

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 26, 2006**

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 Nos. 2005AP2444-CR  
2005AP2445-CR  
2005AP2446-CR**

**Cir. Ct. Nos. 2004CT116  
2004CT117  
2004CM158**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ADRIAN CASTELAN-MARTINEZ,**

**DEFENDANT-APPELLANT.**

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APPEAL from judgments of the circuit court for Calumet County:  
DONALD A. POPPY, Judge. *Affirmed.*

¶1 NETTESHEIM, J.<sup>1</sup> Adrian Castelan-Martinez (Castelan) appeals from judgments convicting him of one count each of operating while under the influence (OWI) and operating with a prohibited blood alcohol content (PAC), both fourth offenses, operating after revocation and bail jumping.<sup>2</sup> He contends on appeal that he was arrested without probable cause and convicted by a jury upon insufficient evidence. We disagree and affirm the judgments.

### BACKGROUND

¶2 In the early morning hours of June 13, 2004, City of Chilton Police Officer Lisa Winsted arrested Castelan for OWI. Most of the facts leading up to the arrest are not in dispute. We will lay them out in some detail later. Castelan moved to suppress all evidence acquired incident to the arrest on grounds that Winsted lacked probable cause to arrest him because he had too poor a grasp of English to allow him to appropriately comply with the request to submit to field sobriety testing. Castelan stipulated at the suppression hearing that he was intoxicated. The trial court found probable cause and denied his motion to suppress.

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<sup>1</sup> 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.

<sup>2</sup> As to the OWI and PAC charges, we note that the judgment of conviction recites convictions for both counts, although the penalties imposed are for a single conviction. WISCONSIN STAT. § 346.63(1)(c) allows for the prosecution of both OWI and PAC when the charges stem from the same incident, but the statute permits only a single conviction for purposes of sentencing and for purposes of counting prior convictions. Castelan makes no complaint about the form of the judgment of conviction, and we make no determination as to whether the judgment comports with the statute. We simply bring the matter to the attention of the parties and the trial court and leave it to them to decide upon remittitur of the record whether any alteration to the judgment is necessary.

¶3 Trial was held to a jury. Castelan again stipulated that he was legally intoxicated, that he was aware that his operating privileges were revoked on the night in question, and that a month before he had been charged with a misdemeanor but released on a signature bond and ordered not to engage in any criminal activity. The only issue was whether Castelan was the vehicle's driver. The theory of defense was that Castelan's cousin, Jose Socoro Albiter-Castelan, was the driver of the vehicle, and that Castelan was merely a passenger.

¶4 The jury found Castelan guilty of all of the charges. He was sentenced to eight months in the county jail, a fine tripled because of the alcohol surcharge,<sup>3</sup> court costs, a license revocation for thirty-six months, an ignition interlock device, and alcohol assessment.

## DISCUSSION

¶5 Castelan raises two issues on appeal. He contends that Winsted lacked probable cause to arrest him and that the evidence was insufficient for the jury to convict him of the OWI and PAC charges. We address each in turn.

### 1. Probable cause

¶6 Castelan's probable cause challenge contends that Winsted did not have sufficient evidence of his intoxication to support the arrest.<sup>4</sup> The parties'

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<sup>3</sup> Castelan's blood alcohol concentration was 0.226 percent, subjecting him to a triple fine. *See* WIS. STAT. § 346.65(2)(g)2.

<sup>4</sup> We are sorely tempted to summarily reject this argument without further discussion because Castelan stipulated during the suppression hearing that he was intoxicated. The trial court noted this fact, but chose in the interests of completeness to address all of the attendant facts. We will do likewise.

disagreement at the motion hearing essentially boiled down to whether Castelan *could* not or *would* not continue the field sobriety tests unless he was addressed in Spanish. Castelan argued that the language barrier hindered further testing, while the State contended that he simply refused to comply. As to any disputed facts, the trial court's findings will be upheld unless clearly erroneous. WIS. STAT. § 805.17(2). Whether the facts constitute probable cause is a question of law that we review without deference to the trial court. *State v. Babbitt*, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994).

¶7 The following evidence was adduced at the suppression hearing. On June 13, 2004, at approximately 1:45 a.m., Winsted observed a pickup truck parked illegally outside of a bar. She issued a parking ticket. When she placed the ticket under the windshield wiper, she observed a male asleep in the passenger seat. She then left the area.

