

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 30, 2003

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. 02-1984-CR
STATE OF WISCONSIN**

Cir. Ct. No. 99-CT-313

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RANDAL M. WOODARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sauk County: PATRICK TAGGART, Judge. *Affirmed.*

¶1 DYKMAN, J.¹ Randal M. Woodard appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant (OMVWI), contrary to WIS. STAT. § 346.63(1)(a), and from an order denying his

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). All references to the Wisconsin Statutes are to the 2001-2002 version unless otherwise noted.

postconviction motions. The issues are whether the evidence was sufficient to convict him and whether he is entitled to a new trial in the interest of justice. We conclude that the evidence was sufficient and that Woodard is not entitled to a new trial in the interest of justice. Accordingly, we affirm.

¶2 A passerby stopped to assist Woodard, whose vehicle was stuck over a culvert in a rural driveway with the engine still running. Unsuccessful, she drove home and discussed the incident with her aunt and uncle. One of them called the sheriff's department. Ultimately, several deputy sheriffs went to the scene. At Woodard's trial, they testified that they felt that Woodard was too intoxicated to safely take field tests for intoxication. The deputies arrested him, took him to a hospital for a blood draw and gave him citations for OMVWI and operating a motor vehicle with a prohibited blood alcohol concentration (BAC). The trial court dismissed the BAC citation after Woodard was found guilty of OMVWI.

¶3 At trial, Woodard asserted that the State had not proved that he had operated his vehicle on a public highway. Several of the deputies testified as to the location of Woodard's car, but neither party requested a jury instruction as to the definition of "highway," and the trial court did not give one. The jury found Woodard guilty.

Insufficient Evidence

¶4 We use the following standard when determining whether evidence is sufficient to support a conviction:

[A]n 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.

State v. Watkins, 2002 WI 101, ¶68, 255 Wis. 2d 265, 647 N.W.2d 244 (quoting *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)).

¶5 Woodard argues that the evidence is insufficient to show that he was operating his vehicle on a highway, a requirement of WIS. STAT. § 346.61. WISCONSIN STAT. § 340.01(22) provides that the entire width of a right-of-way is a highway, but that private roads or driveways are not highways. Woodard contends that the State did not prove that his automobile had entered a highway when it became disabled.

¶6 John Hanson, a Sauk County Deputy Sheriff, testified that he observed Woodard's vehicle within five feet of the edge of the paved portion of Terrytown Road. He continued:

Q: Is this vehicle on the paved portion of the roadway?

A: No, it is not on Terrytown Road.

Q: Why are you working with it at all?

A: Because it's still within what is believed to be the road right-of-way.

Q. That is in your area of jurisdiction?

A. Yes.

Q. Can you explain that for us a little?

A. I believe the right of way of roadway in this particular location is 66 feet, which would be 33 feet from the center of the roadway. In this instance north and south of Terrytown road.

¶7 Rebecca Johnson, the passerby, testified that Woodard's car was three to five feet off the road. Sharon Peterson testified that she saw the vehicle in

a driveway which was the entrance to a farm home. The car was about five to eight feet from the paved lane of travel of Terrytown Road. Dale Hackbarth, a patrol officer for the Sauk County Sheriff's Department, testified that Woodard's vehicle was probably no more than five feet, and probably quite a bit less, from the paved portion of the traveling lane of Terrytown Road. Perry Schleichert, a Deputy Sheriff for the Sauk County Sheriff's Department, testified: "I observed [Woodard's car] was a couple feet off the roadway. It wasn't on the traveled portion of roadway, but it was off the roadway by maybe two to six feet." A reasonable jury could find that Woodard's car was two or three feet from the paved portion of Terrytown Road.

¶8 From this testimony, a jury could reasonably believe that the Terrytown right-of-way was sixty-six feet wide and that the edge of the right-of-way was thirty-three feet from the center of the roadway. A common meaning of the word "roadway" is "the strip of land over which a road passes." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 1012 (10th ed. 1993). While roads in rural areas can be graveled or paved, the term "road" also is commonly used to designate the traveled portion of a highway.

¶9 A reasonable jury, using common sense, could infer that Terrytown Road was not a superhighway but a rural road. Therefore, a reasonable jury could conclude that the paved portion of Terrytown Road was not 66 feet wide. This, plus the testimony we have noted, would permit a reasonable jury to conclude that there was more than two or three feet between the edge of the paved portion of Terrytown Road and the edge of the right-of-way of Terrytown Road. That would place Woodard's car within the right-of-way of Terrytown Road. We therefore reject his assertion that the evidence was insufficient to prove that he drove on a highway.

Discretionary Reversal

¶10 Woodard asks that we grant him a new trial in the interest of justice, pursuant to WIS. STAT. § 752.35. He asserts that because the trial court did not instruct the jury as to the definition of the word “highway,” the real controversy was not tried. But the real controversy was whether Woodard’s car was within the right-of-way of Terrytown Road. We have repeated and quoted some of the testimony regarding where Woodard’s car was found. A deputy sheriff testified that his area of jurisdiction was the Terrytown right-of-way, which was sixty-six feet wide. That is another way of stating that a highway covers the entire right-of-way, which is what the jury would have heard had the trial court told it, in the words of WIS. STAT. § 340.01(22), that a highway “includes the entire width between the boundary lines of every way open to the use of the public.” The statement of the deputy sheriff was consistent with the statutory definition of “highway.” The jury was not misled as to the area covered by a highway, and had before it evidence from which it could choose whether the State had or had not proved that Woodard had operated his automobile on a highway. It chose to conclude that he had. That was the real controversy in this case, and that controversy was fully tried. Accordingly, we decline to order a new trial in the interest of justice, pursuant to § 752.35.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

