

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 21, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP439-CR

Cir. Ct. No. 2003CT777

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY G. HENSCHEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: DALE L. ENGLISH, Judge. *Affirmed.*

¶1 SNYDER, P.J.¹ Jeffrey G. Henschel appeals from a judgment of conviction for operating a motor vehicle while intoxicated, fourth offense, contrary to WIS. STAT. § 346.63(1)(a), and operating a motor vehicle with a prohibited alcohol concentration, fourth offense, contrary to § 346.63(1)(b). Henschel contends that the circuit court erred when it concluded that his equal protection and due process rights were not violated by the multi-tiered prohibited alcohol concentration standard in the Wisconsin statutes. He further contends that error tainted the trial through improper hypothetical questioning of the State's expert witness. We disagree with both contentions and affirm the judgment of conviction.

¶2 On September 6, 2003, at approximately 8:55 p.m., Fond du Lac County Sheriff's Deputy Anthony Barr was on routine patrol northbound on County Highway G in St. Cloud. He observed a southbound vehicle that appeared to be traveling in excess of the speed limit. After obtaining a radar reading that the vehicle was traveling thirteen miles per hour over the speed limit, Barr turned to follow it. He activated his lights and the vehicle pulled over.

¶3 Barr identified the driver as Henschel and informed him that the purpose of the stop was for his excess speed. Henschel replied that he did not know the posted speed limit on that road. Barr noted the odor of intoxicants coming from the inside of the vehicle and he observed that Henschel's eyes were bloodshot and glassy. Henschel told Barr that he had been at a tavern and had consumed approximately five beers. Barr then asked Henschel to perform field

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

sobriety tests, and Henschel agreed. Barr concluded that Henschel was operating while under the influence of alcohol and made the arrest.

¶4 Barr read Henschel the Informing the Accused form, and Henschel agreed to an evidentiary chemical test of his blood. The test indicated that Henschel's blood contained .116% by weight of alcohol. Department of Transportation records indicated that this was Henschel's fourth offense.

¶5 Henschel was charged with his fourth OWI and PAC offenses and he pled not guilty. He filed several pretrial motions, including a challenge to the constitutionality of prosecuting fourth and subsequent violations under WIS. STAT. § 346.63(1)(b) at a prohibited alcohol concentration of .02%. The circuit court denied the motions and a jury trial ensued.

¶6 During the trial, the State's expert witness testified regarding Henschel's blood alcohol concentration and the number of alcoholic beverages Henschel would have had to consume to reach a concentration of .116%. The expert witness used a hypothetical body weight of a 230 pound male to calculate the number of drinks needed to reach the target blood alcohol concentration. Henschel objected on the grounds that "clearly he's not a 230 pound man," but the circuit court allowed the testimony. The jury found Henschel guilty on both charges. Henschel appeals.

¶7 Henschel's first contention is that Wisconsin's multi-tiered prohibited alcohol concentration scheme violates the constitutional protections of

due process and equal protection.² We need not reach Henschel's constitutional challenge because, as the State correctly argues, Henschel has no standing to make the challenge.

¶8 Whether a person has standing to make a constitutional challenge is a question of law which this court reviews independently. *Mogilka v. Jeka*, 131 Wis. 2d 459, 467, 389 N.W.2d 359 (Ct. App. 1986). When determining whether Henschel has standing to raise his constitutional challenge, we must determine if he was injured in fact, and whether the interest allegedly injured is within the zone of interest to be protected by the statute or constitutional guarantee in question. *See id.* Henschel fails to meet the test. His blood alcohol concentration of .116% is well above the standard imposed on any driver, regardless of the absence or presence of prior offenses. Henschel could not have been harmed by the application of the more stringent standard because he would have been equally culpable under the .10% standard applied to first and second

² At the time of Henschel's conviction, WIS. STAT. § 340.01(46m) (2001-02) read as follows:

“Prohibited alcohol concentration” means one of the following:

(a) If the person has one or no prior convictions, suspensions or revocations, as counted under s. 343.307(1), an alcohol concentration of 0.1 or more.

(b) If the person has 2 prior convictions, suspensions or revocations, as counted under s. 343.307(1), an alcohol concentration of 0.08 or more.

(c) If the person has 3 or more prior convictions, suspensions or revocations, as counted under s. 343.307(1), an alcohol concentration of more than 0.02.

offenses. Thus, Henschel has no standing to raise the alleged due process and equal protection violations.

¶9 Next, Henschel argues that the circuit court should not have allowed the State's expert to testify regarding Henschel's estimated alcohol consumption using retrograde extrapolation. Henschel argues that the testimony was not relevant and should have been excluded by the circuit court. "Relevant evidence" is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. WIS. STAT. § 904.01. Whether an expert's opinion should be admitted into evidence is largely a matter of the circuit court's discretion. See *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. We will uphold a decision to admit or exclude evidence if the circuit court examined the relevant facts, applied the proper legal standard, and used a demonstrated rational process to reach a reasonable conclusion. *Id.*

¶10 As explained by the State's expert, retrograde extrapolation is a calculation based on certain assumptions that allows one to estimate what amount of alcohol a person would have to consume to reach a certain blood alcohol concentration. In making the calculation regarding Henschel's alcohol consumption, the expert used an estimated body weight of 230 pounds. She explained that, according to the American Medical Association guidelines, this was the ideal body weight for a 6'1" male and that anything over that figure would be fat tissue, which would not absorb alcohol. Henschel objected on grounds that he weighs in excess of 300 pounds and therefore the figure used by the expert was arbitrary and her conclusions were based on mere speculation. The circuit court overruled Henschel's objection, stating, "First of all, this witness has testified ...

as to the reason that she's using that figure. Second, any argument as far as the difference in figures goes to weight and not to admissibility.”

¶11 We agree. An expert witness may offer an opinion if the testimony “will assist the trier of fact to understand the evidence or to determine a fact in issue.” *State v. Jensen*, 147 Wis. 2d 240, 256, 432 N.W.2d 913 (1988). Here, the State’s expert explained the underlying assumption for her calculation and the source of that assumption. Henschel had the opportunity to cross-examine the State’s expert, and specifically challenged her use of the 230-pound figure in her calculation. Furthermore, Henschel presented his own expert witness to testify about retrograde extrapolation. Henschel’s expert had the opportunity to challenge the assumptions made by the State’s expert, and the jury had before it competing opinions to weigh during deliberations. The circuit court properly allowed the testimony of both expert witnesses and left the weight and credibility of each to the jury.

¶12 We hold that Henschel has no standing to raise his constitutional challenge to Wisconsin’s multi-tiered blood alcohol concentration standards. We further hold that the circuit court properly exercised its discretion when it allowed the testimony of the State’s expert witness.

By the Court.—Judgment affirmed.

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