¶8 About fifteen minutes later, Winsted observed the same vehicle turning around in a parking lot. She followed the vehicle for a short while, during which time it was traveling approximately fifteen miles per hour in a twenty-five-mile-per-hour zone. As she tailed the vehicle, she observed the driver and a passenger inside. The vehicle then pulled into a parking lot of a residence at 222 East Main Street, where it stopped, blocking access to the rear parking lot. Winsted's attention was briefly off the vehicle while she turned her squad car around on the street. Within a minute or two, Winsted saw the driver's-side door open and a person later identified as Castelan emerge. She saw no one exit the vehicle before Castelan. In her police report and suppression hearing testimony, Winsted identified Castelan as "the driver."

¶9 Castelan walked toward Winsted's marked police car. Winsted turned on her headlights and drove toward him. Castelan flagged her down and asked why he had received the parking citation, addressing Winsted in English. From about three feet away, Winsted could detect the odor of intoxicants on Castelan and observed him swaying from side to side. He admitted having had a couple of beers.

¶10 Winsted advised Castelan that she would conduct field sobriety tests. Castelan told her he spoke very little English. Winsted began with the horizontal gaze nystagmus (HGN) test. Castelan exhibited jerkiness in both eyes and was unable to follow the pen without also moving his head. Winsted observed that his eyes were bloodshot. Castelan then refused to participate in further testing unless Winsted spoke to him in Spanish. Winsted informed him that she did not speak Spanish. Up to that point, all conversation had been in English, and Castelan had responded appropriately in English to commands and questions put to him in English. Castelan again refused further testing and Winsted then arrested him for OWI. With Castelan's consent, she turned the keys to the vehicle over to the passenger. Winsted characterized Castelan's behavior at the time of arrest as "uncooperative." Winsted transported Castelan to Calumet Medical Center for a blood test. During the ride, he continued to ask about the parking citation in English. Nonetheless, Winsted requested an interpreter to read the "Informing the Accused" form to Castelan at the hospital. Castelan then submitted to a blood draw. No evidence was adduced at the suppression hearing that someone other than Castelan had been the driver.

¶11 Probable cause exists if the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable

police officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant. *Id.* While the information must be sufficient to lead a reasonable officer to believe that the defendant's involvement in a crime is more than a possibility, it need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not. *State v. Kutz*, 2003 WI App 205, ¶11, 267 Wis. 2d 531, 671 N.W.2d 660. The trial court's task is only to ascertain the plausibility of a police officer's account. *State v. Nordness*, 128 Wis. 2d 15, 36, 381 N.W.2d 300 (1986).

¶12 Applying those standards to the facts at hand, we comfortably uphold the trial court's ruling that Winsted had probable cause to arrest Castelan. The undisputed facts were that Winsted observed Castelan's vehicle traveling well under the speed limit. From about three feet away, she could detect the odor of alcohol on Castelan, who had bloodshot eyes, swayed while standing and admitted to having been drinking. Winsted had observed only two occupants in the vehicle, only Castelan was observed exiting from the driver's door, the other occupant was still was in the passenger seat, and Castelan did not dispute at the time of the arrest that he was the driver.

¶13 In addition, the trial court found that, while not a "textbook" administration of the HGN, the test was sufficiently completed and Castelan's participation reflected sufficient understanding to satisfy the court that the test was adequately administered. Finally, the court found that Castelan was uncooperative at the hospital even once provided with an interpreter and being given instructions

in Spanish.<sup>5</sup> We cannot say that these findings are clearly erroneous when Castelan did not tell Winsted that anyone else had been driving and Castelan both initiated and maintained in English a debate about the parking citation.

¶14 Castelan suggests that a more complete battery of field sobriety tests was necessary. In support, he cites *State v. Swanson*, 164 Wis. 2d 437, 453 n.6, 475 N.W.2d 148 (1991), *abrogated on other grounds*, *State v. Sykes*, 2005 WI 48, ¶¶23-26, 279 Wis. 2d 742, 695 N.W.2d 277, for the proposition that “unexplained erratic driving, the odor of intoxicants and the coincidental time of the incident [bar-closing time] ... should not, in the absence of a field sobriety test, constitute probable cause to arrest someone” for OWI. *Swanson* does not salvage his position. The very footnote Castelan urges us to accept goes on to say that “[a] field sobriety test could be as simple as a finger-to-nose or walk-a-straight-line test.” *Id.* Something more than a “simple” test was done here: the HGN test. The results were consistent with intoxication. Moreover, Swanson exhibited only three “indicia of criminal conduct,” unexplained erratic driving, odor of intoxicants, and coincident timing. *Id.* Castelan exhibited all three of those, as well as a swaying stance, which Swanson did not, *see id.* at 442, and bloodshot eyes. In addition, Castelan admitted drinking beer, and his vehicle had been ticketed for parking illegally in front of a bar shortly before. In determining whether probable cause exists, an officer’s conclusions based on his or her investigative experience may be considered. *See State v. Wille*, 185 Wis. 2d 673,

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<sup>5</sup> We recognize that this fact was not known to Winsted at the time she arrested Castelan. However, the fact is relevant to the credibility of Castelan’s claim that he was not sufficiently fluent in English to understand Winsted’s directions at the scene of the arrest.

