COURT OF APPEALS
DECISION
DATED AND FILED

June 12, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2090 **Cir. Ct. No. 02-TR-1037**

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

CITY OF LA CROSSE,

PLAINTIFF-RESPONDENT,

V.

BRIAN H. HOFF,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Affirmed.*

¶1 DYKMAN, J.[1] Brian Hoff appeals from a judgment convicting him of OWI as a first offense, a violation of WIS. STAT. § 346.63(1)(a). Because we

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

conclude that there was sufficient evidence to support the jury's guilty verdict and there was no bias by the trial judge or in the verdict form, we affirm.

BACKGROUND

¶2 At approximately 3:30 a.m. on January 5, 2002, Sergeant Troy Nedegaard, an officer with the City of La Crosse Police Department, observed that Hoff's vehicle had its left headlight out. After Hoff passed him, Nedegaard made a U-turn and followed. Hoff headed north at the intersection of Main and Fourteenth Street, then made two left turns and a right turn before Nedegaard stopped him in an alley off the 1000 block of Main Street.

¶3 Noticing the odor of intoxicants and that Hoff's speech seemed to be slightly slurred, Nedegaard asked Hoff to perform field sobriety tests. Nedegaard administered three tests: the horizontal gaze nystagmus (HGN), the walk and turn and the one leg stand. Hoff exhibited five out of six clues in the HGN, indicating that he might be under the influence of an intoxicant. During the walk and turn, Hoff lost his balance, missed the line with two steps and failed to walk heel-to-toe on two steps. While performing the one leg stand, Hoff touched the ground three times and began to lose his balance towards the end of the test, swaying back and forth and raising his arms. Based on these observations, Nedegaard concluded that Hoff was intoxicated and placed him under arrest.

¶4 Hoff waived his Miranda rights and answered Nedegaard's questions. Hoff stated that he had awakened at 8:30 the previous morning, and had consumed four beers and two shots of vodka between 1:00 a.m. and 3:00 a.m. An intoximeter test conducted at the La Crosse Police Station revealed that Hoff's blood alcohol concentration was .09 percent at 4:23 a.m. Nedegaard issued Hoff a citation for OWI and a written warning for the inoperable headlight.

¶5 Hoff pleaded not guilty and represented himself at his jury trial. Besides Hoff, the only other witness was Nedegaard. On cross-examination Nedegaard conceded that, apart from the headlight, Hoff had not committed any traffic violations before he was stopped. Although Nedegaard had not written on the alcohol influence report what initially led him to suspect that Hoff might be intoxicated, he testified that the odor of intoxicants on Hoff's breath was the first sign. With respect to the HGN, Nedegaard agreed that Hoff did not exhibit one of the six clues, nystagmus in the left eye onset to forty-five degree angle. Nedegaard described Hoff's attitude throughout the stop as cooperative and very polite.

¶6 Hoff testified on his own behalf, stating that at the time of the traffic stop he was very anxious and his mouth was dry, but after his first sentence he spoke fluently. Hoff admitted drinking four beers and two shots of vodka over two hours but denied being impaired after that. He added that he had taken a caffeine pill because he was very tired, but he believed the caffeine had worn off when Nedegaard stopped him. Hoff explained that "I was extremely tired and—and when you get tired you can't always concentrate fully, physically or mentally, and that's why I had not passed all of the field sobriety tests." When cross-examined, Hoff agreed that lack of sleep intensifies the effects of alcohol.

¶7 Before closing arguments the trial court gave Hoff and the assistant city attorney an opportunity to review the jury instructions. There were no objections. After reading the instructions the trial court informed the jury that the verdict must be agreed to by five-sixths or more of the jurors. It also explained that any dissenting jurors were to sign their names in the place indicated on the verdict form: "When you have agreed upon your verdict, have it signed and dated

by the person you have selected to preside and at the foot of the verdict you will find a place provided where dissenting juror, if there be any, will sign their name."

¶8 The jury returned a unanimous guilty verdict. Hoff appeals.

