COURT OF APPEALS
DECISION
DATED AND RELEASED

April 15, 1997

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

NOTICE

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

No. 96-1553-CR

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

State of Wisconsin,

Plaintiff-Respondent,

v.

Steven Swenson,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ROBERT W. LANDRY, Reserve Judge, and MAXINE A. WHITE, Judge.[1] *Affirmed*.

Before Fine, Schudson and Curley, JJ.

[1] The Honorable Robert W. Landry presided over the trial and sentencing; the Honorable Maxine A. White presided over the postconviction motion.

PER CURIAM. Steven Swenson appeals from a judgment of conviction, following a jury trial, for homicide by intoxicated use of a motor vehicle, in violation of § 940.09(1)(a), STATS. (1991-92)[2], causing injury by intoxicated use of a vehicle, contrary to § 940.25(1)(a), STATS., and causing injury by intoxicated use of a vehicle, contrary to §§ 346.63(2)(a)1 & 346.65(3), STATS. He also appeals from an order denying his postconviction motion. Swenson argues: (1) that the trial court erred in admitting the statement he made to the police near the scene; (2) that the evidence was insufficient; (3) that the trial court erred in denying his request for an affirmative defense instruction; and (4) that his eight-year sentence is unduly harsh. We reject his arguments and affirm.

I. FACTUAL BACKGROUND

In the early morning hours of May 25, 1992, Swenson crossed the center line of the 35th Street viaduct and caused a head-on collision killing one person and seriously injuring two others. Following the accident, Swenson left the scene and went to a nearby gas station. Shortly thereafter, City of Milwaukee Police Officer Matthew Schulz found Swenson in the stall of the gas station's restroom and questioned him about his facial lacerations. Swenson told the officer that he had been in a fight. Concerned about Swenson's welfare, Officer Schulz called for an ambulance. Approximately fifteen minutes later, police arrested Swenson and escorted him to the Milwaukee County Medical Complex for treatment and blood work.

After receiving his ***Miranda***[3] warnings, Swenson waived his rights and stated that he had been driving northbound on the bridge, had looked down to adjust the radio, and that as he removed his eyes from the radio and looked up, the crash occurred. A blood test, drawn at 3:40 a.m., established Swenson's blood alcohol concentration (BAC) at .086%.

II. DISCUSSION

[2] All further references are to the 1991-92 Statutes unless otherwise noted.

[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

A. Statement

Swenson first argues that the trial court erred in denying his motion to suppress his first statement to the police. At the ***Miranda-Goodchild*** hearing, Officer Schulz testified that after he found Swenson hiding in the restroom of the gas station, he asked Swenson how he was injured. According to Officer Schulz, Swenson replied, "I was in a fight." Following the hearing, the trial court denied Swenson's motion concluding:

> Well, rulings on the various proffered statements by the defendant beginning with the first one which is ... "I was in a fight," this [statement] was outside the requirements of ***Miranda***. He was not in custody.... It falls outside of ***Miranda*** and will be allowed.

We agree.

For ***Miranda*** warnings to be required, a person must be in "custody" and under "interrogation" by the police. ***State v. Mitchell***, 167 Wis.2d 672, 686, 482 N.W.2d 364, 369 (1992). A person need not be under formal arrest to be in a custodial status requiring ***Miranda*** warnings. *See* ***State v. Pounds***, 176 Wis.2d 315, 322, 500 N.W.2d 373, 377 (Ct. App. 1993). To evaluate whether a person is in custody for Fifth Amendment ***Miranda*** purposes, courts must consider the totality of the circumstances and determine whether a "reasonable person in the defendant's position would have considered himself or herself to be 'in custody,' given the degree of restraint." ***State v. Swanson***, 164 Wis.2d 437, 446-47, 475 N.W.2d 148, 152 (1991). This court independently reviews a trial court's conclusions about whether certain undisputed facts establish custody and interrogation. *See* ***State v. Lee***, 175 Wis.2d 348, 354, 499 N.W.2d 250, 252 (Ct. App. 1993) (application of evidentiary or historical facts to constitutional principles presents questions of law independently reviewed on appeal).

Swenson claims that "as of the time of questioning, [he] was the target of a hit-and-run investigation and would not have been free to leave the scene. The inquiry by the officer was not for any other purpose than to derive information linking [him] to the accident, and thereby inculpating him." He

also contends that the environment in which he was questioned was isolated and coercive by its very nature.

