COURT OF APPEALS
DECISION
DATED AND FILED

January 13, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2637-FT

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

CITY OF KIEL,

PLAINTIFF-APPELLANT,

V.

SCOTT A. HALVERSON,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Manitowoc County: PATRICK L. WILLIS, Judge. *Affirmed*.

SNYDER, P.J. The City of Kiel appeals from an order of acquittal entered in favor of Scott A. Halverson on a charge of operating a motor vehicle with a prohibited blood alcohol concentration (BAC) contrary to § 346.63(1)(b),

STATS.[1] The trial court denied the City's motions for a directed verdict on the BAC charge and for judgment notwithstanding the jury's BAC verdict of not guilty. The City contends that the trial court erred and the motions should have been granted because there is no credible evidence supporting a BAC acquittal. We disagree and affirm the trial court order.

The City first contends that the evidence obligated the trial court to enter a directed verdict of guilty to the BAC charge. Section 805.14(1), STATS., mandates that a directed verdict motion should be denied "unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party." A reviewing court must affirm a ruling to deny a motion for a directed verdict provided there exists any evidence which supports the nonmoving party's cause of action. *See* ***Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Co.,*** 96 Wis.2d 314, 336, 291 N.W.2d 825, 836 (1980). A review of the evidence presented at trial is required to determine whether any material facts were in dispute and, if so, were properly left to the jury's determination. *See* ***City of Omro v. Brooks,*** 104 Wis.2d 351, 353, 311 N.W.2d 620, 621 (1981).

The first element of a BAC violation is that the defendant drove a motor vehicle on a highway. Halverson does not contest that element. The second element requires that Halverson had a prohibited alcohol concentration at the time

[1] The jury returned not guilty verdicts to operating while under the influence of intoxicants (OWI) contrary to § 346.63(1)(a), STATS., and operating with a prohibited BAC contrary to § 346.63(1)(b). While the notice of appeal relates to both acquittal orders, the City actually appeals from only the BAC order. Because the City makes no argument from the § 346.63(1)(a) order, we affirm the OWI acquittal. *See* ***Dubman v. North Shore Bank,*** 85 Wis.2d 819, 822, 271 N.W.2d 148, 150 (Ct. App. 1978).

he drove the motor vehicle. A prohibited alcohol concentration means 0.10% or more by weight of alcohol in a person's blood. *See* § 340.01(46m)(a), STATS.

The BAC evidence at trial consisted of Halverson's blood alcohol test result and the testimony of Halverson, Halverson's wife and Thomas Ecker, a chemist with the toxicology section of the State Laboratory of Hygiene. Ecker testified that he performed a "gastromatographic analysis" on Halverson's blood sample. He stated that the test procedure is "very reliable," that it had "a tolerance of plus or minus five percent of the [reported] value," that Halverson's test result was 0.185% blood alcohol and that the result was accurate to a reasonable degree of scientific certainty.

Section 885.235(1)(c), STATS., provides that the fact that a BAC analysis shows that there was 0.10% or more by weight of alcohol in the person's blood is prima facie evidence that he or she had an alcohol concentration of 0.10% or more. However, subsec. (4) of the same statute states that the admissibility of chemical tests for blood alcohol concentration shall not be construed as limiting the introduction of any other competent evidence bearing on the question of whether a person has a prohibited alcohol concentration. Therefore, the City established a prima facie BAC case when it brought into evidence the 0.185% test result and the burden shifted to Halverson to offer evidence controverting the City's charge. *See* ***City of Omro,*** 104 Wis.2d at 356-57, 311 N.W.2d at 623.

Halverson disputed the accuracy of the test result based upon his historical version of the events leading to the blood sample that he gave at

3:35 a.m. on September 12, 1997.[2] Halverson told the arresting officer at the scene that he had consumed four twelve-ounce cans of beer at Knapp's restaurant and testified that he was not concerned about providing the blood sample "because with four beers … I knew I wasn't drunk." Halverson testified that he went to Knapp's restaurant at 6:00 p.m. the previous night with a friend and that he drank four twelve-ounce beers from 6:00 p.m. to 12:30 a.m.

Halverson further testified that he takes aspirin to cope with recurring back spasms caused by a 1988 motorcycle accident. He stated that he had taken a total of nineteen aspirins in the thirty-hour period preceding his arrest—four at 9:00 p.m. on September 10; four at 1:30 a.m., four at 10:15 a.m., four at 3:00 p.m. on September 11; and three sometime after 6:00 p.m. on September 11.

Ecker was asked to address Halverson's contention that he had consumed only four twelve-ounce beers and his aspirin consumption as related to the blood alcohol test result. Ecker first confirmed the validity of the Widmark formula in blood alcohol calculations and testified that the formula utilizes an individual's sex, weight, the amount of alcohol consumed, the time period of consumption and the rate of elimination to determine the amount of alcohol necessary to obtain a certain BAC result.

