**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

May 29, 1997

**NOTICE**

**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.**

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

**No. 96-2550**

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

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**CITY OF MADISON,**

**PLAINTIFF-RESPONDENT,**

**v.**

**JENS W.L. HINRICHSEN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

VERGERONT, J.[1] Jens Hinrichsen appeals from a conviction for operating a motor vehicle while under the influence of an intoxicant (OWI) and driving with a prohibited alcohol concentration in violation of § 12.64(1)(a) and

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

(b) MADISON GENERAL ORDINANCES, which adopt § 346.63(1)(a) and (b), STATS.[2] He makes these arguments on appeal: (1) there was no probable cause to arrest; (2) the trial court erred in excluding certain evidence; (3) the evidence was insufficient to support the verdict; and (4) he had a right to free legal assistance and expert testimony because he was unable to afford them. We reject each contention and affirm.

Hinrichsen was arrested in the early morning of December 16, 1995. Madison Police Officer Jeffrey McPike, who had been dispatched to the scene based on a citizen call, found Hinrichsen alone and unconscious in the driver's seat of his car, which was parked on the street. The car's engine was running. Officer McPike woke Hinrichsen and asked if he was okay. Hinrichsen said he was, but he was feeling ill. Hinrichsen was not wearing a coat or shoes, and there was vomit on his shoes. The officer testified that he noticed a strong odor of intoxicants coming from the vehicle and that Hinrichsen's speech was slurred. Hinrichsen acknowledged he had been drinking. After administering field sobriety tests, the officer arrested Hinrichsen for OWI and took him to the police station. There an intoxilyzer test was administered and, when the tests results showed a breath alcohol concentration (BAC) of .11 grams per 210 liters of breath, the officer issued a citation for driving with a prohibited alcohol concentration.

[2] "Prohibited alcohol concentration" for a person who has no prior conviction, such as Hinrichsen, means .10 grams or more in 210 liters of the person's breath. Section 340.01(46m)(a), STATS.

Prior to trial,[3] the State filed a number of motions in limine, which we will discuss in more detail below. Hinrichsen represented himself at trial. The jury returned a verdict of guilty on both charges. The court entered a judgment of conviction on both counts and sentenced Hinrichsen on the OWI count, imposing a forfeiture of $250 plus costs and surcharges, suspension of operating privileges for 240 days and mandatory alcohol and drug abuse assessment pursuant to § 343.30(1q)(c), STATS.[4] The trial court granted a stay of the penalties and suspension pending appeal.

Hinrichsen first challenges the propriety of his arrest. However, he does not indicate that he raised this issue before the trial court, and we see no evidence in the record that he did. In order to challenge an arrest on appeal, the defendant must preserve the issue by bringing a motion before the trial court. *See* ***Lampkins v. State***, 51 Wis.2d 564, 570-71, 187 N.W.2d 164, 167 (1971). Since Hinrichsen did not do so, we do not address this issue.

Hinrichsen next argues that the trial court erred in granting the State's motion in limine, excluding certain evidence that Hinrichsen wished to present at trial. Specifically, Hinrichsen contends that he should have been permitted to present certain learned treatises and to present his views on the effects on human beings of cold temperatures, carbon monoxide and gas fume exposure.

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[3] Hinrichsen was found guilty of both charges after a trial in Madison municipal court and requested a trial de novo before a six-person jury in circuit court pursuant to § 800.14(4), STATS.

[4] When a person is found guilty under both § 346.63(1)(a) and (b), STATS., based on the same incident, there is a single conviction for purposes of sentencing and for purposes of counting convictions under certain statutes. Section 346.63(c).

Rulings on the admissibility of evidence are committed to the trial court's discretion. *See* ***State v. Migliorino***, 170 Wis.2d 576, 590, 489 N.W.2d 678, 683 (Ct. App. 1992). We affirm such rulings if the trial court applied accepted legal standards to the facts of record and had a reasonable basis for its decision. ***Id.*** We conclude that the trial court properly exercised its discretion with respect to each of the challenged evidentiary rulings.

The trial court did not permit Hinrichsen to introduce certain writings on hypothermia and carbon monoxide poisoning as learned treatises. The court concluded they were hearsay and did not meet the requirements for the learned treatise exception to hearsay in § 908.03(18), STATS.[5] First, Hinrichsen did not provide notice to opposing counsel at least forty days before trial as required by § 908.03(18)(a), STATS. Second, he did not have an expert witness to testify that the writers of these materials were recognized as experts in their field, and the court did not have the information necessary to take judicial notice. The

[5] Section 908.03(18)(a), STATS., provides:

> LEARNED TREATISES. A published treatise, periodical or pamphlet on a subject of history, science or art is admissible as tending to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the writer of the statement in the treatise, periodical or pamphlet is recognized in the writer's profession or calling as an expert in the subject.
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> (a) No published treatise, periodical or pamphlet constituting a reliable authority on a subject of history, science or art may be received in evidence, except for impeachment on cross-examination, unless the party proposing to offer such document in evidence serves notice in writing upon opposing counsel at least 40 days before trial. The notice shall fully describe the document which the party proposes to offer, giving the name of such document, the name of the author, the date of publication, the name of the publisher, and specifically designating the portion thereof to be offered. The offering party shall deliver with the notice a copy of the document or of the portion thereof to be offered.

trial court also did not permit Hinrichsen to testify to the effects of hypothermia, carbon monoxide and gas fume inhalation on humans because, after questioning him about his education and experience, the court determined that he did not possess any expertise with respect to these topics. The court did permit Hinrichsen to testify to the physical symptoms and feelings he experienced that night. In making each of these rulings, the trial court elicited and considered the relevant facts, considered Hinrichsen's argument, applied the correct law, came to a reasonable conclusion, and carefully and thoroughly explained its reasoning.

