

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 12, 2002**

Cornelia G. Clark  
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. 02-1619-CR**

**Cir. Ct. No. 00 CT 6115**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**NEIL MONTOTO,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.<sup>1</sup> Neil Montoto appeals from the judgment of conviction entered after a jury found him guilty of operating a motor vehicle with a prohibited blood alcohol concentration, contrary to WIS. STAT. § 346.63(1)(b)

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (1999-2000).

(1999-2000).<sup>2</sup> Montoto argues that the trial court erroneously exercised its discretion when it allowed into evidence the blood alcohol concentration (BAC) test result. He contends that because he refused to consent to a breath test, the result of the BAC test was not automatically admissible and should have been excluded on the basis that the State failed to lay a proper foundation for its admission. Montoto also argues that the trial court erroneously exercised its discretion in instructing the jury. Because Montoto did not raise a timely objection on the first issue and because the jury instructions were not erroneous, this court affirms.

### BACKGROUND

¶2 Montoto was charged with having operated a motor vehicle on October 20, 2000, while under the influence of an intoxicant, and with a prohibited alcohol concentration, contrary to WIS. STAT. § 346.63(1)(a) and (b). Prior to the trial, Montoto filed a motion to dismiss his refusal or, in the alternative, to suppress the BAC results. The trial court handling the motion dismissed the refusal case.

¶3 At the start of the trial, Montoto moved to have any testimony or evidence concerning his refusal to provide a breath sample precluded from the trial. The State agreed not to mention anything about Montoto's refusal and the trial court then ordered that no testimony or evidence concerning that issue was to be brought up at trial. The Informing the Accused form was also redacted so that it would not reflect Montoto's initial refusal to submit to the breath test.

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<sup>2</sup> All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶4 At trial, Montoto testified that the Informing the Accused form had been read to him. Officer John McCure testified about reading the form to Montoto, about transporting Montoto to Columbia Hospital for a blood draw, and about the procedures that were followed. Testimony regarding the blood draw was also provided by phlebotomist Annie Ward. Montoto did not provide any testimony concerning his blood test.

¶5 Amy Cochems, a chemist from the State Laboratory of Hygiene, testified as to the result of Montoto's blood alcohol test. No objection was made during her testimony. After Cochems completed her testimony, the State moved to admit the written form documenting the results of the BAC into evidence. Montoto objected. Initially, Montoto's objection was specifically to the written report of his BAC test result being admitted into evidence on the basis that the State failed to provide a proper foundation to show relevance. Montoto then expanded his objection to include all of Cochems's testimony. The court overruled the objection on several grounds, including the fact that Montoto did not raise an objection during any of the testimony concerning the blood test.

¶6 After the close of evidence, during the jury instruction conference, Montoto objected to the portion of the proposed jury instructions that addressed the presumption of accuracy in the test result, arguing that this was not an implied consent case and therefore there should not be a presumption of accuracy. The court overruled the objection and declined to replace the portion objected to with the instruction Montoto requested. The trial court, however, did allow Montoto's proposed instruction to be included in the final instructions read to the jury.

¶7 The jury returned a verdict of not guilty as to the operating a motor vehicle while under the influence of an intoxicant charge, and guilty as to the

operating a motor vehicle while having a prohibited blood alcohol concentration charge. Montoto now appeals.

## DISCUSSION

### A. *Admission of BAC Results.*

¶8 Montoto contends that the blood alcohol sample was not drawn pursuant to the provisions of Wisconsin’s Implied Consent Law, WIS. STAT. § 343.305, and therefore it is not automatically admissible as evidence. To be received as evidence, Montoto argues, the State should have presented a foundation showing the relevancy of the test result obtained. Montoto suggests that the State failed to lay the proper foundation, and the trial court allowed the “automatic admission” anyway. The State responds that Montoto waived his right to raise this issue because he failed to timely object to the BAC test results. The trial court agreed with the State. This court concludes that Montoto’s objection was not timely and, therefore, he waived his right to raise this issue.

¶9 The question of whether a party objected to evidence being admitted in a manner sufficient to preserve the issue for appeal is a question of law that requires the application of WIS. STAT. § 901.03(1)(a) to an undisputed set of facts, and is reviewed independently. *State v. Peters*, 166 Wis. 2d 168, 174, 479 N.W.2d 198 (Ct. App. 1991).

¶10 The purpose of WIS. STAT. § 901.03(1)(a) (the waiver rule) is to “cultivate timely objections.” *State v. Erickson*, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999).

The waiver rule serves several important objectives. Raising issues at the trial court level allows the trial court to correct or avoid the alleged error in the first place,

eliminating the need for appeal. It also gives both parties and the trial judge notice of the issue and a fair opportunity to address the objection. Furthermore, the waiver rule encourages attorneys to diligently prepare for and conduct trials. Finally, the rule prevents attorneys from “sandbagging” errors, or failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal. For all of these reasons, the waiver rule is essential to the efficient and fair conduct of our adversary system of justice.

