COURT OF APPEALS
DECISION
DATED AND FILED

August 20, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0106

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

COUNTY OF OZAUKEE,

PLAINTIFF-RESPONDENT,

V.

JASON T. WINKEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: WALTER J. SWIETLIK, Judge. *Affirmed.*

NETTESHEIM, J. Jason T. Winkel appeals from a judgment of conviction for operating a motor vehicle while under the influence of intoxicants (OWI) contrary to § 346.63(1), STATS. Winkel challenges his conviction on two grounds. He first contends that he was denied his right to exercise peremptory challenges and, as a result, he was denied his right to a fair

and impartial jury. Because Winkel did not raise this issue before the trial court, we deem it waived.

Winkel next argues that the trial court erroneously failed to suppress chemical test results from an intoxilyzer test which utilized a simulator solution which was more than 120 days old. Because Winkel was convicted of OWI, not the accompanying charge of operating a motor vehicle with a prohibited blood alcohol concentration (PAC), and because the evidence supports the OWI conviction, we do not address this issue on the merits.

We affirm the judgment of conviction.

FACTS

On July 4, 1996, at approximately 1:12 a.m., Winkel was stopped by Sergeant Cory McCormick of the Ozaukee County Sheriff's Department for a speeding violation. McCormick testified that when he spoke with Winkel, he detected an odor of intoxicants. McCormick additionally noted that Winkel's eyes were "bloodshot and glassy" and his speech was slurred. After Winkel admitted to having had a couple of drinks, McCormick requested Winkel to recite the alphabet. Winkel did so, making one error. McCormick then requested Winkel to exit his vehicle to perform three field sobriety tests. Winkel performed poorly on each test. At that point, McCormick concluded that Winkel's driving ability was impaired, arrested him and transported him to the Ozaukee County Sheriff's Department.

At the sheriff's department, McCormick issued Winkel a citation for OWI. Winkel was then read the Informing the Accused Form and asked to take a chemical test. Winkel agreed. The test resulted in a prohibited blood alcohol

concentration. Winkel was then issued an additional citation for PAC contrary to § 346.63(1)(b), STATS.

Winkel pled not guilty to the offenses and requested a jury trial. Prior to trial, the parties selected a "pre-struck jury panel" resulting in a jury panel comprised of ten jurors who were supposed to appear on the designated trial date.[1] However, only six of the ten jurors reported on the trial date. The trial court stated that it would proceed to trial with the six jurors. Defense counsel then stated his "preference to proceed with a few more [jurors] than that." The court again stated its intention to proceed with only six jurors, to which defense counsel responded: "Judge, just for the record, it's my understanding that under the statutes, even in cases like this, there are some challenges for cause that can be made even though there is a pre-selected jury."

The trial court then inquired of defense counsel whether there were any questions he would like the court to ask the jurors. Winkel's counsel responded that he would like to know whether the jurors had had any contacts with law enforcement and whether they would be able to be impartial. The court then put a series of questions to the jurors, including those requested by Winkel's counsel. At the close of the questioning, the court requested that the clerk administer the oath to the jury. Winkel raised no further objection to the jury.

[1] The parties' briefs do not explain exactly how this process worked. We note that there is a document in the record entitled "Juror's selection and peremptory challenges" which consists of the names of twenty-two jurors. The names of ten of these jurors are crossed out with a notation listing the defendant's peremptory challenges numbered 1 through 5 and the County's peremptory challenges numbered 1 through 5. Based on this document, we assume that at some point prior to trial the parties were able to exercise peremptory challenges during a jury selection process.

The jury found Winkel guilty of both OWI and PAC. The trial court entered a judgment of conviction for OWI pursuant to § 346.63(1), STATS. Winkel appeals.

DISCUSSION

Winkel first contends that the trial court failed to comply with § 805.08, STATS., which provides for peremptory challenges. Winkel argues that as a result of this error, he was denied his right to a fair and impartial jury. We deem this issue waived.