Hinrichsen challenges the sufficiency of the evidence to support the jury determination that he was operating a motor vehicle, that he had a prohibited BAC level, and that he was driving while under the influence of an intoxicant. The challenge to the determination that he was operating the vehicle also appears to include a challenge to the jury instruction defining "operate" as "the physical manipulation or activation of any controls of a motor vehicle necessary to put it in motion … includ[ing] either turning on the engine or leaving the motor running while the vehicle is in park."

The State had to prove each element of the charges against the defendant by clear, satisfactory and convincing evidence. *See* ***Monroe County v. Kruse***, 76 Wis.2d 126, 130, 250 N.W.2d 375, 377 (1977). On appeal, we affirm the jury's verdict unless the evidence, viewed most favorably to the State and the conviction, is so lacking in probative value that no reasonable jury could have found Hinrichsen guilty of the charges by clear, satisfactory and convincing evidence. *See* ***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990).

The evidence was sufficient to prove that Hinrichsen was operating his vehicle by clear, satisfactory and convincing evidence. In ***Milwaukee County v. Proegler,*** 95 Wis.2d 614, 626, 291 N.W.2d 608, 613 (Ct. App. 1980), we held that operation of a vehicle within the meaning of § 346.63(3)(a), STATS., includes either turning on the ignition or leaving the motor running while the vehicle is in "park." That section defines "operate" as "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." While Hinrichsen attempts to draw factual distinctions between ***Proegler*** and this case, none of the distinctions make the definition of "operate" in ***Proegler*** inapplicable in this case. The jury instruction defining "operate" was a correct statement of the law.

The evidence was also sufficient to support a determination, according to the requisite burden of proof, that Hinrichsen was operating his vehicle while under the influence of an intoxicant. There was evidence that Hinrichsen had between five and seven twelve-ounce cans of beer plus a partial glass of beer during the evening. There was evidence that he was parked in a bus loading zone without emergency flashers on, there was an odor of alcohol when he got out of the car, his speech was slurred, he had vomited on himself, he was unsteady on his feet, and he failed the field sobriety tests. In his defense, Hinrichsen presented his version of events. He testified that he had a sudden and undiagnosed abdominal ailment, and that is why he stopped the car and why he vomited. He decided to stay in the car and sleep off the illness because it was cold out and he was sick, and he kept the engine on to keep warm. Through cross-examination of Officer McPike, Hinrichsen suggested his own explanation for his poor performance on the field sobriety tests--the cold and having just been awakened. It was for the jury to determine how to credit and weigh Hinrichsen's

testimony. It could reasonably reject his explanations and determine instead that he was under the influence of an intoxicant.

The evidence was also sufficient to support a determination, according to the requisite degree of proof, that Hinrichsen was operating a motor vehicle with a prohibited BAC level. Much of Hinrichsen's argument here is based on evidence that was not received in evidence which, according to Hinrichsen, shows that the intoxilyzer test results were affected by carbon monoxide and gas fumes in his blood. We have already affirmed the trial court's rulings excluding this evidence, and we do not consider it in assessing the sufficiency of evidence to support the jury's verdict. The jury heard evidence that a licensed intoxilyzer analyst administered the intoxilyzer test, and instructed Hinrichsen how to perform it. Hinrichsen complied with the instructions, and provided two adequate breath samples for analysis. The intoxilyzer was functioning properly and reported Hinrichsen's BAC as .11gms/210 liter of breath. This evidence was not successfully impeached by Hinrichsen.

Finally, Hinrichsen argues that he was entitled to have free representation by counsel and free expert testimony because he could not afford either, and this hampered him in presenting his defense. Hinrichsen does not have a constitutional right to counsel for a first offense violation of § 346.63(1), STATS., *see* ***State v. Novak,*** 107 Wis.2d 31, 41, 318 N.W.2d 364, 369 (1982); and there is no statutory entitlement. The same is true with respect to expert testimony. We do not disagree with Hinrichsen's contention that a person proceeding without the assistance of counsel may be hampered in presenting a defense for that reason. However, we have reviewed the record carefully and we are impressed with the

trial court's efforts to make sure that Hinrichsen understood the proceedings and had a fair opportunity to present his evidence and arguments.[6]

The State asks that we declare Hinrichsen's appeal frivolous and award the State double cost, fees and reasonable attorney fees under §§ 809.25(3) and 809.83, STATS. The State argues that the appeal was brought in bad faith because Hinrichsen has not raised issues of appellate law or presented legal argument. The State points to an ex parte motion Hinrichsen filed to supplement the record before this court and his subsequent inclusion of those items in the appendix to his brief as evidence of his bad faith. The State also argues that because Hinrichsen lost before the municipal court and the trial court, he knew or should have known that the issues he raises on appeal are without legal basis in law, equity or fact, and he has failed to advance any good faith argument for an extension, modification or reversal of existing law.

In an earlier order in response to another portion of the State's motion, we struck the materials from the appendix to Hinrichsen's brief but accepted the remainder of the brief for filing, although we recognized that Hinrichsen had not strictly complied with the formatting requirements. We held in abeyance the portion of the motion asking for sanctions. We now decline to award any sanctions. We are not persuaded that the evidence the State points to shows bad faith, as opposed to a lack of understanding of proper procedure. We also conclude that, although the arguments Hinrichsen presents on appeal can best be described as weak, they are not all so lacking in merit that sanctions are warranted.

[6] Hinrichsen asks for monetary compensation in the amount of $1,500 as reimbursement for his court-related expenses. He provides no legal authority for this request and we do not consider it.

*By the Court.*—Judgment affirmed.

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