COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1245 **Cir. Ct. No. 2007TR2910**

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

COUNTY OF BROWN,

PLAINTIFF-RESPONDENT,

V.

KURT J. KEUKEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed*.

¶1 BRUNNER, J.[1] Kurt Keuken appeals a conviction for driving while under the influence of an intoxicant, first offense. Keuken contends the trial court erroneously admitted evidence of his blood test results because the blood was not

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

drawn by a person authorized under WIS. STAT. § 343.305(5)(b). Because Keuken fails to fully develop his argument and present a complete record, we affirm.

BACKGROUND

¶2 Keuken was stopped at approximately 12:13 a.m. and issued citations for driving eleven miles over the posted speed limit, driving with a prohibited alcohol concentration, and driving while under the influence. At trial, Keuken objected to admission of the testimony of Leanne Smart, the hospital lab assistant who had withdrawn his blood sample following his arrest. Keuken argued Smart was not one of the persons specifically authorized by WIS. STAT. § 343.305(5)(b) to withdraw blood, nor was she acting under the direction of a physician.

¶3 Smart initially responded in the affirmative when asked whether she was acting under the direction of a physician when she withdrew Keuken's blood. However, she was unable to identify how this was so, other than to say there were doctors running the hospital at the time. She acknowledged no physician supervised the blood draw or gave permission or requested her to perform it. She also testified she was unaware of any standing orders directing her to perform OWI blood draws. When asked how a doctor was involved, Smart stated, "I don't know. I think it's just implied that, you know, we're working under the physician in charge."

¶4 After hearing Smart's testimony, the trial court declined to rule that, as a matter of law, Smart was not acting under the direction of a physician. The court stated:

> The question … from the record that I have in front of me, is – is there evidence from which a jury could reasonably

> infer that she was acting under the direction of a physician.… Now, you can argue to the jury that … the standing orders aren't there, but I don't – I can't on this record find as a matter of law that you've established that she wasn't acting under the direction of a physician…. [F]or me to act as a matter of law, there has to be no other inferences, and … for me [to] say this is not admissible on the record in front of me, I can't do it.

¶5 Keuken was convicted by the jury on all three citations. However, he is not appealing the speeding conviction and asserts the prohibited alcohol charge was "dismissed prior to sentencing under [WIS. STAT.] Section 246.63(1)(c)." Thus, he only appeals his conviction for driving while under the influence.

DISCUSSION

¶6 WISCONSIN STAT. § 343.305(5)(b) provides in relevant part: "Blood may be withdrawn from the person arrested … only by a physician, registered nurse, medical technologist, physician assistant or person acting under the direction of a physician." Paragraph (5)(d) then states: "At the trial of any civil or criminal action or proceeding … the results of a test administered in accordance with this section are admissible on the issue of [intoxication] …. Test results shall be given the effect required under [WIS. STAT.] s. 885.235."

¶7 The application of a statute to a set of facts presents a question of law this court decides independently of the trial court. ***State v. Penzkofer***, 184 Wis. 2d 262, 264, 516 N.W.2d 774 (Ct. App. 1994). However, we accept the trial court's factual findings unless they are clearly erroneous. ***State v. Armstrong***, 223 Wis. 2d 331, 352, 588 N.W.2d 606 (1999). Additionally, WIS. STAT. § 805.18(1) requires this court to "disregard any error or defect in the ... proceedings which shall not affect the substantial rights of the adverse party." If a court has

improperly admitted evidence, § 805.18 prohibits this court from reversing unless an examination of the entire proceeding reveals that the admission of the evidence has affected the substantial rights of the party seeking the reversal. ***Armstrong***, 223 Wis. 2d at 368 (citing § 805.18(2)).

¶8 Keuken relies on ***Penzkofer*** to argue the prosecution should be precluded from having the test results automatically admitted under WIS. STAT. § 343.305(5)(b). There, we concluded a lab assistant was acting under the direction of a physician where the hospital physician in charge at the time testified that the assistant performed her duties under his general supervision and direction. ***Penzkofer***, 184 Wis. 2d at 265-66. Additionally, the physician identified a detailed, written protocol of the procedures the lab assistant must follow, which was dated and signed by the physician. ***Id.***

¶9 Here, we need not decide whether the test results were properly admissible in Keuken's trial, because he fails to fully develop his argument and present a complete record. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed). Thus, regardless of whether it was error to admit the evidence, we are unable to assess whether any error was harmless.

¶10 We first note that, while Keuken objected to the admissibility of Smart's testimony that she was acting under the direction of a physician, he does not claim he objected to the admissibility of the blood test results. Keuken's failure is compounded by the fact he presented us with only a partial transcript. Because only the portion of the trial concerning Smart's testimony is transcribed, we are unable to ascertain whether Keuken ever objected to admission of the test results. Thus, Keuken fails to demonstrate he preserved the issue for appeal.

¶11 More importantly, Keuken's failure to provide the entire transcript makes it impossible to evaluate whether the jury had other evidence on which it could have properly relied to convict. Keuken argues that the test results would have substantially impacted the jurors' decision because they were instructed they could convict on both alcohol charges based on the test results alone. However, this argument does not address the WIS. STAT. § 805.18(2) prohibition against reversal except upon examination of the entire proceedings.

¶12 Finally, we note it is not the prohibited alcohol concentration charge from which Keuken appeals, but from the driving while under the influence charge. The blood test results are less critical to proving the latter charge than they are the former. Further, our independent review of the record reveals the State introduced as an exhibit a copy of the officer's OWI report. That document indicates Keuken had "slurred speech, glossy and bloodshot eyes." Additionally, it shows the officer observed five clues on the horizontal gaze nystagmus eye test, four clues on the walk and turn test, and that Keuken "could not do" the one-leg stand.

By the Court.—Judgment affirmed.

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