COURT OF APPEALS
DECISION
DATED AND FILED

January 16, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1727-CR **Cir. Ct. No. 2011CT584**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES W. WARREN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond Du Lac County: PETER L. GRIMM, Judge. *Affirmed.*

¶1 BROWN, C.J.[1] In this case, James W. Warren claims that the arresting officer's opinions based on how he performed during field sobriety tests

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

amounted to expert scientific opinion and the ***Daubert***[2] rule applies. He asserts that, because no foundation was laid as to the police officer's expertise regarding these field tests, the resulting evidence should not have been admitted. But that is not the law in Wisconsin. A law officer uses these tests merely as a subjective tool by which to measure whether he or she believes there is probable cause to arrest for operating a vehicle while intoxicated. The case law explicitly says that this is not science based. We affirm.

¶2 At about 2 a.m. on October 21, 2011, Warren hit a deer with his car while driving on a county highway. He called 911 for help and a police officer responded. ***Id.*** While talking with Warren, the responding police officer noticed that Warren had a strong odor of alcohol on his breath and bloodshot, glassy eyes. Warren admitted that he had a mixed drink earlier that evening at a friend's house and said he had stopped drinking around 11:30 p.m.; Warren did not say when he started drinking.

¶3 Already suspecting Warren was intoxicated, the officer asked him to conduct field sobriety tests, and Warren agreed to cooperate. The officer had training and experience with such tests, having conducted over 800 of them and having arrested more than 200 impaired drivers during his career. The three tests the officer used with Warren were the horizontal gaze nystagmus (HGN) test, the walk-and-turn test, and the one-legged stand. During Warren's performance of each test, the officer observed indications convincing him that Warren was unlawfully impaired—e.g., eye twitching during the HGN test, swaying during instructions and while walking and standing, and loss of balance. Based on all of

[2] ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993).

the indicia of impairment he had observed, the officer concluded that Warren was intoxicated. He placed Warren under arrest and drove him to the county jail.

¶4 About halfway to the jail, the officer had to pull over so that Warren could vomit "three or four times, quite a large amount." At the jail, Warren consented to a breath test of his blood alcohol level, which showed he had a blood alcohol concentration of .149. Warren was subsequently charged with two violations, operating a motor vehicle while intoxicated, WIS. STAT. § 346.63(1)(a) and operating a motor vehicle with a prohibited alcohol concentration, § 346.63(1)(b).

¶5 At trial, the arresting officer testified about his observations of Warren that night, including the field sobriety tests, and about the breath test results at the jail. Over objection, the court allowed the officer to give his opinion that based upon his training and experience "the field tests are a reliable indicator of whether someone is .08 or higher" and that in fact the HGN test alone is sufficient to detect an alcohol concentration over .08. The State also presented the video recording of the interaction between the officer and Warren and the audio recording of Warren's 911 call.

¶6 The defense argued to the jury that the HGN test was not reliable because lights from the defendant's car might have affected the test and that the breath test was not reliable because "residual mouth alcohol" from Warren's vomit might have affected the results. The defense also argued that Warren did not look or sound impaired in the video and audio evidence. After deliberation, the jury found Warren not guilty of the first charge, operating while impaired, but guilty of the second charge, operating with a prohibited alcohol level.

¶7 On appeal, Warren renews his objection to the officer's opinion testimony, asserting that the trial court allowed the officer to give "an expert opinion that field sobriety tests are reliable indicators of whether someone is .08 or higher." The argument fails because this was not about expert scientific testimony being admitted in Warren's trial. As we explained in ***City of West Bend v. Wilkens***, 2005 WI App 36, ¶21, 278 Wis. 2d 643, 693 N.W.2d 324, an officer testifying that field sobriety tests and other observations led him to form the subjective opinion that a driver's alcohol level was impermissibly high is not scientific or expert testimony:

> Ordinary individuals are readily familiar with the manifestations of alcohol consumption, both physical and mental. They do not need to hear expert testimony about how to discern drunkenness. Moreover, they know intuitively that a PAC and drunkenness often accompany each other. They do not need "scientific evidence" to tell them so any more than they require an explanation of the theory of gravity in a suit where a plaintiff claims to have been injured by a fallen object.

Id.

¶8 In other words, as we said in ***Wilkens***, the tests are "observational tools, not litmus tests that scientifically correlate certain types or numbers of 'clues' to various blood alcohol concentrations." ***Id***. at ¶17. Allowing a jury to consider an officer's subjective opinion that the defendant was impaired, based on his observations of the defendant (including observations made during field sobriety tests) that the officer considered to be reliable indicators, is not error. *See* ***id***. ¶13 ("The trial court is within its discretion so long as it examined the relevant facts, applied a proper legal standard, and reached a conclusion that a reasonable judge could reach through a demonstrated rational process.").

¶9 We note that, while the officer's personal observations of the defendant at the scene of the accident were relevant information for the jury to consider in determining whether Warren was guilty of the charge of operating while intoxicated, the evidence had no relevance to the result recorded by the intoximeter. He either had a reading that was within the law or he did not. But, we will not base our opinion on whether the challenged evidence was relevant to the charge for which he was convicted. We will assume for the sake of argument that it was. Still, not only was the officer's testimony far from being scientific opinion, there was no suggestion made to the jury that they were scientific, expert conclusions. Moreover, the jury was properly instructed regarding its duty and competence to weigh all of the evidence and to evaluate the witnesses' credibility, a duty it seems to have taken seriously when it found Warren guilty on one charge but not another.

By the Court.—Judgment affirmed.

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