Based on our review of the record, we conclude that Winkel did not raise the issue of peremptory challenges before the trial court. Although defense counsel stated his preference to proceed with more jurors, he did not argue that he was being denied his right to exercise his peremptory challenges. Instead, Winkel raised concerns regarding voir dire and challenges for cause. Thus, at Winkel's request, the court conducted voir dire prior to swearing in the jury. Following this procedure, Winkel failed to raise any further challenge to the make up of the jury. This is understandable since there was nothing in the jury's responses which would have warranted an objection on this ground. We therefore deem Winkel's preemptory challenge argument waived. *See* ***State v. Gove***, 148 Wis.2d 936, 940-41, 437 N.W.2d 218, 220 (1989) (generally, issues not presented to the circuit court will not be considered for the first time on appeal).

Next, Winkel contends that the trial court erred by admitting evidence of an intoxilyzer chemical test result which utilized a simulator solution which had not been certified within 120 days of the test.[2] This argument

[2] In so challenging the validity of the breath test, Winkel relies upon § 343.305(6)(b), STATS., which provides:

(continued)

challenges the validity of the chemical test result indicating that Winkel had a PAC at the time of his arrest. While Winkel was found guilty of both OWI and PAC, Winkel was convicted only of OWI. Winkel's challenge to the results of the intoxilyzer test are not dispositive for purposes of his OWI conviction.

We note that the distinction between the evidence necessary to sustain a PAC conviction and an OWI conviction is illustrated by the pattern jury instructions for cases in which a defendant is charged with both offenses. *See* WIS J I—CRIMINAL 2668.[3] With respect to a violation of § 346.63(1)(b), STATS. (PAC), the state must satisfy the jury to a reasonable certainty that (1) the defendant operated a motor vehicle on a highway and (2) the defendant had a prohibited alcohol concentration at the time he or she operated a motor vehicle.

Although the first element of an OWI offense—that the defendant operated a motor vehicle—is the same as that of a PAC offense, the second elements differ. To sustain an OWI conviction, the state must satisfy the jury to a reasonable certainty that the defendant was under the influence of an intoxicant at the time he or she drove a motor vehicle. WISCONSIN J I--CRIMINAL 2668 goes on to state that:

> **(b)** The department of transportation shall approve techniques or methods of performing chemical analysis of the breath and shall:
> ….
>
> 3. Have trained technicians, approved by the secretary, test and certify the accuracy of the equipment to be used by law enforcement officers for chemical analysis of a person's breath under sub. (3)(a) or (am) before regular use of the equipment and periodically thereafter at intervals of not more than 120 days….

[3] The trial court delivered this instruction in this case.

> '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 alcoholic beverages 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.

Here, Winkel challenges the validity of the intoxilyzer results. He does not directly call into question the remaining evidence supporting his OWI conviction. Nor does he argue that the County urged the jury to convict of OWI based on the chemical test results.[4] Instead, his argument is an oblique challenge to the sufficiency of the evidence. He contends, "It is impossible to conclude that absent the admission of the Intoxilyzer test result, the jury would have reached the same verdict." (Emphasis omitted.)

Although Winkel's briefing of this question is only marginal, we nevertheless conclude that the record contains sufficient evidence to support Winkel's conviction for OWI. McCormick concluded that Winkel's ability to operate a motor vehicle was "impaired." This conclusion was based upon Winkel's poor performance on three field sobriety tests. As the jury instruction states, an OWI conviction must demonstrate "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."

[4] Winkel has not included a transcript of the final arguments to the jury in the appellate record.

See WIS J I—CRIMINAL 2668. McCormick's testimony as to Winkel's inability to touch his nose, walk in a straight line and balance on one leg provided the jury with sufficient evidence to conclude that Winkel lacked the ability to operate a motor vehicle. We conclude that the evidence was sufficient to support a conviction of OWI. Accordingly, we affirm the judgment.

By the Court.—Judgment affirmed.

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