COURT OF APPEALS
DECISION
DATED AND RELEASED

March 6, 1997

NOTICE

No. 96-2322-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TERRY A. GIVENS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Sauk County: VIRGINIA WOLFE, Judge. *Affirmed*.

DEININGER, J.[1] Terry Givens appeals from a judgment convicting her of operating a motor vehicle while under the influence of an intoxicant (OMVWI), a violation of § 346.63(1), STATS., as a second offense. She claims the trial court erred in denying her motion made at the close of the State's case, to dismiss for insufficient evidence. We conclude that the jury, acting reasonably, could find Givens guilty of OMVWI beyond a reasonable doubt on the evidence introduced at trial. Accordingly, we affirm.

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

The supreme court has established the following standard of appellate review when a defendant claims there is insufficient evidence to sustain a jury finding of guilt:

> The test is not whether this court or any member is convinced of the guilt of the defendant beyond a reasonable doubt but whether this court can conclude that a trier of facts could, acting reasonably, be convinced to the required degree of certitude by the evidence which it had a right to believe and accept as true. On review we view the evidence in the light most favorable to sustaining the conviction. Reasonable inferences drawn from the evidence can be used to support a conviction; if more than one reasonable inference can be drawn from the evidence, the inference which supports the conviction is the one that the reviewing court must adopt.

State v. Hamilton, 120 Wis.2d 532, 540-41, 356 N.W.2d 169, 173-74 (1984).

Givens concedes that the evidence before the jury established her operation of a motor vehicle on a highway. She claims, however, that since the State had no evidence of her blood alcohol concentration, the evidence of Givens' impaired driving due to intoxication was "circumstantial" and insufficient to exclude "any reasonable hypothesis of innocence." *See* ***State v. Shaw***, 58 Wis.2d 25, 29, 205 N.W.2d 132, 134 (1973).

We are not convinced that the evidence presented by the State in this case is properly termed "circumstantial."[2] It consists entirely of personal observations of Givens by the arresting officer and the officer's opinion as to her intoxication. A blood alcohol test result is not a necessary element of proof in an OMVWI prosecution. ***State v. Burkman***, 96 Wis.2d 630, 642-43, 292 N.W.2d 641, 647 (1980).

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[2] BLACK'S LAW DICTIONARY 243 (6th ed. 1990), defines "circumstantial evidence" as follows: "Testimony not based on actual personal knowledge or observation of the facts in controversy, but of other facts from which deductions are drawn, showing indirectly the facts sought to be proved."

Regardless of whether the State's case is deemed "circumstantial," however, our analysis is the same.[3] The supreme court has observed that circumstantial evidence, if believed by the jury, is as capable of supporting a guilty verdict as is "direct" evidence:

> Circumstantial evidence may be and often is stronger and as convincing as direct evidence. The same rule of the burden of proof in a criminal case applies to circumstantial evidence as to positive, direct evidence; and in both cases the evidence must be sufficiently strong and convincing to establish the facts of guilt beyond a reasonable doubt in the mind of the trier of the facts.

State v. Johnson, 11 Wis.2d 130, 134-35, 104 N.W.2d 379, 381 (1960).

The only witness at trial was the arresting officer, who testified to his observations of Givens and gave his opinion as to her intoxication. The officer's testimony included the following: Givens drove down the centerline of State Highway 12; there was a strong odor of intoxicants on her breath; she admitted to having a "couple shots"; her eyes were bloodshot and her speech slurred; she used her hand against her car as a "crutch" when walking; she failed three field sobriety tests by, among other things, swaying back and forth, missing her nose with her finger, side-stepping for balance and reciting letters of the alphabet in the incorrect order. The officer further testified that Givens was uncooperative during booking and that she refused to take an Intoxilyzer test. He gave his opinion, based on his training and five years experience as a patrol officer, that Givens "was too intoxicated to be operating a motor vehicle on a highway."

Givens' counsel cross-examined the officer and established that the initial traffic stop and field sobriety tests took about five to seven minutes and that the "informing the accused" procedure prior to the refusal took a similar amount of time. The officer conceded during cross-examination that a

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[3] The Wisconsin Supreme Court has held that the "reasonable hypothesis of innocence" rule contained in ***Shaw*** is not "in any way applicable" in reviewing the sufficiency of the evidence. ***State v. Poellinger***, 153 Wis.2d 493, 506, 451 N.W.2d 752, 757 (1990).

Wisconsin State Patrol training manual includes a statement that "persons not under the influence of alcohol were just as likely to `fail' [tests similar to those administered to Givens] as those who were impaired." Givens did not testify or offer any testimony and "relies on [her] presumption of innocence and [the] claimed insufficiency of the evidence." *See* ***State v. Johnson***, 11 Wis.2d 130, 134-35, 104 N.W.2d 379, 381 (1960).

The jury heard the officer's testimony and chose to accept his opinion that Givens' operation of her vehicle was impaired by intoxication,[4] despite the cross-examination tending to diminish the basis for the officer's opinion. The jury is the sole judge of witness credibility. See ***State v. Toy***, 125 Wis.2d 216, 222, 371 N.W.2d 386, 389 (Ct. App. 1985). We conclude that the jury, acting reasonably, could beyond a reasonable doubt conclude from the testimony summarized above that Givens was operating her vehicle while under the influence of an intoxicant.

By the Court.—Judgment affirmed.

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

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[4] The jury was instructed that:

> "Under the influence" of an intoxicant means that the defendant's ability to operate a vehicle was impaired because of consumption of an alcoholic beverage.
>
> Not every person who has consumed an alcoholic beverage is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.
>
> It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

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