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. 96-3042

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

CITY OF BARABOO,

PLAINTIFF-RESPONDENT,

v.

EDWIN E. TESKE,

DEFENDANT-APPELLANT.

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

DEININGER, J.[1] Edwin Teske appeals a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant (OMVWI), contrary to § 346.63(1)(a), STATS. He claims the trial court erred by instructing the jury that it could find that Teske was OMVWI based on blood and breath

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

alcohol test results alone, and by not giving his requested alternate instruction regarding alcohol absorption/elimination evidence. We conclude the trial court did not erroneously exercise its discretion in instructing the jury as it did. Accordingly, we affirm the conviction.

BACKGROUND

At 10:55 p.m. on June 29, 1995, a Baraboo police officer observed Teske back his truck out of a parking stall across a full lane of traffic, make a right turn from an improper traffic lane without proper signaling and weave from the street center line to the parking lane and back. After the officer stopped Teske, she observed that he had slurred speech, unsteady balance, a moderate odor of alcohol on his breath, and difficulty in locating his driver's license. She had Teske perform three field sobriety tests (horizontal gaze nystagmus, walk and turn, and one-legged stand), all of which indicated impairment. The officer arrested Teske, transported him to the police station, and obtained a breath alcohol test result of .11 grams of alcohol per 210 liters of breath at 11:47 p.m. A blood sample was drawn at a local hospital at 1:00 a.m., and was later analyzed to have .142 percent blood alcohol concentration.

At trial, two witnesses testified for the City of Baraboo: the arresting officer and a toxicologist. The officer described her observations of Teske's driving, his performance on field sobriety tests and the Intoxilyzer testing procedure and result. The toxicologist testified to her analysis of a sample of Teske's blood, which was drawn when Teske requested an additional test under § 343.305, STATS. The toxicologist was extensively cross-examined on alcohol absorption and elimination rates, the correlation of blood test and breath test results and the "blood alcohol curve." Teske did not testify and called no

witnesses, but did introduce a State of Wisconsin publication entitled "Basic Training Program for Breath Examiner Specialist, Student Study Guide," which in Part D discusses the "Pharmacology and Physiology of Alcohol."

At the instructions conference, Teske requested that a version of the "elements of OMVWI" instruction be given which includes the following language:[2]

> [Breath and blood test results] are relevant evidence to the question of whether the defendant was under the influence of an intoxicant … at the time of the alleged operating. Evidence has also been received as to how the body absorbs and eliminates alcohol. You may consider the evidence regarding the analyses of the breath and blood samples and the evidence of how the body absorbs and eliminates alcohol along with all the other evidence in the case, giving the analyses just such weight as you determine them to be entitled.

The trial court, however, declined to give the alternative language, and instead instructed the jury on the "prima facie" effect of the test results:[3]

> If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that there was point one zero grams or more of alcohol in 210 liters of the defendant's breath [.10 percent or more of alcohol in the defendant's blood] at the time the test was taken you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged operating, … but you are not required to do so.

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[2] Teske's request is based on language in footnote 12 of WIS J I—CRIMINAL 2663 and WIS J I—CRIMINAL 234.

[3] *See* WIS J I—CRIMINAL 2663. The trial court read separate paragraphs for the breath test and blood test results.

The jury was asked to return three verdicts: one for OMVWI; one for "prohibited alcohol concentration" (PAC), based on the breath test; and one for PAC based on the blood test. *See* § 346.63(1)(b), STATS. The jury returned guilty verdicts on all three. The court entered judgment only for OMVWI, from which Teske appeals. *See* § 346.63(1)(c), STATS.

