COURT OF APPEALS DECISION DATED AND FILED

December 21, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP840

Cir. Ct. No. 2009TR37849

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

MILWAUKEE COUNTY,

PLAINTIFF-RESPONDENT,

V.

ALEXANDER FRIEDMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed*.

¶1 BRENNAN, J.[1] Alexander Friedman,[2] *pro se*, appeals from a judgment entered following a court trial, at which the trial court found Friedman

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] Although the title page of the appellant's brief states that his name is "Alexsandr," the record shows that he testified that his name was spelled "Alexander" at trial. Consequently, we refer to the appellant as "Alexander."

guilty of driving too fast for conditions, a violation of WIS. STAT. § 346.57(3), as adopted by MILWAUKEE COUNTY ORDINANCES, Appendix C, § 1(b) (published Nov. 30, 1989). Friedman argues that the evidence does not support his conviction.[3] The State responds that the testimony of Deputy Joann Donner, which the trial court found credible, supports the conviction. We agree with the State and affirm.

STATEMENT OF FACTS

¶2 Two witnesses testified at the court trial: Milwaukee County Deputy Sheriff Joann Donner and Friedman. Deputy Donner testified that at the time of her testimony she had been an employee of the Milwaukee County Sheriff's Department for nine years, had worked the freeway for four years and had been in the airport division for two years. She testified that on December 3, 2009, at 7:45 p.m., she was called to a single vehicle accident on Highway 119, a ramp from I-94 southbound to the airport in Milwaukee County. She testified that: it

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[3] In his "Statement of Issues," in his brief-in-chief, Friedman questions the accuracy of the transcript made from the audio recording of the trial proceedings and complains that he did not receive the copy of the audio recording that he requested. However, Friedman does not raise this issue in the argument section of his brief-in-chief and does not state with specificity in his brief-in-chief what inaccuracies in the transcript he believes the audio recording would reveal. Consequently, we determine that his argument is undeveloped and we decline to address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

Furthermore, while Friedman does mention his request for the audio recording in the argument section of his reply brief, and in his reply brief specifies that he believes one word of his testimony was transcribed incorrectly, we do not generally address issues raised for the first time in a reply brief and decline to do so here. *See* ***Torke/Wirth/Pujara, Ltd. v. Lakeshore Towers of Racine***, 192 Wis. 2d 481, 492, 531 N.W.2d 419 (Ct. App. 1995). And regardless, even if Friedman had raised the issues in his brief-in-chief, there is no evidence of his request for the audio recording in the record and Friedman has not attempted to supplement the record. Again, we conclude he has not developed the issue and we will not address it. *See* ***Pettit***, 171 Wis. 2d at 646.

had started to snow two hours earlier; snow was starting to accumulate in the distress lanes; and the roadways were wet and beginning to get slushy.

¶3 Deputy Donner further testified that upon her arrival at the scene she saw Friedman's vehicle, a Lincoln Town Car, facing the wrong direction and the front end was severely damaged. Deputy Donner testified that Friedman told her that he had started to accelerate to fifty miles per hour on the curve when he spun out and hit a wall. She testified that Friedman told her he might have been going too fast for conditions.

¶4 Friedman testified that he worked as a taxicab driver and drove that ramp ten times a day. He further testified that: it was cold the night of the accident; it had been snowing; and he knew that part of the ramp was always wet. He also admitted during the trial that at the time of the accident he had been driving thirty-five miles per hour on the curve. However, he denied telling Deputy Donner that he was accelerating to fifty miles per hour.

¶5 The trial court found Deputy Donner credible and, based on Deputy Donner's testimony, concluded that the County had met its burden of proof—to a reasonable certainty by evidence that is clear, satisfactory and convincing—that Friedman had been driving too fast for conditions in violation of WIS. STAT. § 346.57(3). The trial court imposed a forfeiture of $216.60, including all costs, fees and assessments, and ordered that Friedman pay the forfeiture within sixty days. Friedman appeals *pro se*.

STANDARD OF REVIEW

¶6 We review a challenge to the trial court's exercise of discretion by deferring to the trial court's findings of fact and credibility determinations unless clearly erroneous. *See* WIS. STAT. § 805.17(2). Findings are not clearly erroneous just because another inference can be drawn from the credible evidence. *See* ***Mentzel v. City of Oshkosh***, 146 Wis. 2d 804, 808, 432 N.W.2d 609 (Ct. App. 1988). 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 it. *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. § 346.57(3) "is clear, satisfactory and convincing." *See* WIS. STAT. § 345.45.

