

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 10, 2007

David R. Schanker
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. 2007AP728
STATE OF WISCONSIN**

Cir. Ct. Nos. 2006TR3164
2006TR3165

**IN COURT OF APPEALS
DISTRICT II**

COUNTY OF MANITOWOC,

PLAINTIFF-RESPONDENT,

V.

GLENN E. JAEGER,

DEFENDANT-APPELLANT.

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

¶1 NETTEHSEIM, J.¹ A jury found Glenn E. Jaeger guilty of operating a motor vehicle while under the influence of an intoxicant (OWI)

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

pursuant to WIS. STAT. § 346.63(1)(a) and operating a motor vehicle with a prohibited blood alcohol concentration (BAC) pursuant to § 346.63(1)(b). The trial court entered a conviction for OWI. Jaeger appeals from this judgment of conviction. He argues that the trial court erroneously exercised its discretion by denying his motion in limine to allow his testimony that he holds a commercial driver's license (CDL). We conclude that Jaeger's arguments for admitting the CDL evidence go only to the BAC charge, which is moot because the judgment of conviction is for OWI, not BAC. We affirm the judgment.

BACKGROUND

¶2 The facts are undisputed. On July 30, 2006, Jaeger was involved in a motorcycle accident after consuming, according to his testimony, five cans of beer over a two-and-one-half- to three-hour period. After investigating the accident, Manitowoc County Sheriff's Deputy Melia Prange issued two citations to Jaeger. One citation was for OWI and the other was for BAC. The blood test results indicated that Jaeger had a BAC of .148% at the time of the accident. Jaeger entered a plea of not guilty to both the OWI and BAC charges.

¶3 At trial, Jaeger brought a motion in limine seeking admission of evidence to the jury, through his testimony, that he held a CDL. Jaeger argued that the evidence was relevant to the accuracy of the chemical test because, since he knew an OWI or BAC conviction would result in a license suspension and thus affect his employment, he always kept careful track of the amount of alcohol he drank. Jaeger asked the court to instruct the jury to limit the use of his CDL testimony to his state of mind, and not use it to impermissibly consider the impact of a guilty verdict on his livelihood. The trial court, however, agreed with the State that the CDL evidence could generate unfair jury bias. The court concluded

that the risk of the jury considering the evidence in light of the potential sentence outweighed any probative value. The court denied the motion.

¶4 The jury returned a guilty verdict on both charges. The trial court then entered a judgment of conviction only on the OWI charge pursuant to WIS. STAT. § 346.63(1)(c). Jaeger appeals, challenging the trial court's evidentiary ruling.

DISCUSSION

¶5 The trial court concluded that allowing Jaeger to testify to holding a CDL risked misleading the jury into considering the penalty flowing from a guilty verdict, rather than confining itself to the question of guilt or innocence. Jaeger contends this was error because the fact of his CDL is relevant to how carefully he monitors his alcohol consumption. Because he realizes that an OWI or BAC conviction would result in the suspension of his CDL, which could affect his employment, Jaeger self-monitors his alcohol consumption. Jaeger claims that this state-of-mind evidence, in conjunction with the "*Hinz* Chart," shows that the BAC test results offered by the State were not accurate.² He contends that excluding the evidence "significantly impaired his ability to counter the [S]tate's chemical test evidence at trial." The State's response is that admitting the CDL testimony would risk unfair jury prejudice because, even with a cautionary instruction, the jury might overlook the other inculpatory evidence out of sympathy for the impact on Jaeger's livelihood. As the standard burden of proof

² A "*Hinz* Chart" shows estimated blood alcohol concentration based upon the drinker's weight and number of drinks consumed, and a formula for determining blood alcohol concentration decrease over time after drinking ceases. See *State v. Hinz*, 121 Wis. 2d 282, 284-85, 360 N.W.2d 56 (Ct. App. 1984).

jury instruction states, reasonable doubt cannot be based on sympathy. *See* WIS JI—Criminal 140.³

¶6 Relevant evidence, which is any evidence that has a tendency to make the existence of a fact more or less probable, generally is admissible, unless “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” WIS. STAT. §§ 904.01, 904.02, 904.03. We generally review the trial court’s determination of the admissibility of evidence as an act within its discretion. *See State v. Hinz*, 121 Wis. 2d 282, 285, 360 N.W.2d 56 (Ct. App. 1984).