ANALYSIS

A trial court may exercise broad discretion in deciding whether to give a requested jury instruction. ***State v. McCoy***, 143 Wis.2d 274, 289, 421 N.W.2d 107, 112 (1988). If the instructions given adequately cover the law applied to the facts, we will not find error in refusing special instructions even though, if given, they, too, would not be erroneous. ***State v. Amos***, 153 Wis.2d 257, 278, 450 N.W.2d 503, 511 (Ct. App. 1989). "'A defendant is entitled to an instruction on a valid theory of defense, but not to an instruction that merely highlights evidentiary factors. Such instructions are improper, and trial courts are correct if they reject them.'" ***State v. Morgan***, 195 Wis.2d 388, 448, 536 N.W.2d 425, 448 (Ct. App. 1995) (quoted source omitted).

Teske first argues that the trial court erred by instructing the jury that it could find that Teske was OMVWI from the chemical test results alone. *See* § 885.235, STATS.[4] Citing ***State v. Vick***, 104 Wis.2d 678, 312 N.W.2d 489 (1981),

[4] Section 885.235, STATS., provides in relevant part as follows:

> (1) In any action or proceeding in which it is material to prove that a person was under the influence of an intoxicant or had a prohibited alcohol concentration or a specified alcohol concentration while operating or driving a motor vehicle … evidence of the amount of alcohol in the person's blood at the time in question, as shown by chemical analysis of a sample of the person's blood or urine or evidence of the amount of alcohol in the person's breath, is admissible on the issue of whether he or

(continued)

Teske claims that the supreme court has held "that such an instruction is not proper *unless* the evidence in the case makes it more probable than not that the driver's alcohol concentration at the time of testing was lower than at the time of driving." This is incorrect. The supreme court stated in ***Vick***:

> *The issue ... is whether the presumed fact that defendant was under the influence of an intoxicant at the time of driving "more likely than not" flows from the proven fact of intoxication at time of testing*. The trial judge was satisfied, under all the evidence before him, that this test was met. We conclude that he did not abuse his discretion in issuing the jury instruction.

Id. at 695, 312 N.W.2d at 498 (emphasis added). Thus, for OMVWI, which is the only offense under consideration on this appeal, the precise level of Teske's blood or breath alcohol concentration at the time of driving, and whether it is higher or lower than at the time of testing, is not critical to the giving of the presumption instruction. What is required is that, under all of the evidence in the case, the fact of intoxication, as shown by tests given one and two hours after Teske's arrest,

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> she was under the influence of an intoxicant or had a prohibited alcohol concentration or a specified alcohol concentration if the sample was taken within 3 hours after the event to be proved. The chemical analysis shall be given effect as follows without requiring any expert testimony as to its effect:
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> ….
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> (a)2.(c) 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 was under the influence of an intoxicant and is prima facie evidence that he or she had an alcohol concentration of 0.1 or more.

makes it more likely than not that he was "under the influence of an intoxicant" while driving.[5]

In ***Vick***, an expert testified regarding alcohol absorption and elimination, and the State's expert acknowledged that he was unable "without additional facts" to state what the defendant's blood alcohol level was at the time of driving. ***Vick,*** 104 Wis.2d at 683-84, 312 N.W.2d at 492. Unlike in this case, however, there was some evidence in ***Vick*** regarding what food and alcohol the defendant had consumed and when he had done so. ***Id.*** at 682-85, 312 N.W.2d at 491-93. The court summarized the evidence as follows:

> The state introduced evidence which, although refuted by the defendant, demonstrated: (1) Defendant told a police officer that he had been drinking earlier in the afternoon; (2) Defendant failed a field sobriety test at the time of arrest; (3) Defendant had been driving erratically; (4) Defendant was uncooperative at the time of arrest; (5) Defendant possessed an odor of alcohol; (6) Defendant admitted having two drinks shortly before his arrest; (7) Defendant's speech was slurred; (8) Defendant had a blood alcohol level in excess of 0.13 percent at the time of testing, some 36 minutes after his arrest. Defendant introduced evidence to account for the above which the jury was free to accept or reject. Indeed, our review of the lengthy transcript of the trial proceedings leaves us with no doubt that the defendant had amply set forward his theory of the case: namely, even though defendant may have been intoxicated at the time of testing, he was not intoxicated at

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[5] "Under the influence of an intoxicant" means:

> [T]he defendant's ability to operate a vehicle was impaired because of the consumption of an alcoholic beverage.
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> …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.

