COURT OF APPEALS
DECISION
DATED AND RELEASED

July 17, 1996

No. 95-3241

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

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ROBERT J. TURICIK,

Defendant-Respondent.

APPEAL from orders of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed*.

SNYDER, J. The State appeals from the dismissal of charges against Robert J. Turicik of operating a motor vehicle while under the influence of an intoxicant (OWI) and operating with a prohibited blood alcohol concentration. The State contends that the trial court erred when it: (1) failed to grant the State's motion for a directed verdict, and (2) denied the State's motion for judgment notwithstanding the verdict. Because the cross-examination of the

State's witness provided sufficient evidence to controvert a material element of the offense, the motions were properly denied. Accordingly, we affirm.

The facts underlying the incident are not disputed. Turicik was stopped by State Trooper Lori Maples on a Friday night at approximately 10:45 p.m. Maples had observed Turicik's car traveling with only one headlight lit and, after following the car for a short distance, had observed the vehicle weaving in its lane of travel. After Turicik had pulled over, Maples approached the car and observed an odor of intoxicants on Turicik's breath. She also noted that he had red, glassy eyes and that his speech was slurred.[1]

Maples then had Turicik perform several field sobriety tests. On all three tests, Maples observed signs of intoxication. Turicik was arrested and transported to the police station. One hour and fifteen minutes after the initial stop, he submitted to an Intoxilyzer test which produced a reading of 0.10%.

The case was tried to a jury. The State presented the testimony of Maples. The defense conducted a cross-examination, eliciting the fact that Turicik never admitted consuming any intoxicants and that the Intoxilyzer test has a "built-in 10% error." After the cross-examination, the defense rested, declining to present any additional evidence.

The State then motioned for a directed verdict. The court determined that there were competing inferences that could be drawn under

[1] Maples never asked Turicik whether he had consumed any alcoholic beverages.

the facts presented and denied the motion. After deliberations, the jury returned a verdict of not guilty.

The State appeals on two grounds. It contends that the trial court erred when it denied the initial motion for a directed verdict as well as a later motion for judgment notwithstanding verdict. We first address the directed verdict issue.

Section 805.14(1), STATS., mandates that a directed verdict motion should be denied "unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party." The reviewing court must affirm a ruling to deny a motion for a directed verdict provided there exists any evidence which supports the nonmoving party's cause of action. ***Wisconsin Natural Gas v. Ford, Bacon & Davis Constr. Co.***, 96 Wis.2d 314, 336, 291 N.W.2d 825, 836 (1980).

Turicik was charged with violating § 346.63(1)(a) and (b), STATS., which prohibits a person under the influence of an intoxicant or with a 0.10% blood alcohol concentration (BAC) from operating a motor vehicle. The charges require the State to establish two elements by clear, satisfactory and convincing evidence: (1) that the person was operating a motor vehicle, and (2) that the person was doing so while under the influence of intoxicants.

A review of the evidence presented at trial is required to determine whether any material facts were in dispute and were properly left to the jury's determination. ***City of Omro v. Brooks,*** 104 Wis.2d 351, 353, 311 N.W.2d 620, 621 (1981). Since the driving element was not disputed, we will review the evidence pertaining to whether Turicik was under the influence of intoxicants at the time he was stopped.

The State's witness, Maples, provided the only testimonial evidence. Maples testified that Turicik had the odor of alcohol on his breath, exhibited slurred speech and red, glassy eyes, failed all three field sobriety tests and when tested after the arrest had a BAC of 0.10%.

Section 885.235(1)(c), STATS., states:

> The fact that the analysis shows that there was 0.1% or more by weight of alcohol in the person's blood or 0.1 grams or more of alcohol in 210 liters of the person's breath is prima facie evidence that he or she had an alcohol concentration of 0.1 or more.

Although the above paragraph mandates that an Intoxilyzer reading of 0.10% or higher establishes a prima facie case, subsec. (4) of the same statute provides:

> [T]he admissibility of chemical tests for alcohol concentration, intoxication or blood alcohol concentration shall not be construed as limiting the introduction of any other competent evidence bearing on the question of whether or not a person was under the influence of an intoxicant [or] had a specified alcohol concentration ....

The State established its prima facie case when it brought into evidence the 0.10% Intoxilyzer reading. Consequently, the burden shifted to Turicik to offer

evidence controverting the State's claim that he operated his vehicle while under the influence of intoxicants. *See* ***City of Omro,*** 104 Wis.2d at 356-57, 311 N.W.2d at 623.

On cross-examination, defense counsel elicited from Maples that she failed to question Turicik regarding whether he had consumed intoxicants. Nor did he voluntarily make any admission of intoxication. Also, Maples attested that the squad car's flashing lights remained on while Turicik performed the field sobriety tests. Maples further testified that the Intoxilyzer had a built-in 10% margin of error. Defense counsel then indicated that this could result in a reading "10% on the high side or 10% on the low side." Maples agreed.

