COURT OF APPEALS
DECISION
DATED AND FILED

July 3, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0458-CR **Cir. Ct. No. 01-CT-60**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM R. ESTES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: ANNETTE K. ZIEGLER, Judge. *Affirmed*.

¶1 ANDERSON, J.[1] William R. Estes appeals from the judgment, following a jury trial, convicting him of his second offense of driving a motor vehicle while intoxicated. He first challenges the trial court's refusal to sequester

[1] This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

the arresting officer during the jury trial. We determine that the trial court appropriately exercised its discretion in authorizing the officer to assist the prosecutor during the trial. Estes' second challenge is to the sufficiency of the evidence that he operated his car on a public highway while intoxicated. Our review of the record establishes that the evidence was sufficient to support the jury's verdict. Therefore, we reject both of Estes' challenges and affirm his conviction for his second offense of operating while intoxicated.

SEQUESTRATION OF WITNESS

¶2 Estes first challenges the trial court's denial of his motion to sequester the arresting officer, Washington County Sheriff's Deputy Keith Kiupelis. The proceedings on that issue, contained in the appellate record, are:

> [DEFENSE COUNSEL]: Just—I would move to sequester the witnesses, Your Honor.
>
> THE COURT: Okay. You have an officer?
>
> [PROSECUTOR]: I have a court officer. Other than that, we had anticipated there would be sequestration. I would ask that if there's any witnesses for the defense, they also be sequestered.
>
> [DEFENSE COUNSEL]: There are none. I would also move to sequester the officer under 906.15. I think under 906.15(2) it states that in certain situations the officer—that witnesses don't need to be sequestered. But only when there's a showing that the witness is necessary or essential, is what 906.15 states, to the State's presentation of the case. I don't think there's been a showing here, and I think the witness—the officer should also be sequestered, Your Honor.
>
> THE COURT: Okay. Well, you haven't asked for a showing.
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> [PROSECUTOR]: Well, detective—Or Deputy Kiupelis was the officer that was in charge of and assigned to the OWI arrest of Mr. Estes. He was involved in all facets of that. He was the first officer on the scene, he was the

> officer that had the conversations with Mr. Estes. He was the officer that was—followed Mr. Estes to the hospital, that spoke with Mr. Estes at the hospital, that observed the blood being drawn, that then took the blood from the tech and had that put into the evidence locker. He was also the officer that took photographs of where Mr. Estes' vehicle was in relation to Highway G. He's been involved in all facets and has done a significant amount of investigation for the State. I think in order to insure that we—I cover, and that our witnesses cover, every base, it is essential that he's here.
>
> ….
>
> THE COURT: I'm going to exclude that officer from the sequestration order.

¶3 Sequestration of witnesses is governed by WIS. STAT. § 906.15.[2] As this court recently explained:

> The statute governing exclusion of witnesses, WIS. STAT. § 906.15, authorizes a judge to exclude witnesses

[2] WISCONSIN STAT. § 906.15, in relevant part, provides:

> **Exclusion of witnesses. (1)** At the request of a party, the judge … shall order witnesses excluded so that they cannot hear the testimony of other witnesses.…
>
> **(2)** Subsection (1) does not authorize exclusion of any of the following:
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> ….
>
> (b) An officer or employee of a party which is not a natural person designated as its representative by its attorney.
>
> (c) A person whose presence is shown by a party to be essential to the presentation of the party's cause.
>
> ….
>
> **(3)** The judge … may direct that all excluded and non-excluded witnesses be kept separate until called and may prevent them from communicating with one another until they have been examined or the hearing is ended.

> from the courtroom so that they cannot hear the testimony of other witnesses. The purpose of sequestration is to assure a fair trial—specifically, to prevent a witness from "shaping his [or her] testimony" based on the testimony of other witnesses. The statute does not, however, permit exclusion of "a person whose presence is shown by a party to be essential to the presentation of the party's case."
>
> Sequestration of witnesses is within the discretion of the trial court. And, as we have often said, our review of discretionary determinations is deferential: we do no more than examine the record to gauge whether the circuit court reached a reasonable conclusion based on proper legal standards and a logical interpretation of the facts.