WIS J I—CRIMINAL 2663 (footnote omitted).

> the time of arrest. The jury was apprised of expert testimony to the effect that the expert could not state from the breathalyzer test results what defendant's blood alcohol level would have been at the time of defendant's arrest. *We believe it entirely rational that a reasonable jury could have drawn the permissive inference from all the facts before it that it was more likely than not that if defendant were intoxicated at the time of testing, that he was intoxicated at the time of arrest.*

Id. at 695-96, 312 N.W.2d at 497-98 (emphasis supplied).

Here, as the trial court observed, there was no evidence in the record regarding "specifics of the defendant's behavior" prior to his arrest: "I think there has been expert testimony in general about absorption and elimination of alcohol, but nothing that indicates any specifics what this defendant did." We conclude that based on the evidence in the present case, the trial court could, as did the trial court in ***Vick***, reasonably conclude that "the presumed fact that [Teske] was under the influence of an intoxicant at the time of driving 'more likely than not' flow[ed] from the proven fact of intoxication at time of testing." *See* ***Vick***, 104 Wis.2d at 695, 312 N.W.2d at 498. We therefore conclude that the trial court did not erroneously exercise its discretion in giving the presumption instruction.

Next, Teske argues that the trial court's refusal to give his requested absorption/elimination instruction, instead of the presumption instruction, required him to "prove his innocence" to avoid an instruction "that allowed him to be found guilty based solely on the test result." We have concluded above that the trial court did not err in giving the presumption instruction. Teske argues, however, that by refusing to give his proposed instruction, the court impermissibly shifted the burden of proof away from the City to show his guilt and onto him to show his innocence. We disagree, and conclude that the trial court did not abuse its discretion in refusing to give Teske's requested instruction.

We note first that the defendant in ***State v. Vick*** made an identical argument, i.e., that "th[e] instruction allows the state to escape its burden of proof" regarding the defendant's intoxication at the time of operating a motor vehicle. ***Id.*** at 692, 312 N.W.2d at 496. There, the supreme court held that the § 885.235, STATS., presumption does not shift the burden of proof because it:

> affects the application of the 'beyond a reasonable doubt' standard only if, under the facts of the case, there is *no rational way* the trier [of fact] could make the connection permitted by the inference. For only in that situation is there any risk that an explanation of the permissible inference ... has caused the presumptively rational factfinder to make an erroneous factual determination.

Id. at 695, 312 N.W.2d at 497-98 (quoting ***County Court of Ulster County v. Allen***, 442 U.S. 140, 157 (1979)) (emphasis in ***Vick***). We thus conclude that the presumption instruction did not impermissibly shift the burden of proof.

Furthermore, we note that even in criminal cases, a defendant is not automatically entitled to a so-called "theory of defense" instruction. ***State v. Stoehr***, 134 Wis.2d 66, 87, 396 N.W.2d 177, 185 (1986). We recognize that the dispute here does not involve a true theory of defense instruction, but which instruction regarding the City's proof of the elements of OMVWI should have been given. It remains true, however that the trial court need not give a requested instruction "'unless the evidence reasonably requires it,'" and that the determination "'turns on a case-by-case review of the evidence.'" ***Id.*** (quoted source omitted).

We conclude that based on the evidence in the present case, Teske is no more deserving of an instruction other than the one given than was the defendant in ***Vick***; in fact, probably less so. Moreover, even if we were to

conclude otherwise, we would not reverse unless there were a probability and not just a possibility that the jury was misled by the instruction given. ***Fischer v. Ganju***, 168 Wis.2d 834, 849-50, 485 N.W.2d 10, 16 (1992). Given the arresting officer's testimony regarding Teske's erratic driving, his appearance, demeanor and field test performance, we cannot so conclude. We therefore affirm the conviction.

By the Court.—Judgment affirmed.

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