¶7 Here, however, the issue is moot. An issue is moot when “a determination is sought which, if rendered, could have no practical effect upon a then-existing controversy.” *State ex rel. McDonald v. Circuit Court for Douglas County*, 100 Wis. 2d 569, 572, 302 N.W.2d 462 (1981). Moot issues will not be considered on appeal unless the issue is of great public importance; the identical issue arises frequently and a decision is needed to guide trial courts; the issue likely will arise again and should be resolved; it is likely of repetition yet evades review; or it involves a statute’s constitutionality. *See State v. Leitner*, 2002 WI 77, ¶14, 253 Wis. 2d 449, 646 N.W.2d 341.

³ The record does not include the transcript of the jury instructions or a copy of any written instructions that were submitted to the jury. Nonetheless, we properly assume that WIS JI—Criminal 140 was used since it is the standard burden of proof instruction given in all criminal cases. Jaeger makes no claim that this standard instruction was not given. Nor does he make any claim of instructional error. As the appellant, Jaeger has the duty to ensure the completeness of the appellate record. *See State v. Koeppe*n, 2000 WI App 121, ¶37, 237 Wis. 2d 418, 614 N.W.2d 530.

¶8 The jury found Jaeger guilty of both OWI and BAC. The findings required for convictions of OWI and BAC each require proof of a fact which the other does not. WIS. STAT. § 346.63(1)(c). An OWI conviction requires finding that Jaeger (1) operated a motor vehicle (2) while under the influence of an intoxicant. Sec. 346.63(1)(a). A BAC conviction requires finding that Jaeger (1) operated a motor vehicle (2) while having a prohibited alcohol concentration. Sec. 346.63(1)(b). Thus, OWI and BAC are separate and discrete substantive offenses, and the jury was properly instructed under the different instructions for each.⁴ In short, a BAC test result is not necessary to a conviction for OWI.

¶9 Here, although the jury returned guilty verdicts as to both charges, *the trial court entered a judgment of conviction only on the OWI verdict*. Jaeger's appellate challenge to the court's evidentiary challenge travels only to the BAC charge. Any ruling by this court as to the trial court's evidentiary ruling could have no practical effect upon the controversy. The issue is moot.

¶10 Even if we were to view Jaeger's appellate stance as challenging the sufficiency of the evidence as it relates to the OWI conviction, we could not conduct such an analysis since Jaeger has failed to provide a full transcript of the evidentiary phase of the trial. The transcript he has provided is limited to the evidentiary question concerning his CDL and a portion of his testimony concerning the accident and his alcohol consumption. To review a sufficiency of evidence question on the OWI conviction, we need the full record bearing on that charge. *See Peissig v. Wisconsin Gas Co.*, 155 Wis. 2d 686, 702-03, 456 N.W.2d

⁴ Here again, as with the burden of proof instruction, we properly assume that the jury was given the separate jury instructions that cover these two different substantive offenses. *See* footnote 3.

348 (1990) (“The standard of review for sufficiency of evidence requires a reviewing court to examine the record for any credible evidence” to support the trier of fact’s findings.). It is the appellant’s burden to ensure that the record is sufficient to address the issues raised on appeal. *Lee v. LIRC*, 202 Wis. 2d 558, 560, n.1, 550 N.W.2d 449 (Ct. App. 1996). When the record is incomplete, an appellate court will assume the missing material supports the jury’s verdict. *See Duhamel v. Duhamel*, 154 Wis. 2d 258, 269, 453 N.W.2d 149 (Ct. App. 1989).

¶11 In summary, we need not determine the admissibility of the CDL testimony because it would have no practical or legal effect upon Jaeger’s OWI conviction. *See State ex rel. McDonald*, 100 Wis. 2d at 572. Jaeger was not convicted of the BAC charge, and he makes no challenge to the evidence relating to the OWI conviction. We affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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