State v. Evans, 2000 WI App 178, ¶¶6-7, 238 Wis. 2d 411, 617 N.W.2d 220, *review denied*, 2001 WI 1, 239 Wis. 2d 773, 621 N.W.2d 629 (Wis. Dec. 12, 2000) (No. 99-2315-CR) (citations omitted).

¶4 This court concludes that Estes has failed to establish that the trial court erroneously exercised its discretion in determining that Kiupelis should be exempted from the sequestration order. The record reflects no defense argument countering the prosecutor's assertion that Kiupelis' presence was essential to assist in the presentation of the case. Given that Kiupelis was the arresting officer, his essential status, absent any suggestion to the contrary, was apparent.

SUFFICIENCY OF EVIDENCE

¶5 Estes insists that the State "failed to put forth any evidence that indicated that [he] operated his motor vehicle on a highway." While he concedes he was operating the vehicle, he argues that there was no evidence presented that even one person saw him drive his vehicle on the highway, across the gravel shoulder, through the ditch to a spot approximately thirty-two feet from the road's surface. Estes also argues that the State failed to present sufficient evidence that where his vehicle was stopped was within the right-of-way of the county highway.

¶6 Our review of the sufficiency of the evidence is to determine whether the evidence, viewed most favorably to the State and the conviction, "is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Ray***, 166 Wis. 2d 855, 861, 481 N.W.2d 288 (Ct. App. 1992) (citation omitted). We will affirm a conviction if we conclude that the trier of fact, acting reasonably, could be convinced beyond a reasonable doubt by evidence it is entitled to accept as true. ***State v. Teynor***, 141 Wis. 2d 187, 204, 414 N.W.2d 76 (Ct. App. 1987). We will not substitute our judgment for that of the trier of fact unless "the evidence supporting the jury's verdict conflicts with nature or the fully established facts, or unless the testimony supporting and essential to the verdict is inherently and patently incredible." ***State v. Sharp***, 180 Wis. 2d 640, 659, 511 N.W.2d 316 (Ct. App. 1993).

¶7 The jury is often asked to rely upon circumstantial evidence which may be stronger and more satisfactory than direct evidence.[3] ***Clark v. State***, 62 Wis. 2d 194, 197, 214 N.W.2d 450 (1974). Furthermore, "[r]easonable inferences drawn from the evidence can support a finding of fact." ***Bautista v. State***, 53 Wis. 2d 218, 223, 191 N.W.2d 725 (1971). When this court is faced with a record of historical facts which supports more than one inference, we must accept the inference drawn by the jury unless the evidence on which that inference is based is

[3] Or as Henry D. Thoreau said, "Some circumstantial evidence is very strong, as when you find a trout in the milk." ***State v. Ritchie***, 2000 WI App 136, ¶16 n.2, 237 Wis. 2d 664, 614 N.W.2d 837, *review denied*, 2000 WI 102, 237 Wis. 2d 260, 618 N.W.2d 750 (Wis. July 27, 2000) (No. 99-1902-CR) (citation omitted).

incredible as a matter of law.[4] ***State v. Poellinger***, 153 Wis. 2d 493, 506-07, 451 N.W.2d 752 (1990).

¶8 We summarize the evidence which is most favorable to support Estes' conviction. In late afternoon, Mark Helm and his wife were traveling on a county highway in Washington county when they saw a Ford Explorer on a hillside next to a ditch; either the taillights or the brake lights were on, and the driver had his head on the side window. Helm approached the vehicle and the driver appeared to be unconscious. He looked in through the vehicle's window and saw the keys were in the ignition, the vehicle was in drive and the driver had his foot on the brake pedal. Helm went to his truck and called the Washington county sheriff's department. Helm returned to the vehicle and began trying to rouse the driver by pounding on the window; the driver raised his head a few times, appeared to be very groggy and had drool hanging from his mouth. Another citizen stopped and along with Helm opened the driver's door. Helm reached across the unconscious driver and put the transmission into park and