The weight and credibility of evidence, and inferences drawn therefrom, are matters for the jury. ***Holloway v. K-Mart Corp.,*** 113 Wis.2d 143, 150, 334 N.W.2d 570, 574 (Ct. App. 1983). The case should be taken from the jury and a verdict directed only if the evidence gives rise to no dispute as to material issues or when evidence is so clear and convincing as reasonably to permit unbiased and impartial minds to come to but one conclusion. ***Id.***

A reviewing court gives weight to the trial court's decision to deny a directed verdict motion. ***Id.*** As the trial court explained:

> Under the circumstances in this case, I believe that a reasonable jury could make a determination that as to some of the facts involved, that it is not such that there is no other conclusion that could be drawn. That there are various ways to account for certain of the results of tests or observations made by the trooper. And under these circumstances, the Court would not

> direct a verdict, and will deny the motion to the State.

When more than one reasonable inference can be drawn from the evidence, the court of appeals must accept the inference drawn by the fact finder. ***Id.*** at 151, 334 N.W.2d at 574. This court is not to search the record on appeal for evidence to sustain a verdict the jury could have reached but did not. ***Fehring v. Republic Ins. Co.,*** 118 Wis.2d 299, 306, 347 N.W.2d 595, 598 (1984).

The evidence elicited on cross-examination could reasonably be interpreted as raising a question as to whether Turicik was under the influence of an intoxicant at the time of the stop. The evidence offered could suggest that Turicik's performance on the field sobriety tests was adversely affected by the squad car's red and blue flashing lights. Also, the testimony that the Intoxilyzer machine had a 10% margin of error, when combined with the later reading of 0.10%, could lead to the inference that at the time of the stop, Turicik was not intoxicated. This evidence, coupled with the fact that Turicik was never questioned about his intoxication and never admitted that he consumed alcoholic beverages, was sufficient to bring into issue a material fact and allow the matter to go before the jury.

The State argues, however, that the testimony presented during the cross-examination of Maples was not sufficient to counter its prima facie case. In support of this position, the State relies on ***City of Omro***, 104 Wis.2d at 359, 311 N.W.2d at 624, a decision which reversed a trial court's denial of a directed verdict motion. While ***City of Omro*** presents the directed verdict issue

in a similar context, we are unpersuaded that the facts of the instant case meet the ***City of Omro*** standard, requiring the court to grant a motion for a directed verdict.

The driver in ***City of Omro*** was charged with operating a motor vehicle while under the influence of intoxicants after the arresting officer detected the odor of alcohol on his breath and he failed field sobriety tests. He had a 0.23% BAC, the testimony of the arresting officer was that the driver admitted consuming a substantial amount of alcohol and, at trial, the driver confessed that he had a large number of drinks prior to the stop.

At the close of the ***City of Omro*** case, the State motioned for a directed verdict. The trial court denied the motion and allowed the case to go to the jury, which returned a not guilty verdict. On appeal, the judgment was reversed and a verdict was directed against the driver because the material elements of the offense were not disputed.

The State attempts to analogize this case with ***City of Omro***, claiming that Turicik failed to offer evidence sufficient to dispute the State's case and consequently should be ruled against as a matter of law. However, we conclude, as did the trial court, that there is a clear distinction between the two cases. In ***City of Omro***, the driver's admission that he was both driving and under the influence of intoxicants removed all dispute as to both elements of the

offense. *See* ***id.*** at 357-58, 311 N.W.2d at 623. In the instant case, Turicik concedes the "driving" element of OWI, but made no concession regarding being under the influence of intoxicants. Therefore, the absence of such an admission, coupled with sufficient controverting evidence, afforded Turicik the opportunity to employ the jury's fact-finding function.

The State also contends that its motion for judgment notwithstanding the verdict should have been granted. A motion for judgment notwithstanding the verdict must be denied if, after viewing the evidence in the light most favorable to the nonmoving party, reasonable people could fairly reach different conclusions. ***Kolb v. Chrysler Corp.,*** 661 F.2d 1137, 1140 (7th Cir. 1981). A motion for judgment notwithstanding the verdict is not a proper challenge to the sufficiency of the evidence, ***Koplin v. Pioneer Power & Light Co.,*** 162 Wis.2d 1, 29, 469 N.W.2d 595, 606 (1991), as the State concedes in its brief.

Motions for judgment notwithstanding the verdict are reserved for instances when a party believes that "the verdict is proper but for reasons evident in the record which bear upon matters not included in the verdict, [the moving party] should have judgment." Section 805.14(5)(b), STATS. Based on our conclusion that the evidence presented raised a question as to a material element and was subject to more than one reasonable inference, the motion for judgment notwithstanding the verdict was properly denied.

We conclude that the testimonial evidence elicited by the cross-examination of the arresting officer was subject to more than one reasonable

inference and was therefore sufficient to bring the matter before the jury. As a reviewing court, we must accept the inferences drawn by the jury. The motions for a directed verdict and judgment notwithstanding the verdict were properly denied.

By the Court.—Orders affirmed.

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