DISCUSSION

¶7 Here, the record shows that the trial court reasonably concluded that Deputy Donner was credible and that her testimony, setting forth Friedman's admissions, constituted clear, satisfactory and convincing evidence that Friedman was driving too fast for conditions, contrary to WIS. STAT. § 346.57(3). Section 346.57(3) requires "the operator of every vehicle" to "drive at an appropriate reduced speed … when approaching and going around a curve … and when special hazard[s] exist[] ... by reason of weather or highway conditions." Consequently, drivers are required to reduce their speed when confronting a curve or when encountering bad weather and poor highway conditions, all of which were in existence here. The test is an objective one, namely, what a reasonable person would do, as expressed in WIS JI-CIVIL 1285:

> Appropriate reduced speed means less than the otherwise lawful speed. An appropriate reduced speed is that speed at which a person of ordinary intelligence and prudence would drive under the same or similar circumstances.

¶8 The trial court found Deputy Donner credible and based its findings and conclusions on her testimony. *See* ***Whitaker v. State***, 83 Wis. 2d 368, 377, 265 N.W.2d 575 (1978) ("The credibility of the witnesses and the weight of the evidence is for the trier of fact."). Accordingly, the trial court found that at the time of the car accident Friedman knew that: there was construction in the area; it was snowing; and there was ice on the road. The trial court also found that Friedman was driving thirty-five miles per hour around the curve and then sped up to approximately fifty miles per hour and lost control of his vehicle. Consequently, the trial court concluded that Friedman should have been driving slower based on the road conditions and should have taken more precautions, including driving slower around a curve.

¶9 Most of the evidence at trial was undisputed. Friedman admitted that he was familiar with the curve on the airport ramp, that he drove it ten times a day, and that he was aware there had been construction in the area, which left the road wet all the time. Friedman also conceded that he knew it was cold that day and that it had snowed. Friedman did not dispute Deputy Donner's observations that the road was wet and slushy or that his car sustained extensive front end damage when it spun out and hit a wall.

¶10 The only disputed point at trial was whether Friedman admitted to Deputy Donner that he had been accelerating to fifty miles per hour at the time he spun out. Deputy Donner testified that Friedman told her that "he was negotiating a turn, finished negotiating the turn. He started to accelerate to approximately

fifty miles an hour, when he started to fishtail and spun around and hit the wall." Friedman told Deputy Donner that "he might have been going too fast for the weather." Friedman then cross-examined Deputy Donner asking her how she knew his speed. She replied:

> Because when I asked [Friedman] what had happened, [Friedman] told me that [he was] negotiating the turn. [He] did say that [he was] going approximately thirty-five, that [he] sped up on the straightaway to about fifty, and that's when [he] lost control.

¶11 Friedman disputed driving fifty miles per hour or telling Deputy Donner that he was driving fifty miles per hour. But Friedman *admitted* that he was driving thirty-five to forty miles per hour and was accelerating when he spun out, testifying as follows:

> So what happened, when I spinning from curve and I go thirty-five, I don't go more. If I go more, I make incident—accident on curve. So after I move from curve and start, I push gas, yes, but not—I don't tell her I push fifty. No. *It's no fifty, no nothing. Just start. It was, like, thirty-five to forty.*

(Emphasis added.)

¶12 Even accepting Friedman's testimony as true, the record shows Friedman was driving too fast for conditions. On a cold, snowy day, he was traveling thirty-five miles per hour on a freeway ramp curve and then accelerated to forty miles per hour onto a part of the pavement that he knew was always wet. A reasonably prudent driver would have reduced his speed to accommodate conditions.

¶13 On appeal, Friedman disputes for the first time whether he knew there was ice on the road. He argues that the trial court's finding that he had admitted seeing ice on the road was in error. At the trial Friedman told the trial

court twice that there was ice on the road—apparently in an attempt to persuade the trial court that the ice, not he, caused the accident. Friedman testified: "I just push gas, and it was ice" and "[b]ecause it's wet place, was wet always, when it's cold, it[] was ice." Whether Friedman said he saw ice on the road is not germane to our decision. The record shows that Friedman testified that he knew it was cold and that he knew the area was always wet, leading to the inescapable conclusion that he should have known there was a possibility of ice and therefore should have driven slower. He testified to as much:

> [COURT]: You knew this area was always wet?
>
> [FRIEDMAN]: Yes. And that's why I make accident.

¶14 For all of the above reasons, we conclude that the record shows that the evidence at trial supported the trial court's findings and conclusions and we affirm.

By the Court.—Judgment affirmed.

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