Using the Widmark formula, Ecker was then asked to determine the amount of alcohol Halverson, weighing 200 pounds,[3] would have had to consume

[2] Halverson was arrested at 2:02 a.m. on September 12, 1997. He does not contest probable cause for the officer requesting that he submit to the blood alcohol test, that the blood sample was obtained within a three-hour period from his arrest or the admission of the test evidence. *See* § 885.235(1g), STATS.

[3] Halverson's weight was established by his wife's testimony.

to achieve a 0.185% BAC result at 3:35 a.m. if he had his first drink at 6:00 p.m. Ecker calculated that Halverson would have needed to drink sixteen twelve-ounce beers or the equivalent to reach 0.185%. When asked what BAC test result would occur under the formula if Halverson had consumed only four beers, Ecker testified that Halverson's BAC test result would have been 0.00%. Ecker stated that if Halverson consumed only four beers, the BAC result of 0.185% could be explained only if Halverson was lying, if Halverson was mistaken as to the amount of alcohol consumed or if there was something misleading about the BAC test results.

Halverson relied on an article in the *Journal of the American Medical Association* to question Ecker about the impact of aspirin ingestion upon BAC results,[4] and Ecker agreed that the journal itself was "a peer-reviewed journal" that he would accept as a learned treatise.[5] The City contends that Ecker testified "unequivocally" that Halverson's aspirin consumption could not have reduced the BAC result from 0.185% to something below the legal limit of 0.10%. However, while Ecker opined that aspirin "ha[d] absolutely no effect" on blood alcohol testing and that he saw no connection between the BAC test result and the aspirin ingestion, he also testified, "I guess I am not sure what relevance the [aspirin] study and conclusion would have here" and that "[t]he effect of the aspirin is not so great that … he should be at a [0.00%] at three-thirty."

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[4] Ecker agreed with Halverson's attorney that the article was entitled "*Aspirin Increases Blood Alcohol Concentrations in Humans after Ingestion of Ethanol*." Ecker stated that "ethanol" is the alcohol found in beer.

[5] The trial court refused to receive the article into evidence but allowed Ecker to be questioned about the article without objection from the City.

A directed verdict should be granted when the evidence gives rise to no dispute as to the material issues or when the evidence is so clear and convincing as to reasonably permit unbiased and impartial minds to come to but one conclusion. *See* ***City of Omro,*** 104 Wis.2d at 358, 311 N.W.2d at 624. It is the duty of the court to direct a verdict where the essential elements of the offense are uncontroverted, and a verdict should be vacated and a judgment of guilty directed by the trial court when the jury returns an unsupported verdict. *See* ***id.*** at 359, 311 N.W.2d at 624.

Halverson disputes the BAC test result by his testimony of how much beer he consumed and by challenging the BAC test result with his aspirin consumption evidence. We disagree with the City's contention that Ecker testified unequivocally that the aspirin consumption could not have reduced Halverson's BAC to something less than 0.10%. Ecker testified that the aspirin effect was not so great that Halverson should have been at 0.00% when the sample was taken. Ecker also testified that an explanation for Halverson's version of his alcohol consumption resulting in a test result of 0.185% (plus or minus 5%) was that there might be something misleading about the BAC test results. The jury heard probative evidence concerning the validity of the blood test results.

The City attempts to analogize this case with ***City of Omro*** because the evidence considered most favorable to Halverson is so insufficient in probative value and force that as a matter of law the jury could not return a verdict of not guilty. However, ***City of Omro*** can be distinguished. In ***City of Omro***, the defendant conceded that he had more than twelve beers, and his admission that he was both driving the vehicle and under the influence of intoxicants removed all dispute as to both elements of the OWI charge. *See* ***id.*** at 356-58, 311 N.W.2d at 623. Halverson admitted to drinking four beers and made no concession to the

validity of the evidence of the BAC charge. We conclude that sufficient controverting evidence afforded Halverson the opportunity to employ the jury's factfinding function.

The City also contends that its motion for judgment notwithstanding the verdict should have been granted. A motion for judgment notwithstanding the verdict must be denied if, after viewing the evidence in the light most favorable to the nonmoving party, reasonable people could fairly reach different conclusions. *See* ***Kolb v. Chrysler Corp.,*** 661 F.2d 1137, 1140 (7th Cir. 1981). Motions for judgment notwithstanding the verdict are reserved for instances when a party believes that "the verdict is proper but, for reasons evident in the record which bear upon matters not included in the verdict, the [moving party] should have judgment." Section 805.14(5)(b), STATS. Because the evidence presented raised a question as to a material element and was subject to more than one reasonable inference, the motion for judgment notwithstanding the verdict was properly denied.

The trial court properly instructed the jury that Halverson should be found guilty of the BAC charge if it was satisfied that the evidence supported a BAC of 0.10% or more from that fact alone. We conclude, however, that the testimonial evidence elicited from Halverson and by cross-examination of chemist Ecker created more than one reasonable inference and was therefore sufficient to bring the matter before the jury. As a reviewing court, we must accept the inference drawn by the jury. The motions for a directed verdict and judgment notwithstanding the verdict were properly denied.

By the Court.—Order affirmed.

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