COURT OF APPEALS
DECISION
DATED AND FILED

May 14, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2347-CR **Cir. Ct. No. 2006CT1360**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT R. FROHMADER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Affirmed.*

¶1 ANDERSON, P.J.[1] Scott Frohmader appeals from a judgment finding him guilty of operating a motor vehicle while under the influence of an

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

intoxicant (third offense) as well as operating with a prohibited alcohol concentration (third offense). Frohmader believes the trial court erred in its instructions given to the jury because the instructions misled the jury. We disagree and therefore affirm the judgment of the trial court.

¶2 The facts of the case are as follows. On August 25, 2006, a motorist discovered a truck that had crashed into a tree alongside the road. That motorist, David Moran, stopped to determine if the driver of the truck was present and whether he or she had sustained any injuries. Not finding anybody at the scene of the accident, Moran had his wife call 911 to report the accident.

¶3 After Moran's wife called 911, Moran was approached by the defendant, Scott Frohmader, who was disoriented and had suffered obvious head wounds as his face was bleeding and swollen. Frohmader originally denied the truck was his, but then admitted to Moran that the truck was, in fact, his.

¶4 In response to the 911 call from Moran's wife, Deputy Mark Blicharz was sent to the scene and arrived at approximately 1:00 a.m. When Blicharz arrived at the scene, he first spoke with Moran and then Frohmader. Blicharz testified that Frohmader smelled of intoxicants and demonstrated slurred speech, which led him to believe that Frohmader had been drinking. However, Blicharz did not administer any field sobriety tests to Frohmader due to the nature of the injuries Frohmader had sustained. Frohmader changed his story of how the accident occurred, maintaining that he had not been the driver and admitted only that he had been out at Kelly's Bleachers[2] with friends before the accident.

[2] Kelly's Bleachers is a bar and restaurant.

¶5 Also when Blicharz arrived on the scene he attempted to determine approximately what time the accident occurred. He felt the hood of the truck and the front of the radiator to gauge if the engine was still warm, which he determined to be extremely warm, "[a]lmost too warm to touch." In addition, Blicharz also observed fluid still escaping from the front of the vehicle and that the lights of the truck were still on. However, an exact time of the accident was never determined.

¶6 After Blicharz had spoken to Frohmader at the scene of the accident, Frohmader was transported to the hospital to receive treatment for his head wounds. While at the hospital, Frohmader provided a blood sample that indicated a blood alcohol concentration of .137 percent. Subsequently, Frohmader was arrested and charged with operating a motor vehicle while under the influence of an intoxicant (third offense) as well as operating with a prohibited alcohol concentration (third offense).

¶7 At the trial, against Frohmader's objection, the jury was instructed as follows:

> If you are satisfied beyond a reasonable doubt that there was .08 grams or more of alcohol in 100 milliliters of the defendant's blood at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged driving or that he had a prohibited alcohol concentration at the time of the alleged driving ….

Frohmader objected to this instruction, arguing that it relieved the State of its burden to prove that the test had been taken within three hours of driving. Frohmader now appeals on the same issue, arguing that the trial court erred in giving this instruction to the jury because it misled the jurors to believe that the test had been taken within three hours despite the lack of proof of the actual time of the accident.

¶8 An appellate court's review of jury instructions is deferential to the trial court. ***State v. Wille***, 2007 WI App 27, ¶23, 299 Wis. 2d 531, 728 N.W.2d 343, *review denied*, 2007 WI 61, 300 Wis. 2d 194, 732 N.W.2d 859. The appellate court will only inquire as to whether the trial court misused it broad discretion of instructing the jury. ***Id***. Furthermore, an appellate court will only reverse and order a new trial if the jury instructions, taken as a whole, misled the jury or expressed an incorrect statement of law. ***Miller v. Kim***, 191 Wis. 2d 187, 194, 528 N.W.2d 72 (Ct. App. 1995).

¶9 We hold that the trial court did not misuse its discretion of instructing the jury in the present case. An appellate court does not have to agree with the trial court's decision, but where there is a reasonable basis for the trial court's decision, the appellate court will not disturb it. ***Grube v. Daun***, 213 Wis. 2d 533, 541-42, 570 N.W.2d 851 (1997). In the present case, the trial court's instruction to the jury as a whole was:

> The law states that the alcohol concentration in a defendant's blood taken within three hours of driving or operating is evidence of the driver's alcohol concentration at the time of driving or operating. If you are satisfied beyond a reasonable doubt that there was .08 grams or more of alcohol in 100 milliliters of the defendant's blood at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged driving or that the defendant had a prohibited alcohol concentration at the time of the alleged driving, operation or both, but you are not required to do so. You the jury are here to decide these questions on the basis of all of the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged driving or operation or that the defendant had a prohibited alcohol concentration at the time of the alleged driving or operation, or both, unless you are satisfied of that fact beyond a reasonable doubt.

¶10 We hold that there was a reasonable basis for the trial court to instruct the jurors that they may consider whether the test was taken within three hours of the accident and, if they decided it had been, they could then consider the evidence from the blood test. Although the time of the accident was never established, there was ample circumstantial evidence presented to the jury that may have suggested that the accident occurred no more than three hours before the time of the blood test. The jury was presented with evidence of the engine still being warm, the headlights remaining on, and fluid still leaking from the engine. Also the defendant was observed with fresh blood on his face. Based on the circumstantial evidence presented to the jury, there was a reasonable basis for the trial court to instruct the jury that it may consider whether the accident had occurred within three hours of the blood test.

¶11 We further hold that it is not probable that the jury instructions, as a whole, confused the jury. A challenged jury instruction is only prejudicial if it probably and not merely possibly misled the jury. ***Miller***, 191 Wis. 2d at 194. In the present case, the jury instructions informed the jury that "the alcohol concentration in a defendant's blood taken within three hours of driving or operating is evidence of a driver's alcohol concentration at the time of driving or operating." This instruction presents an inference that if the blood test was not taken within three hours of the driving or operating, it cannot be considered as evidence in the case. Here, Frohmader argues that the instruction misled the jury to believe that the test was taken within three hours of driving or operation of the vehicle, despite no proof of the actual time of the accident. However, even if Frohmader's argument is accepted, it is still unlikely the jurors were confused by the instructions because both sides explained in closing arguments that the jury must decide for itself whether the test was taken within three hours of driving or

operation of the vehicle before it considered the evidence of the blood test. Although Frohmader argues that closing arguments are not evidence for the jury to consider during deliberations, closing arguments are summations of each side's case where the parties clarify the evidence that has been presented to the jury and clarify the jury instructions and how the jurors should understand those instructions. Based on the jury instruction itself as well as each side's closing arguments, we hold that it is not probable that the jury was misled to believe that the instruction was telling it that the test was taken within three hours of the operation of the vehicle.

¶12 We conclude that the trial court did not misuse its broad authority in instructing the jury and, furthermore, that the jury instructions were not likely to mislead the jury.

By the Court.—Judgment affirmed.

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