall be raised before trial by motion or be deemed waived.

Because Stewart failed to raise his objection before trial, his objection is waived.

IV. Production of certified copy of Stewart's driving record at trial

¶16 Stewart argues that the State was required to produce a certified copy of his driving record at trial. Stewart raised this issue during the trial and the court explained that because the validity or existence of prior offenses was not at issue in the OWI trial, a certified driving record was not necessary. Stewart was provided with a certified record prior to sentencing.

¶17 This court agrees with the trial court that a certified record was not necessary at trial because the information was irrelevant. It is not necessary that

the prior convictions be proved at trial, as they are not elements of the OWI offense.[2] It is only necessary that they be alleged in the complaint in order to secure the enhanced penalty. As stated in ***State v. McAllister***, 107 Wis. 2d 532, 535, 319 N.W.2d 865 (1982):

> The conduct prohibited by sec. 346.63(1), Stats., consists of (1) driving or operating a motor vehicle, and (2) doing so while under the influence of an intoxicant. It is the conduct of operating a motor vehicle while under the influence of an intoxicant which is prohibited by sec. 346.63(1). Nothing more need be proven to sustain a judgment of conviction against a motorist. These were the two elements of the offense contained in the jury instruction, and the jury was therefore properly instructed. The penalties for violation of OMVWI are contained in sec. 346.65(2), Stats. Repeated violations are subject to increasingly harsher penalties. This graduated penalty structure is nothing more than a penalty enhancer similar to a repeater statute which does not in any way alter the nature of the substantive offense, *i.e.*, the prohibited conduct, but rather goes only to the question of punishment. (Footnote omitted.)

V. Interaction of State's two witnesses

¶18 Stewart contends that the court issued a sequestration order and that the two State witnesses violated this order by having lunch together during the trial. Contrary to Stewart's contention, the court did not issue a sequestration order. Rather, the court's only instruction in this respect was for one officer to step outside the courtroom while the other testified. There was never an order or instruction that the officers not communicate with each other outside the courtroom.

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[2] Even when the charged offense is operating with a prohibited alcohol concentration of .08% or higher, where prior convictions are an element of the offense, evidence of prior convictions is not submitted to the jury. *See* ***State v. Alexander***, 214 Wis. 2d 628, 652, 571 N.W.2d 662 (1997).

¶19 In any event, the district attorney told the trial court at the post-trial motion hearing that he instructed the officers not to discuss the case. Stewart admitted that he could not produce any evidence that the officers had discussed the case, and he failed to accept the court's offer to call the officers as witnesses to ask them if they had discussed the case. Stewart's argument is without merit.

VI. Challenge to sufficiency of the evidence

¶20 At the close of trial, Stewart moved for dismissal of the State's case based on insufficiency of the evidence. The court denied Stewart's motion. On appeal, Stewart argues that the trial court erred by failing to dismiss the case at the conclusion of the State's case-in-chief.

¶21 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.*** This court agrees with the trial court that there was sufficient evidence to sustain a conviction.

¶22 The evidence showed that in the early morning hours the officers found Stewart behind the steering wheel of a vehicle that had run off the road into a ditch of the opposite lane. He smelled of strong intoxicants, he had difficulty maintaining his balance, his speech was slurred and his eyes were bloodshot and glassy. He at first lied about his wife driving the vehicle and then admitted driving the vehicle into the ditch and having "too many" drinks. He also failed two of the field sobriety tests before refusing to perform any more tests. This evidence is

more than sufficient to prove that Stewart operated a motor vehicle while under the influence of an intoxicant.

VII. Jury instruction challenge

¶23 Stewart contends he was prejudiced because he was not allowed to review and add jury instructions. The record belies his assertion. Not only did the court discuss the jury instructions on two occasions, it actually gave Stewart a copy of the instructions because Stewart had failed to bring a copy to the trial. Stewart did not request copies of additional instructions and did not object to the instructions or request that any additional instructions be given. Failure to object to alleged errors in jury instructions constitutes a waiver of that issue for appeal. *See* ***State v. Schumacher***, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988).

VIII. Court's refusal to take judicial notice of defense document

¶24 Stewart asked the court to take judicial notice of a document from the National Institute of Justice Research that discussed police attitudes and abuse of authority. The court correctly denied its admission because it was not relevant. The evidence regarding a survey of officers' attitudes and the relationship between a defendant's attitude and the number of arrests made is simply not likely to prove it more or less likely that Stewart operated a motor vehicle on the highway while under the influence of an intoxicant. It may prove that his attitude would contribute to his being arrested, but it has nothing to do with whether he was guilty of OWI.

¶25 Moreover, the trial court indicated that Stewart could use the document to impeach the officers' testimony, but Stewart failed to take advantage of this opportunity. This court rejects Stewart's argument.

IX. Court's refusal to allow evidence of blood alcohol content

¶26 Stewart contends that the trial court erroneously exercised its discretion when it "refused to allow any evidence or testimony related to blood alcohol content." Stewart fails to identify precisely what evidence he wanted admitted. To the extent Stewart is challenging the trial court's general statement that it would not allow evidence of blood alcohol content or the refusal, this court concludes that the trial court did not erroneously exercise its discretion.

¶27 Before trial, the parties agreed that the court would not tell the jury that no blood test had been taken and that they were not to speculate as to why. The court further explained that the State would not be prohibited from mentioning that Stewart refused to take the chemical blood test, and Stewart would not be allowed to argue that the State's lack of a test proves he is innocent. This court concludes that the trial court reasonably exercised its discretion by finding that evidence of blood content was irrelevant and, in any event, could be confusing to the jury.

X. Right to counsel

¶28 When an individual elects to proceed pro se, the circuit court must insure that the individual (1) has knowingly, intelligently and voluntarily waived his or her right to counsel, and (2) is competent to proceed pro se. ***State v. Klessig***, 211 Wis. 2d 194, 203, 564 N.W.2d 716 (1997). To establish a valid waiver of counsel, the circuit court must conduct a colloquy designed to ensure that the individual (1) made a deliberate choice to proceed without an attorney; (2) was aware of the challenges and disadvantages of self-representation; (3) was aware of the seriousness of the charges against him or her; and (4) was aware of the general range of penalties that could be imposed. ***Id.*** at 206.

¶29 When an adequate colloquy is not conducted and relief is later sought from the trial court's judgment, the court must hold an evidentiary hearing to determine if the waiver was knowing, intelligent and voluntary. ***Id.*** at 206-07. Nonwaiver is presumed unless waiver is affirmatively shown to be knowing, intelligent and voluntary. ***Id.*** at 204. The State has the burden of overcoming this presumption. ***Id.*** If a court determines that the defendant knowingly, intelligently and voluntarily waived his right to the assistance of counsel, the court must next determine whether the defendant was competent to represent himself. ***Id.*** at 214. If the answer to this question is also yes, the conviction must stand. If, however, the answer to either question is no, the defendant is entitled to a new trial. ***Id.***

¶30 The State has conceded that the court did not conduct a colloquy. The State suggests that this case be remanded to the trial court for a hearing consistent with ***Klessig***. This court agrees and remands the case.

CONCLUSION

¶31 This court rejects all of Stewart's challenges to his conviction except one: his challenge to his waiver of counsel. This court remands for a hearing so that the trial court can determine if Stewart knowingly, intelligently, and voluntarily waived his right to the assistance of counsel. If yes, the court must next determine whether Stewart was competent to represent himself. If the answer to this question is also yes, the conviction must stand. If, however, the answer to either question is no, Stewart is entitled to a new trial. *See* ***id.***

By the Court.—Judgment affirmed in part, and cause remanded with directions.

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