COURT OF APPEALS
DECISION
DATED AND FILED

May 29, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2230 **Cir. Ct. No. 2012TR7673**

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

COUNTY OF WINNEBAGO,

PLAINTIFF-RESPONDENT,

V.

RAHB J. KETTLESON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: JOHN A. JORGENSEN, Judge. *Affirmed.*

¶1 GUNDRUM, J.[1] Rahb J. Kettleson appeals pro se from a judgment of the trial court finding him guilty of reckless driving, pursuant to WIS. STAT.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

§ 346.62(2). In his brief-in-chief,[2] Kettleson contends that "the state didn't meet [its] burden of proof," the court accepted "impossible testimony as convincing evidence," and "the [County's] witness … lied numerous times under oath." We ultimately interpret Kettleson's appeal as the County does, as a challenge to the sufficiency of the evidence. We affirm.

Background

¶2 The reckless driving citation in this case was issued based upon a citizen complaint to law enforcement. Kettleson has not disputed that he was the operator of the vehicle in question. Kettleson was convicted after a trial to the court.

¶3 At trial, the citizen-witness testified as follows. On May 8, 2012, he was traveling in moderate traffic over a bridge in Winnebago County when a car operated by Kettleson came up behind his vehicle "at a pretty fast pace. I was going about 59, and I estimated the car was probably going about 65 to 68." Kettleson came within five or ten feet of the rear of the citizen-witness's vehicle before passing him, made at least six lane changes without signaling, and was traveling about the same speed, 65 to 68 miles per hour, while coming within approximately five to ten feet of other cars he was passing. The citizen-witness was concerned for his safety and that of others and believed Kettleson's driving "potentially endangered" lives or property.

¶4 Kettleson also testified, acknowledging he was driving the vehicle on the day in question and was the only one in the vehicle. He disputed much of

[2] Kettleson did not file a reply brief.

the citizen-witness's testimony, however, stating "[t]here was nothing that occurred that day" and "[t]he highway is packed with people," so it was "impossible to do what this guy stated .... I did not do this."

¶5 Considering the testimony, the court stated:

> So the question is while you were driving on 441 in this manner, did you endanger the safety of another person? [The citizen-witness] testified under oath, made some observations indicating you were traveling 65 to 68 miles per hour, you came up fast on his vehicle, got five to ten feet from his vehicle, made a quick lane change, no signal, then jumped in front of him, and then did that six more times on other vehicles where you were five to ten feet from their vehicles. [The citizen-witness] indicated he had to slow down, that he was traveling 59 miles per hour. He indicated the traffic was moderate at that time.
>
> Mr. Kettleson indicates this is impossible to do, and it is not impossible to do. I think everyone in this courtroom has had the experience where you are on a highway, and you see a car going—zooming back and forth and in a high-traffic area, and you are questioning yourself how someone can do that, but it happens all the time.

¶6 The court found that the citizen-witness "made these observations," and pointed out that the citizen-witness "went through extra effort to call the police, make contact with them, fill out the police report, and show up in court here and testify as to the negligent behavior that he saw." The court noted that the citizen-witness believed Kettleson "endangered safety based upon the description that he gave of the traffic, the driving, the no signal," adding that it too was convinced by clear, satisfactory and convincing evidence "that this was negligent behavior, that you endangered safety by driving in the manner that you did." The court found Kettleson guilty of reckless driving. Kettleson appeals.

Discussion

¶7 In considering the sufficiency of the evidence, if the evidence presented could have convinced a trier of fact, acting reasonably, that the appropriate burden of proof had been met, we will sustain the verdict. *See* ***City of Milwaukee v. Wilson***, 96 Wis. 2d 11, 21, 291 N.W.2d 452 (1980). The burden of proof for a violation of WIS. STAT. § 346.62(2) is clear, satisfactory and convincing evidence. *See* WIS. STAT. § 345.45.

¶8 On appeal, we will not upset a trial court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). Further, we point out that "when the trial judge acts as the finder of fact, and where there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses." ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979). Whether the evidence presented in the trial ultimately is sufficient to support the conviction is a question of law we review de novo. ***State v. Booker***, 2006 WI 79, ¶12, 292 Wis. 2d 43, 717 N.W.2d 676.

¶9 To convict Kettleson, the County was required to prove that Kettleson: (1) operated his vehicle upon a highway, (2) in a manner constituting criminal negligence, and (3) this criminal negligence endangered the safety of a person or property. *See* WIS. STAT. §§ 346.62 and 939.25(2); WIS JI—CRIMINAL 2650. "Criminal negligence" means a driver's operation of his vehicle created an unreasonable and substantial risk of death or great bodily harm and the driver should have been aware that his operation of the vehicle created this risk. WIS JI—CRIMINAL 2650; *see also* WIS. STAT. § 939.25.

¶10 Despite Kettleson's testimony to the contrary, the court found that he had operated his vehicle in the manner attested to by the citizen-witness. Simply

put, the trial court believed the citizen-witness's testimony over Kettleson's, which it was entitled to do. The court observed the testimony of both witnesses and found the citizen-witness more credible, specifically noting the steps the citizen-witness went through to report Kettleson's driving and follow through with his concerns by testifying at trial. Nothing in the record suggests the court erred in believing the citizen-witness's testimony over Kettleson's, and Kettleson has demonstrated no error in the trial court's findings.[3]

¶11 Based on these findings, we hold that the evidence was sufficient to support the trial court's conclusion that the County had proven by clear, satisfactory and convincing evidence that Kettleson drove recklessly, as set forth in WIS. STAT. § 346.62(2) and the relevant jury instruction for reckless driving.

By the Court.—Judgment affirmed.

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

[3] On appeal, Kettleson attempts to cast doubt upon the testimony of the citizen-witness with allegedly inconsistent statements from an "incident report." He points to "page three" of the report, but acknowledges the report was not entered into evidence during the trial because "I somehow left page three of the incident report at home … and did not have it at trial." We do not consider the report because our review is limited to matters in the record and we "will not consider any materials in an appendix that are not in the record." ***Roy v. St. Lukes Med. Ctr.***, 2007 WI App 218, ¶10 n.1, 305 Wis. 2d 658, 741 N.W.2d 256.