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[4] The trial court instructed the jury on circumstantial evidence using WIS JI—CRIMINAL 170:

> It is not necessary that every fact be proved directly by a witness or an exhibit. A fact may be proved indirectly by circumstantial evidence. Circumstantial evidence is evidence from which a jury may logically find other facts according to common knowledge and experience.
>
> Circumstantial evidence is not necessarily better or worse than direct evidence. Either type of evidence can prove a fact.
>
> Whether evidence is direct or circumstantial, it must satisfy you beyond a reasonable doubt that the defendant committed the offense before you may find the defendant guilty.

turned the ignition off.[5] While waiting for the Washington county sheriff's department, Helm paced off the distance between the vehicle and the county road and estimated that the vehicle was thirty-two feet from the road surface.

¶9 Kiupelis responded to the call from Helm reporting a traffic accident with unknown injuries and a driver slumped over the wheel. When the deputy reached the scene, he saw a maroon Ford Explorer in the ditch along a county highway. The deputy observed the driver slumped over the steering wheel. When the deputy got to the driver's side door, he immediately noticed "an extremely strong odor of alcohol" and that the driver's eyes were bloodshot and glassy. When Kiupelis asked the driver if he had had anything to drink, the driver responded, "a lot," and when asked his name, the driver said he did not know his name. Kiupelis was able to remove the keys from the ignition to prevent the driver from attempting to leave. The driver refused to get out of the car, and Kiupelis and a second deputy had to physically remove the driver from the vehicle and prop him up against the rear of his Explorer. The deputy was able to identify the driver as Estes. Because Estes was highly intoxicated, the rescue squad was called to take him to a hospital. The deputy followed the ambulance to the hospital in West Bend and arrested Estes for operating while under the influence. The result of the blood draw done at the hospital was that Estes had a blood alcohol content of 0.301%.[6]

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[5] Helm and the other individual were volunteer firefighters and proceeded to assess the unconscious driver for any medical problems.

[6] Estes was charged with one count of operating a motor vehicle while intoxicated, second offense, in violation of WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(b) and operating with a prohibited blood alcohol content in violation of §§ 346.63(1)(b) and 346.65(2)(b).

¶10 Estes argues that the evidence of his operating a motor vehicle on a public road is insufficient because the deputy never saw him operate the vehicle on a public highway. Although the deputy did not actually see Estes drive his vehicle, there was sufficient circumstantial evidence before the jury of Estes' operation of a vehicle on public roads. Helm testified that when he looked in through the window of the Explorer, the keys were in the ignition, the vehicle was running, the transmission was in "drive" and Estes' foot was on the brake. The scene was not much different when Kiupelis arrived. Common knowledge and experience would permit the trier of fact to logically conclude that in order for the vehicle to come to rest approximately thirty-two feet from the surface of the road, Estes had to have driven the vehicle on the county highway, driven it off the shoulder, and driven it through the ditch and up a slight incline.[7]

¶11 In summary, we conclude that the trial court properly denied Estes' sequestration motion because the arresting deputy was essential to the presentation of the State's case. We also conclude that there was sufficient evidence and

[7] We explained the reasoning process used with circumstantial evidence in ***Belich v. Szymaszek***, 224 Wis. 2d 419, 425, 592 N.W.2d 254 (Ct. App. 1999) (citations omitted):

> An elementary principle is that an inferred fact is a logical, factual conclusion drawn from basic facts or historical evidence. It is the probability that certain consequences can and do follow from basic events or conditions as dictated by logic and human experience. Building on this elementary principle is the principle that a reasonable inference is a conclusion arrived at by a process of reasoning. This conclusion must be a rational and logical deduction from facts admitted or established by the evidence when such facts are viewed in the light of common knowledge or common experience. Further, an inference is not supposition or conjecture; it is a logical deduction from facts proven and guesswork cannot serve as a substitute.

reasonable inferences to support the jury's determination that Estes operated a vehicle on a public highway.

By the Court.—Judgment affirmed.

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