

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 8, 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. 2007AP1020-CR

Cir. Ct. No. 2006CT23

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAYMOND D. PRATT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Bayfield County:
JOHN P. ANDERSON, Judge. *Reversed.*

Before Dykman, Vergeront and Bridge, JJ.

¶1 PER CURIAM. Raymond Pratt appeals from a judgment convicting him of operating a motor vehicle while intoxicated. His conviction followed a bench trial. He contends that the evidence was insufficient to support the conviction. We agree, and therefore reverse.

¶2 A police officer encountered Pratt in the driveway of his parents' home at 10:30 in the morning, perhaps forty-five minutes after Pratt had arrived there in his parents' pickup truck. The officer noticed a strong odor of alcohol on Pratt's breath, and Pratt appeared very unsteady on his feet. Pratt admitted to drinking while driving around in his parents' truck. A blood alcohol test administered about 12:15 p.m. registered a .094% blood alcohol content (BAC). The State charged him with driving with a prohibited BAC, and with operating while intoxicated.

¶3 At trial, Pratt testified that he was drinking beer while he was driving, but could not say how much or for how long he drank. No other witness testified to Pratt's activities while driving. Pratt also testified that he continued drinking beer between the time he arrived at his parents' home and the time the police officer arrived. The trial court believed Pratt's testimony that he continued drinking, and acquitted him on the charge that he was driving with a prohibited BAC. However, the court found him guilty of driving while intoxicated. In effect, the court reasoned that while Pratt drank enough beer after he stopped driving to put his BAC while driving in doubt, it did not place his intoxication while driving into doubt.

¶4 On appeal we apply the following test:

[I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citation omitted). The *Poellinger* test applies to bench trials as well as jury trials. See *State v. Oppermann*, 156 Wis. 2d 241, 246-47, 456 N.W.2d 625 (Ct. App. 1990). The credibility of the witnesses is for the trier of fact to determine. *Poellinger*, 153 Wis. 2d at 504.

¶5 Here, the court found that Pratt credibly testified that he continued drinking after he stopped driving, in an amount sufficient to create reasonable doubt whether his BAC exceeded .080%. Having made that finding, the court effectively removed the evidentiary basis for a reasonable fact finder to find beyond a reasonable doubt that Pratt was so intoxicated he could not drive safely.¹ A fact finder could only speculate on the effect some unknown lesser amount of alcohol consumed over an unknown period had on Pratt's driving abilities at the time. A guilty verdict may not rest on speculation. See *State v. Watkins*, 2001 WI App 103, ¶26, 244 Wis. 2d 205, 628 N.W.2d 419. Accordingly, we conclude that, given the circuit court's credibility determination, the evidence was insufficient to find beyond a reasonable doubt that Pratt was intoxicated while driving.

By the Court.—Judgment reversed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

¹ A conviction for operating under the influence of an intoxicant requires proof that the defendant was incapable of driving safely. WIS. STAT. § 346.63(1)(a) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