*State v. Huebner*, 2000 WI 59, ¶12, 235 Wis. 2d 486, 611 N.W.2d 727 (citations omitted). Montoto argues that the failure of the State to connect the BAC result with him driving the vehicle was not complete until the witness, chemist Amy Cochems, had finished testifying. He immediately thereafter objected to the admissibility of the written test results and Cochems’s testimony in its entirety. This court is not persuaded by Montoto’s explanation regarding his untimely objection.

¶11 Montoto had many opportunities to object to the admissibility of the BAC test results before the conclusion of Cochems’s testimony. During the pretrial discussions, the State clearly indicated, on the record, that it would be introducing Montoto’s blood test results, and Montoto made no objection. The State also referred to Montoto’s .143% blood alcohol content in its opening statement with no objection from Montoto. Cochems then testified during the trial that Montoto’s BAC was .143%, and his BAC was mentioned several times during her testimony. Montoto never objected to its admissibility.

¶12 Instead, Montoto waited until after Cochems’s testimony had concluded, and the State attempted to offer the form documenting the results of Montoto’s blood alcohol test into evidence. Then, he objected for the first time. Moreover, Montoto’s initial objection was solely to the written test being admitted

as an exhibit, and not the testimony about the BAC results. It was only after questioning by the court that he expanded his objection to include Cochems's testimony.

¶13 The trial court overruled Montoto's objection, and admitted the blood test results into evidence. It did so, in part, because Montoto waited too long to object. If Montoto had objected the first time the issue came up, the State would have had an opportunity to cure the "alleged" foundation/relevance problem. Montoto was aware of the State's intent to admit the blood alcohol test into evidence as early as pretrial discussions, but waited until after Cochems's entire testimony had concluded to object to the admissibility. The timing of his objection did not give the trial court or the State "notice of the issue and a fair opportunity to address the objection."

¶14 Montoto's failure to object to the admissibility of his BAC results in a timely manner, as required by WIS. STAT. § 901.03(1)(a), forces this court to conclude he waived the issue, and he is precluded from bringing it up on appeal.

*B. Jury Instruction.*

¶15 Montoto contends that the trial court erroneously exercised its discretion when it denied his request to redact the portion of WIS JI—CRIMINAL 2669, which refers to the BAC and presumption of accuracy, and instead charged the jury with WIS JI—CRIMINAL 234, the instruction as to blood alcohol curve. He argues that because the blood sample was not drawn pursuant to Wisconsin's Implied Consent Law, the jury should not have been instructed with regard to the presumption of accuracy. The trial court refused to redact the challenged portion of WIS JI—CRIMINAL 2669, but did agree to charge the jury with WIS JI—

CRIMINAL 234. This court cannot conclude that the trial court erroneously exercised its discretion.

¶16 In a case involving challenged jury instructions, we apply a harmless error analysis to determine whether reversal is required. *State v. Lohmeier*, 205 Wis. 2d 183, 192, 556 N.W.2d 90 (1996). If the instructions of the trial court are adequate, this court will not find error simply because special instructions were refused, even when the refused instructions were not erroneous. *State v. Lenarchick*, 74 Wis. 2d 425, 455, 247 N.W.2d 80 (1976). “This court looks to the instructions as a whole in determining whether they were appropriate, and ... will not reverse unless the failure to include the requested instructions that would be likely to prejudice the defendant.” *Id.* Whether a challenged jury instruction violated a defendant’s constitutional rights by misleading the jury is reviewed *de novo*. *Lohmeier*, 205 Wis. 2d at 191-92.

¶17 Here, Montoto objected to the portion of the jury instruction concerning the presumption of accuracy of the BAC. Montoto argues that because his blood sample was drawn outside the provisions of the Implied Consent Law, and there is a question regarding the blood alcohol curve, the jury should not have been instructed with regard to presumption of accuracy. Instead, he contends the jury should have been given an instruction on the blood alcohol curve. The trial court denied Montoto’s request to remove the presumption of accuracy portion of the instruction, but it allowed the blood alcohol curve instruction to be included in the jury instructions.

¶18 This court has already determined that Montoto waived his right to appeal the admissibility of the blood alcohol test results. Because the right to appeal this issue was waived, and there is no evidence that Montoto’s blood was

drawn outside of the provisions of the Implied Consent Law, there is no reason that the State should lose its right to instruct the jury on the presumption of accuracy. Moreover, despite the “minimal evidence at best” to support charging the jury with the blood alcohol curve instruction, the trial court granted Montoto’s request to do so.

¶19 Based on these facts, this court cannot conclude that the trial court erroneously exercised its discretion with respect to the jury instructions. The instructions given provided an accurate statement of the law, and were supported by the evidence in this case. The court’s jury instructions were not in any way misleading to the jury. Therefore, the judgment of conviction cannot be overturned on this basis.

¶20 Because Montoto waived his right to appeal the admissibility of the blood test results by failing to make a timely objection to the admission, and because there was no error in the instructions given to the jury, the judgment of conviction is upheld.

*By the Court.*—Judgment affirmed.

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



