

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 18, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

**Nos. 00-0594-CR
00-0595**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

No. 00-0594-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WALTER J. KUGLER,

DEFENDANT-APPELLANT.

No. 00-0595

COUNTY OF MANITOWOC,

PLAINTIFF-RESPONDENT,

V.

WALTER J. KUGLER,

DEFENDANT-APPELLANT.

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

¶1 ANDERSON, J.¹ Walter J. Kugler challenges the sufficiency of the evidence underlying his convictions for speeding and possessing a switchblade knife. We affirm since the evidence is of sufficient probative value and force that the triers of fact correctly found Kugler guilty of both offenses.

¶2 Kugler was stopped on I-43 in Manitowoc county by Deputy Sheriff Jeff Horneck after he pace-clocked Kugler at 118 miles per hour. After the stop, Horneck patted down Kugler and discovered a switchblade knife in a case on Kugler's belt. Horneck issued a uniform traffic citation charging "speeding in excess of 65 MPH limit" in violation of WIS. STAT. § 346.57(4)(gm).² In addition, a criminal complaint was issued charging Kugler with possession of a switchblade knife in violation of WIS. STAT. § 941.24(1).³

¶3 Kugler entered not guilty pleas to both charges. The speeding charge was tried to the court and the misdemeanor charge was tried to a jury at the same time. Kugler was found guilty of both charges. He now appeals, contesting the sufficiency of the evidence supporting his conviction on both charges. He contends that the deputy's pace-clocking of him as he traveled on I-43 was

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

² WISCONSIN STAT. § 346.57(4) provides, in part: "[N]o person shall drive a vehicle at a speed in excess of the following limits unless different limits are indicated by official traffic signs: (gm) Sixty-five miles per hour on any freeway or expressway."

³ WISCONSIN STAT. § 941.24(1) provides: "Whoever manufactures, sells or offers to sell, transports, purchases, possesses or goes armed with any knife having a blade which opens by pressing a button, spring or other device in the handle or by gravity or by a thrust or movement is guilty of a Class A misdemeanor."

insufficient proof that he was excessively speeding. He also contends that the State failed to prove beyond a reasonable doubt that he knew a switchblade knife was actually in his possession.

¶4 In reviewing the trial court's conclusion that Kugler exceeded the posted speed limit, the court's findings of fact will not be set aside unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2).

¶5 Kugler's complaint regarding the court's finding that he was excessively speeding arises because the arresting deputy and a second deputy separately used radar to determine his speed and obtained results substantially less than 118 miles per hour. On cross-examination, Horneck admitted that when he first observed Kugler, he used his radar and got a reading that Kugler's speed was 79 miles per hour. And, Deputy Paul Herrmann testified that he used his radar on Kugler as he traveled through a construction site north of where Kugler was stopped and had a reading of 70 miles per hour.

¶6 Horneck testified that he received a dispatch concerning a motorcycle believed to be heading southbound on I-43 and traveling in excess of 100 miles per hour. Horneck pulled his squad car into the median crossover, faced north and waited for the motorcycle. When he first saw the motorcycle approaching, he was convinced that it was traveling in excess of the 65 miles per hour speed limit because the motorcycle was in the left lane and passed several vehicles in the right lane.

¶7 Horneck pulled into the southbound lanes and began to follow the motorcycle. He observed the motorcycle move from the passing lane into the driving lane to pass a vehicle, then move back into the passing lane, and accelerate at a high rate of speed. Horneck began to pace-clock the motorcycle after they

cleared the traffic on I-43.⁴ The deputy stated that his squad was equipped with a certified speedometer and that he had verified its accuracy at the start of his shift. According to Horneck, the motorcycle was noticeably pulling away, and the highest speed he observed was 118 miles per hour. When Horneck stopped the motorcycle, he identified the operator as Kugler, who admitted to traveling 110 miles per hour.

¶8 Although Kugler admitted that his motorcycle could go 110 miles per hour, he denied travelling in excess of 100 miles per hour. He also denied ever telling Horneck that he was travelling 110 miles per hour.

¶9 Thus the question is simply one of credibility. The trial court elected to believe the testimony of Horneck. The court was not required to do so, but neither was it required to believe the differing testimony offered by Kugler on his own behalf. Neither Kugler's appellate counsel nor this court was present at the trial to observe the demeanor and manner of testifying of the two witnesses involved. The trial court had that opportunity, and its finding that the deputy was telling the truth and that Kugler was not will not be set aside. *See Neely v. State*, 47 Wis. 2d 330, 332-33, 177 N.W.2d 79 (1970).

¶10 This court knows of no requirement that a radar reading is preferred over a reading established by pace-clocking. Nor has Kugler pointed to any such requirement. The conviction is sustained by evidence in the record sufficient to prove Kugler's guilt by clear, satisfactory and convincing evidence.

⁴ Pace-clocking is accomplished when the subject vehicle is followed at a constant distance. The speed of the subject vehicle is then compared with that registering on the speedometer of the police vehicle. This method of determining speed has been approved in Wisconsin. *See State v. Zick*, 44 Wis. 2d 546, 551-52, 171 N.W.2d 430 (1969).

¶11 In reviewing the sufficiency of the evidence to support the misdemeanor conviction, we may not reverse the trier of fact unless the evidence, viewed in the light most favorable to the outcome of the proceeding, is so deficient that, as a matter of law, no reasonable fact finder could have reached the same result. *See State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). The test is whether this court can conclude that the trier of fact could, acting reasonably, be convinced of the defendant’s guilt by evidence it had a right to believe and accept as true. *See id.* It is the function of the trier of fact—not the appellate court—to fairly resolve conflicts in the testimony, weigh the evidence and draw reasonable inferences from it. *See id.* at 506.

¶12 Kugler asserts that the State has failed to prove beyond a reasonable doubt that he *knowingly* had a switchblade knife under his actual physical control. He points to his testimony that he used knives where he worked but did not use any knife on the day of his arrest and was not aware that he had the knife in a sheath on his belt. The deputy testified that he found the switchblade knife in a sheath on Kugler’s belt when he performed a pat-down search for his safety. Horneck testified, “After [Kugler] was placed under arrest for the possession of the knife he stated that he can have that, it is legal in Illinois, and that it was his and he knew it was a switchblade.”

¶13 The question for the jury was one of credibility. It was for the jury, not this court, to resolve conflicts in the testimony and determine the credibility of witnesses. *See State v. David J.K.*, 190 Wis. 2d 726, 741, 528 N.W.2d 434 (Ct. App. 1994). The jury chose not to rely upon Kugler’s testimony. We will not disturb the jury’s credibility determination.

¶14 The jury apparently chose to deem Kugler's roadside statement as, at least, circumstantial evidence that he knowingly had the switchblade in his physical possession. Knowledge is rarely proven by direct evidence; in its place the jury is often asked to rely upon circumstantial evidence, which in many cases is stronger and more satisfactory than direct evidence. *See Clark v. State*, 62 Wis. 2d 194, 197, 214 N.W.2d 450 (1974).

By the Court.—Judgments affirmed.

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

