COURT OF APPEALS
DECISION
DATED AND RELEASED

April 24, 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. 96-3382-FT

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RICHARD W. HORN,

DEFENDANT-APPELLANT.

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

DYKMAN, P.J. This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS. Richard W. Horn appeals from a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant (OMVWI), contrary to § 346.63(1), STATS. He argues that the trial court erred in admitting evidence of the horizontal gaze nystagmus (HGN) field sobriety test administered to him by the arresting officer. Assuming, *arguendo*, that admission of the HGN

test evidence was error, that error was harmless. Accordingly, we affirm the trial court's judgment.

The State charged Horn with both OMVWI and operating a motor vehicle with a prohibited blood alcohol concentration (BAC), in violation of § 346.63(1)(a) and (b), STATS. Horn pleaded not guilty and demanded a jury trial. Before trial, Horn moved for suppression of all evidence pertaining to the HGN test on the grounds that the test is scientific evidence and the officer who administered the test could not be qualified as an expert. The trial court denied Horn's motion.

At trial, Officer Darrell Hill of the Wisconsin State Patrol was first to testify. He stated that on April 19, 1996 at a little after 8:00 p.m., he was driving on Highway 14 between Viroqua and Readstown when his radar indicated that the vehicle approaching him was traveling sixty-seven miles per hour. The speed limit was fifty-five. Officer Hill activated his emergency lights, turned around and followed the speeding vehicle. The vehicle pulled over to the shoulder of the road. Hill walked to the driver's side of the vehicle, and Horn handed him his driver's license.

Officer Hill noticed that Horn's eyes were bloodshot and smelled an odor of intoxicants coming from the vehicle. He asked Horn to exit the vehicle to perform field sobriety tests. Horn lost his balance as he exited his vehicle. Hill asked Horn to recite the alphabet. Horn said the alphabet correctly, although hesitantly during N, O, P and Q.

Horn then performed the HGN test. Nystagmus is a jerking of the eyeball that is magnified by alcohol consumption. During the HGN test, the officer checks to see if the subject's eyes can pursue a moving object smoothly, if

the subject's eyes shake at their maximum deviation, and if nystagmus begins prior to the eyes deviating more than forty-five degrees from their center point. Officer Hill noticed nystagmus in both of Horn's eyes during all three tests.

Next, Hill gave Horn instructions on how to perform the one-legged stand test. During this test, the subject holds one leg six inches above the ground, slightly points his toe, keeps his hands at his side and counts to thirty before placing his foot back down. When Horn attempted to perform the test, he raised his arms for balance and put his foot down at the count of three. Horn then attempted the test again, but again raised his arms and put his foot down on the count of six.

The final test performed by Horn was the walk-and-turn test. Hill administered the test on the gravel shoulder instead of on the side of the road for safety purposes. Hill instructed Horn to take nine heel-to-toe steps down an imaginary line while keeping his hands at his side, counting his steps as he goes. Hill was then to turn and take nine steps back. After receiving the instructions, Horn asked how many steps he was to take. Hill again said nine. Horn started the test. He left space between his steps, used his arms extensively for balance and counted "one thousand one, one thousand two, one thousand three" for his steps. He took twelve instead of nine steps, turned, and took twelve steps back. Hill videotaped the field sobriety tests from a camera in his squad car. This videotape was played for the jury.

Based on his observations, Hill concluded that Horn was intoxicated, placed him under arrest and brought him to the Vernon County Sheriff's Department. While Horn was at the sheriff's department, he signed several documents accurately and legibly.

Officer Jim Kuhn of the State Patrol was next to testify. He stated that on April 19, 1996, he performed an Intoxilyzer 5000 test on Horn. The Intoxilyzer 5000 measures the percentage of alcohol in an individual's blood by use of their breath. Horn's test measured .13%. Based on his observations, Kuhn thought that Horn was under the influence of an intoxicant.

Sue Salmon testified next. On April 19, 1996, she met Horn at Bowl-A-Way Lanes at about 6:30 p.m. Horn was sitting at the bar with a beer in front of him. Horn ordered one more beer before Salmon left forty-five minutes later. Salmon did not believe that Horn was intoxicated at that point.

Finally, Horn testified on his own behalf. He stated that on April 19, 1996, he went to the Viking Inn at 3:30 p.m. and had one ten-ounce beer. He left around 4:00 p.m. and arrived at Bowl-A-Way Lanes between 4:00 and 4:15 p.m. He drank four twelve-ounce cans of beer before leaving between 7:30 and 7:45 p.m. When the officer pulled him over, he felt "a little bit of a warm feeling and relaxed," but otherwise normal. He did not believe that his ability to drive safely was impaired.

The jury found Horn guilty of both OMVWI and BAC. The court entered judgment on the OMVWI charge and dismissed the BAC charge pursuant to § 346.63(1)(c), STATS.[1] Horn appeals from the OMVWI conviction, arguing that evidence of the HGN test was inadmissible.

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[1] Section 346.63(1)(c), STATS., provides:

> A person may be charged with and a prosecutor may proceed upon a complaint based upon a violation of par. (a) or (b) or both for acts arising out of the same incident or occurrence. If the person is charged with violating both pars. (a) and (b), the offenses shall be joined. If the person is found guilty

(continued)

We do not need to consider whether the trial court erroneously admitted evidence of Horn's HGN test without expert testimony. We conclude that any error made in admitting evidence of the HGN test was harmless. An error is harmless if there is no reasonable probability that it contributed to the conviction. ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985). "Our task is to examine the erroneously admitted evidence and the remainder of the untainted evidence in context to determine whether the error was harmless." ***State v. Harris***, 199 Wis.2d 227, 256, 544 N.W.2d 545, 557 (1996).

The remaining evidence provided a sufficient basis on which to find Horn guilty of OMVWI. Horn's Intoxilyzer test resulted in a .13% reading. This is prima facie evidence that Horn was under the influence of an intoxicant. *See* § 885.235(1)(c), STATS. In addition, Horn lost his balance as he exited his vehicle; stated part of the alphabet hesitantly and haltingly; failed to keep his hands at his side and his foot up during the one-legged stand test; and used his arms for balance, failed to keep feet together and did not take the appropriate number of steps during the walk-and-turn test. The jury saw these field sobriety tests on videotape. The jury's finding that the State established by clear, satisfactory and convincing evidence that Horn operated a motor vehicle while under the influence of an intoxicant is well supported in the record. There is no reasonable possibility that evidence of the HGN test contributed to the conviction. Accordingly, admission of the HGN test results, if error, was harmless.

By the Court.—Judgment affirmed.

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of both pars. (a) and (b) for acts arising out of the same incident or occurrence, there shall be a single conviction for purposes of sentencing and for purposes of counting convictions under ss. 343.30(1q) and 343.305. Paragraphs (a) and (b) each require proof of a fact for conviction which the other does not require.

Not recommended for publication in the official reports. *See* Rule 809.23(1)(b)4, STATS.