683, 518 N.W.2d 325 (Ct. App. 1994). We see no error in the denial of the suppression motion.

## 2. Sufficiency of the Evidence<sup>6</sup>

¶15 Castelan next contends that the jury convicted him upon insufficient evidence. Our review of a sufficiency of the evidence claim is very narrow. *State v. Hayes*, 2004 WI 80, ¶57, 273 Wis. 2d 1, 681 N.W.2d 203. We accord great deference to the trier of fact and must examine the record to find facts that uphold the jury's decision to convict. *Id.* Should the record support more than one inference, we must accept the inference the jury drew unless the evidence upon which it is based is incredible as a matter of law. *State v. Poellinger*, 153 Wis. 2d 493, 506-07, 451 N.W.2d 752 (1990). We may not overturn the verdict even if we believe the jury should not have found guilt if there exists any possibility that the jury could have drawn the inferences appropriate to a finding of guilt. *Id.* at 507.

¶16 Winsted's testimony at the jury trial tracked that given by her at the suppression hearing but added two relevant points. First, she ran a registration check of the vehicle when she issued the parking citation, and the check revealed that the vehicle was registered to Castelan. Second, Winsted identified the passenger to whom she delivered the keys to Castelan's vehicle as Alejandro Albiter-Martinez (Alejandro), the same person who she had seen sleeping in the vehicle when she issued the parking citation.

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<sup>6</sup> Castelan has not waived this claim despite raising it for the first time on appeal. See *State v. Hayes*, 2004 WI 80, ¶46, 273 Wis. 2d 1, 681 N.W.2d 203.

¶17 Castelan's theory of defense introduced a third actor, Jose Socoro Albiter-Castelan (Albiter), into the scenario. Albiter was Castelan's sole defense witness. He testified that on June 12, 2004, he and Castelan drove to Manitowoc in Castelan's truck with Albiter at the wheel. The pair went to a Manitowoc tavern at about three o'clock in the afternoon, where they stayed until 10:30 or 11:00 p.m. Albiter then drove the two of them back to Chilton to another bar, Nick's, picking up Albiter's nephew, Alejandro, on the way. According to Albiter, Alejandro remained in the pickup while Castelan and Albiter went inside Nick's Bar and continued drinking for another hour and a half or two hours. Albiter testified that, despite himself being inebriated and having a suspended license, he drove Castelan's truck home from Nick's Bar with Alejandro in the passenger seat and Castelan sitting upright in the rear seat of the truck. Albiter said he knew there was a ticket on the truck but did not recall seeing it on the windshield. Albiter testified that when the vehicle arrived at the home, he exited the vehicle and went inside the house and stayed there because he did not want to get a ticket. He also testified that he knew the police were outside because he could see the squad car's red and blue lights.

¶18 Albiter's testimony was impeached on a number of fronts. First, contrary to his testimony, Winsted testified that when she saw the vehicle after it left the bar, the bright yellow citation was still on the windshield. Second, also contrary to Albiter's testimony, Winsted testified that she never activated the squad car's emergency lights. Third, Albiter testified on direct examination that he lived at the Chilton address at which Castelan was arrested. However, on cross-examination Albiter admitted that when he was issued a citation from the City of Appleton two weeks before Castelan's arrest, he had listed an Appleton address as his residence and that he also lived there at the time of trial, a year after

the arrest. Fourth, the evidence showed that Albiter's driver's license actually had not been suspended until some four months after Castelan's arrest, damaging Albiter's testimony that he went into the house to avoid being charged with operating after suspension.

¶19 In summary, the jury was required to resolve the conflicting testimony of Winsted and Albiter. Winsted testified that there were only two occupants of the vehicle and that Castelan was the driver. Albiter testified that there were three occupants and that he, not Castelan, was the driver. In resolving this core conflict, the jury had to assess the credibility of the witnesses and to give appropriate weight to the conflicting testimony. *See id.*, at 504, 506. Viewing the evidence in a light most favorable to the jury's finding, we cannot say that the inferences the jury drew are incredible as a matter of law, particularly in light of the serious impeachment of Albiter's testimony. The evidence was sufficient to support the jury's verdicts.

#### CONCLUSION

¶20 We conclude that probable cause supported Castelan's arrest and sufficient evidence supports the conviction. We affirm the judgments.

*By the Court.*—Judgments affirmed.

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