The State counters by pointing out that, contrary to Swenson's assertion, the officer who questioned him about his injuries was not the arresting officer. Further, the State notes, it was Swenson, not the officer, who selected the location of the questioning. The State is correct. We conclude, therefore, that a reasonable person under the same or similar circumstances would not have believed he or she was in custody. Accordingly, the trial court properly denied Swenson's motion to suppress his initial statement to the police.

B. Sufficiency of Evidence

Swenson contends that the evidence was insufficient to convict him of the three crimes. We disagree.

The standards governing appellate review of the sufficiency of evidence to support a conviction are well-established.

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990) (citations omitted). We employ these standards regardless of whether the trial evidence was direct or circumstantial. ***Id.*** at 503, 451 N.W.2d at 756. We will not

substitute our judgment for that of the jury unless its verdict was based on evidence that was "inherently or patently incredible—that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts." ***State v. Tarantino***, 157 Wis.2d 199, 218, 458 N.W.2d 582, 590 (Ct. App. 1990).

The jury clearly had sufficient evidence upon which to find Swenson guilty. Michelle Powless, the driver of the other vehicle, testified that the last thing she remembered before the crash was seeing headlights straight ahead of her in the southbound lane. Officer Charles Harrison, an accident reconstruction expert, testified that the collision took place in the southbound lane. From this testimony, the jury could have inferred that it was Swenson who crossed over onto the wrong side of the road and caused the accident.

The evidence also established that Swenson was under the influence of an intoxicant. Officer Schulz testified that when he encountered Swenson at the gas station, Swenson had poor balance, an odor of alcohol, and slurred speech. Moreover, Swenson's behavior—hiding in the stall of the restroom—could have led the jury to infer that Swenson was trying to avoid detection because he knew that he was intoxicated.

In addition, the State introduced two expert witnesses. James Oehldrich, a forensic scientist in the Toxicology Section of the State Crime Lab, testified that Swenson's blood alcohol concentration at 3:40 a.m. was .086%. He calculated that Swenson's blood alcohol concentration would have been in a range between .101% to .121% at the time of the accident. Patricia Field, Chief of the Toxicology Section of the Wisconsin State Laboratory of Hygiene and Chairperson of the Committee on Alcohol Pharmacology and Technology for the National Safety Commission, testified that crossing over the center line of the road would be very consistent with driver intoxication, and that a BAC of .086% would impair judgment and coordination.

Defense expert, Roger Burr, offered a different opinion. He testified that Swenson's alcohol concentration could not have been as high as the State's expert opined. Burr nevertheless did concede that drinking can cause drowsiness and crossing a center line on dry pavement could be a symptom of someone who has had too much to drink.

In cases with conflicting expert testimony, it is the role of the trier of fact to determine weight and credibility. ***Schultz v. State***, 87 Wis.2d 167, 173, 274 N.W.2d 614, 617 (1979). Based on the evidence, the jury, acting reasonably, could have concluded beyond a reasonable doubt that Swenson was intoxicated; thus, the evidence was sufficient.

C. Jury Instructions

Swenson next argues that the trial court erred in refusing to give his requested affirmative defense instruction. The trial court rejected the request, stating that "[t]he affirmative defense has not been presented to the court. I'm not going to present it. That will not be included." We agree with the trial court.

A trial court has wide discretion regarding jury instructions. ***State v. McCoy***, 143 Wis.2d 274, 289, 421 N.W.2d 107, 112 (1988). A defendant is entitled to an instruction on a valid applicable theory of defense only where such instruction is supported by the credible evidence. ***Turner v. State***, 64 Wis.2d 45, 51-52, 218 N.W.2d 502, 505-06 (1974). Thus, the question is "whether a reasonable construction of the evidence [would] support the defendant's [theory of defense]." ***State v. Mendoza***, 80 Wis.2d 122, 153, 258 N.W.2d 260, 273 (1977).

Under §§ 940.09(2), 940.25(2), and 346.63(2)(b), STATS., as amended by 1989 Wis. Act 275, a defendant must establish, by a preponderance of the evidence, that the death, great bodily harm, or injury "would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant." Swenson contends that he was entitled to the instruction because the driver of the other vehicle had alcohol in her blood and because the accident occurred while he was adjusting the radio dial. We disagree.

