COURT OF APPEALS
DECISION
DATED AND RELEASED

August 29, 1996

NOTICE

No. 96-0676

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

VERNON COUNTY,

Plaintiff-Respondent,

v.

RICHARD J. PETERSON,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed*.

EICH, C.J.[1] Richard Peterson appeals from a judgment finding him guilty of operating a motor vehicle while intoxicated. He argues that the evidence was insufficient to support the finding. We reject the argument and affirm.

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

We note at the outset that Peterson appears to confuse the burden of proof in the trial court in drunk driving cases with the scope of our review of the judgment on appeal, for he repeatedly reminds us that the county must prove its case in the trial court by clear, satisfactory and convincing evidence. *See* § 345.45, STATS. That is true. When the trial is concluded, however, and the decision is entered and appealed, the appellate court is bound by the trial court's findings unless they are clearly erroneous. Section 805.17(2), STATS. And when more than one inference can be drawn from the credible evidence, we must accept the inference drawn by the trier of fact. ***Mentzel v. City of Oshkosh***, 146 Wis.2d 804, 808, 432 N.W.2d 609, 611 (Ct. App. 1988) (citation omitted). We search the record not for evidence opposing the trial court's decision, but for evidence supporting it. ***Id***.

Peterson argues at length that there was a conflict of evidence in the case regarding the amount of beer he consumed prior to his arrest, and he claims that the trial court's "finding" that he had several is unsubstantiated. At one point in its oral decision, the trial court noted the conflicting testimony on the point—whether he and his companion purchased "a six or a twelve pack"—and stated: "I would infer that it probably was a twelve pack," and that "he probably had more than four beers ... [or] more likely ... six or seven." According to the court: "[T]hat's a reasonable inference from all the evidence in this case."

First, Peterson fails to persuade us that the court's inference was unreasonably drawn from the evidence. More to the point, whether he consumed three, four, six or twelve beers seems to be immaterial. As the State correctly points out, what is material in drunk driving cases is evidence that "demonstrate[s] that the defendant was influenced by the alcohol which he had consumed to the point that his [or her] ability to operate a motor vehicle was materially or substantially impaired." We agree with the State that the evidence is sufficient.

Peterson was found lying in a ditch near an overturned motorcycle, which had apparently run off the road and crashed into a rock while attempting to make a U-turn on the highway. Although he appeared to be uninjured, Peterson was lethargic to the point of being unresponsive, and an emergency medical technician noticed a moderate to strong odor of intoxicants about his person. He was taken to the hospital where, approximately one hour

later, one of the deputies noticed a strong odor of intoxicants while standing several feet away from him. His eyes were glassy and bloodshot, and he was unresponsive to the deputies' questions about his family and his motorcycle. While standing at a counter at the hospital, Peterson was observed to be holding onto the countertop while signing a form and swaying from side to side.

Determinations of guilt have been approved on the same—or lesser—evidence. *See, e.g.,* ***State v. Burkman***, 96 Wis.2d 630, 644, 292 N.W.2d 641, 648 (1980) (determining unsteady balance, slurred speech, odor of alcohol and failure to touch nose with fingertip held sufficient under criminal reasonable-doubt burden of proof); ***City of Milwaukee v. Johnston***, 21 Wis.2d 411, 412-13, 124 N.W.2d 690, 692 (1963) (holding poor balance, odor of intoxicants, red face, bloodshot eyes and slurred speech sufficient to convict of ordinance violation).

Peterson puts forth no reasons to overturn the trial court's decision.

By the Court.—Judgment affirmed.

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