

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

April 22, 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. 96-3520-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

EDGARS OSIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

WEDEMEYER, P.J.¹ Edgars Osis appeals from a judgment of conviction after a jury found him guilty of unlawfully operating a motor vehicle while under the influence of an intoxicant contrary to §§ 346.63(1)(a) and 346.65(2), STATS. Osis claims the evidence introduced at trial was insufficient to support the guilty verdict. Because the evidence adduced at trial was not so

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

lacking in probative value that it could be said as a matter of law that no reasonable trier of fact could have reached the conclusion that Osis was operating a motor vehicle while under the influence, this court affirms.

I. BACKGROUND

This appeal has its genesis in the diametrically opposed testimony of the only two witnesses in this case: the arresting deputy sheriff and the defendant. The following is a summary of each's testimony.

According to Osis, at 10 p.m., on April 23, 1995, he met a friend at Kelly's Bleachers, a sports bar located on West Bluemound Road in Milwaukee. He remained there until 2 a.m. During this time he talked with his friend, listened to the music provided by a band, and consumed five 12-ounce glasses of beer. At 2 a.m., he left Kelly's, drove to a service station where he purchased a package of cigarettes, and then proceeded south to the expressway. He felt normal, had no problem driving, and denied that he was "drunk." When he reached the expressway, he drove east. He kept his car under the speed limit but was not driving abnormally slow. He was not weaving from lane-to-lane, did not cut off any cars, and did not recall driving on the "gore" part of the expressway. After he reached the end of the expressway, he turned left and proceeded north on Lincoln Memorial Drive where he stopped at a red traffic light. While stopped, the arresting deputy pulled up behind him and flashed his red and blue lights. Osis turned on his signal light and pulled over to the curb. The deputy approached his car and asked for his driver's license. He complied. The deputy asked if he had been drinking and he replied "five beers." At the deputy's request, he got out of the car without difficulty. Next, the deputy asked him to recite the alphabet. Osis said he was "not too strong with the English alphabet" but he could recite the

Latvian version because it was very close to the American. The deputy asked him to “try English.” Osis explained “I not exactly explain or I not finish whole alphabet.” Next, the deputy asked him to perform the heel-to-toe test, first showing him how to do it. As instructed, Osis said he took the nine steps required, turned around, and returned. He denied walking off the imaginary line or falling into the arms of the deputy. He also denied blurting out at that time that he was “drunk.” Lastly, he was asked to perform the finger-to-nose test, but he did not remember exactly how he performed that test.

Deputy Sheriff Scott Stiff testified as follows. At approximately 2:30 a.m., while patrolling the expressway, he observed a Pontiac driven by Osis forty feet in front of him. He observed the Pontiac weave into the gore area (stopping lane) for about thirty feet and then weave back out across two lanes. He observed the car exit the expressway onto Lincoln Memorial Drive and then make an abrupt stop at a red light located on East Michigan Street. After he activated his lights and Osis pulled over to the curb, he approached the Pontiac and spoke to Osis. He noticed that Osis had slurred speech, smelled of alcohol, and had red, glassy, bloodshot eyes. Deputy Stiff asked Osis if he had been drinking prior to driving and Osis responded “I like beer.” He then asked Osis to exit his car and walk to the rear of his vehicle to perform some sobriety tests. He first asked Osis to recite the alphabet. Osis told him that he could speak fluent English. Deputy Stiff testified that he could understand Osis’s English. He learned that Osis was a Latvian national who was in school at UWM’s “English as a Second Language” course. Deputy Stiff said that Osis failed the alphabet test by not completing it. He did not give him a second chance. The second test he asked him to perform was the heel-to-toe test. First, however, he explained and demonstrated to Osis how to perform the test. When Osis attempted this test, he took two steps,

staggered into the deputy and would have fallen if the deputy had not caught him. At this juncture, Osis stated “I’m drunk.” Lastly, Deputy Stiff asked him to perform the finger-to-nose test, again demonstrating how he wished the test to be performed. In Deputy Stiff’s opinion Osis also failed this test, swaying back and forth and then staggering into the back of his car, almost falling. Osis was subsequently arrested for operating a vehicle while intoxicated. It is obvious from this review of the testimony that there is total disagreement as to how Osis drove his Pontiac automobile and then how he responded to the field sobriety tests.

The jury convicted Osis. He now appeals.

II. ANALYSIS

When reviewing an insufficiency of the evidence claim, this court may not reverse a conviction “unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” *State v. Poellinger*, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). Accompanying this standard of review is the recognition that a jury, as the trier of fact, must decide which evidence is credible, which is not, and which evidence will be given more weight when conflicts in the evidence exist. *Id.* at 506, 451 at 757. It logically follows then that the jury, within the bounds of reason, may reject evidence that is suggestive of innocence. Thus, where adverse inferences can be drawn, 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, this court may not overturn a verdict even if it believes the trier of fact should not have found guilt based upon the evidence before it. *Id.* at 507, 451 N.W.2d at 755.

With these rubrics in mind, a brief return to the evidence summarized above is in order. There is no dispute that Osis was the driver of the Pontiac observed by Deputy Stiff or that Osis consumed five 12-ounce glasses of beer. Osis claims he was in control. The deputy claims Osis failed the finger-to-nose test. Osis does not remember how he performed this test. The deputy claims Osis failed the heel-to-toe test, while Osis maintains he passed it. How Osis handled the recitation of the alphabet is equivocal because of the level of his English comprehension. Stiff states that Osis admitted being “drunk.” Osis denies he ever made such a statement. Thus, faced with these conflicts in the testimony, it was ultimately a weight and credibility assessment that the jury had to make. The jury, in rendering a guilty verdict, must have found Deputy Stiff’s version of events more credible.

After reviewing the record, this court cannot conclude that the evidence is so lacking in probative value and force that it can be said, as a matter of law, that no reasonable trier of fact could have drawn the inference that the defendant was driving while under the influence of an intoxicant. The verdict of the jury is affirmed.

By the Court.—Judgment affirmed.

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