First, the record does not establish that Swenson explained his basis for the affirmative defense instruction. In addition, Swenson's proposed instructions did not accurately set forth the law. Swenson's proposed instructions stated:

> Wisconsin law provides that it is a defense to the crime charged in this case if you are satisfied to a reasonable certainty by the greater weight of the credible evidence that the death would have occurred even if the defendant had not been under the influence.

The affirmative defense instruction under the statutes in question requires a defendant to prove that the death, great bodily harm or injury would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant. *See* §§ 940.09(2), 940.25(2), and 346.63(2)(b), STATS. Swenson's instructions failed to mention this requirement.

Additionally, based on the facts of the case, the instructions were inapplicable. The evidence established that Swenson's car was on the wrong side of the road when it collided with the other vehicle. The other vehicle was in the proper lane and any alcohol in the other driver's bloodstream was not an intervening cause. Even if the accident took place because Swenson was averting his eyes to adjust his radio dial, it resulted from his own failure to exercise due care, not from an intervening cause. Thus, the trial court correctly denied the request for an affirmative defense instruction.

D. Sentence

Swenson further claims that, in sentencing, the trial court erroneously exercised discretion and ordered a sentence that is unduly harsh. Swenson contends that the sentencing court "emphasized, to excess, the impact of the accident to (sic) the public" and gave "inordinate weight to the outcry and sentiment from the emotional victim's friends and relatives." We disagree.

In reviewing whether a trial court erroneously exercised its sentencing discretion, we consider whether the trial court considered appropriate factors and whether the trial court imposed an excessive sentence. ***State v. Glotz***, 122 Wis.2d 519, 524, 362 N.W.2d 179, 182 (Ct. App. 1984). Appellate review is tempered by a strong policy against interfering with the sentencing discretion of the trial court. ***State v. Larsen***, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). Further, the trial court is presumed to have

acted reasonably, and the defendant bears the burden of showing unreasonableness from the record. ***State v. Echols***, 175 Wis.2d. 653, 681-82, 499 N.W.2d 631, 640, *cert. denied*, 510 U.S. 889 (1993).

Our review is limited to a two-step inquiry. We first determine whether the trial court properly exercised discretion in imposing sentence. If so, we then consider whether the trial court imposed an excessive sentence. *See* ***Glotz***, 122 Wis.2d at 524, 362 N.W.2d at 182. When a defendant argues that his or her sentence is unduly harsh or excessive, we will find an erroneous exercise of discretion "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975).

The sentencing court must consider three primary factors: (1) the gravity of the offense; (2) the character of the offender; and (3) the need to protect the public. ***State v. Harris***, 119 Wis.2d 612, 623, 350 N.W.2d 633, 639 (1984). The trial court may also consider: the defendant's record; the defendant's history of undesirable behavior patterns; the defendant's personality, character and social traits; the presentence investigation reports; the viciousness or aggravated nature of the defendant's crime; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance or cooperativeness; the defendant's rehabilitative needs; the rehabilitative needs of the victim; the needs and rights of the public; and the length of the defendant's pretrial detention. ***State v. Jones***, 151 Wis.2d 488, 495-96, 444 N.W.2d 760, 763-64 (Ct. App. 1989). Additionally, the weight given each of these factors is within the trial court's discretion. ***State v. Curbello-Rodriguez***, 119 Wis.2d 414, 434, 351 N.W.2d 758, 768 (Ct. App 1984).

The record reflects the trial court's consideration of all the required sentencing criteria. The trial court referred to the gravity of the offense and the need to protect the public from the danger that drunk drivers pose to the community. The court referred to the defendant's failure to summon help after the crash, the lies he told investigating officers, and his previous OWI citation. In addition, the court noted that Swenson, who was only twenty years old, violated the law just by drinking alcohol. Thus, the record reveals that the trial

court considered the appropriate sentencing factors and adequately explained the bases for the sentence it imposed.

Further, we do not conclude that "the sentence is so excessive and unusual and so disproportionate to the offense committed so as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas***, 70 Wis.2d at 185, 233 N.W.2d at 461. Although the court sentenced Swenson to the statutory maximum, during sentencing the trial court was advised that the Wisconsin Legislature had increased the maximum penalty for violators of § 940.09(1)(a), STATS., from five years to ten years, effective January 1, 1993. Under the circumstances, and considering the death and devastation to the victims, the sentence was not unduly harsh or excessive.

By the Court. – Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.