ANALYSIS

¶9 We read Hoff's briefs as presenting three issues for review: that the evidence was insufficient to support the jury's verdict, that the verdict form was improper, and that the trial judge was biased. At the outset, we note that Hoff's remedies are limited to reversal or modification of judgment. WIS. STAT. § 808.09. We cannot, as he requests, reduce his conviction to "something less serious." *See, e.g.*, ***State v. Myers***, 158 Wis. 2d 356, 362-63, 461 N.W.2d 777 (1990) (court of appeals cannot modify conviction to reflect a lesser included offense when jury not given instructions on that offense). Nor will we act as his advocate in this proceeding and develop his arguments for him, even though he is appearing pro se. ***Waushara County v. Graf***, 166 Wis. 2d 442, 451-52, 480 N.W.2d 16 (1992).

¶10 Hoff challenges a unanimous jury verdict finding him guilty of OWI. Our review of a jury's verdict is extremely deferential. An appeal is not a second trial. Rather, we will sustain the jury's verdict if there is any credible evidence to support it. ***Pieper v. Neuendorf Transp. Co.***, 87 Wis. 2d 284, 290, 274 N.W.2d 674 (1979). It is for the jury to determine the credibility of witnesses, the weight to be given to the evidence, and to resolve conflicts in testimony. ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990). As an error-correcting court, we will not reweigh the evidence, but will view it in the light most favorable to the verdict. ***Coryell v. Conn***, 88 Wis. 2d 310, 315, 276 N.W.2d 723 (1979). Thus our task is to search the record for evidence in support of the jury's verdict

and, if more than one inference can be drawn from the evidence, we are to accept the inference drawn by the jury. ***Nieuwendorp v. American Family Ins. Co.***, 191 Wis. 2d 462, 472, 529 N.W.2d 594 (1995). Reversal requires that "there is such a complete failure of proof that the verdict must have been based on speculation." ***Id.***

¶11 This deference to the jury as factfinder guides our examination of Hoff's sufficiency of the evidence claim. To prove a violation of WIS. STAT. § 346.63(1)(a), the State had to provide clear, satisfactory and convincing evidence that Hoff operated a motor vehicle on a public highway and that he was under the influence of an intoxicant such that his ability to operate his vehicle was impaired.[2] In other words, the City needed to show that Hoff "consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle." WIS JI—CRIMINAL 2663A. We conclude that there is sufficient evidence in the record to support the guilty verdict.

¶12 First, that Hoff was operating a motor vehicle on a public highway is undisputed. Nor does Hoff challenge the validity of the traffic stop. Nedegaard

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[2] WISCONSIN STAT. § 346.63(1)(a) reads as follows:

> Operating under influence of intoxicant or other drug. (1) No person may drive or operate a motor vehicle while:
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> (a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving[.]

observed that Hoff only had one working headlight, a violation of WIS. STAT. § 347.09, and for that reason stopped Hoff's vehicle.

¶13 Second, there is ample evidence of Hoff's intoxication. Hoff testified to having drunk four beers and two shots of vodka in a two hour period. And, at trial he did not dispute that he failed the field sobriety tests by making the errors Nedegaard described. Instead, Hoff argued that his poor performance was the result of fatigue, essentially conceding that his need for sleep had increased the effect of the alcohol. Hoff also confirmed Nedegaard's testimony that he had difficulty speaking; but attributed the cause to having a very dry mouth rather than intoxication. The jury could also consider the results of the intoximeter test showing that Hoff's blood alcohol level was .09 percent. Presented with this evidence, a jury could reject Hoff's estimation of his condition and, based upon Nedegaard's uncontradicted testimony of Hoff's actions, reasonably infer that Hoff's ability to operate his vehicle was impaired by his alcohol consumption. In addition, the jury was entitled to interpret Hoff's driving—leaving Main Street only to return to that area after making three more turns—as evasive and therefore indicative of guilt. *See* ***State v. Amos***, 220 Wis. 2d 793, 801, 584 N.W.2d 170 (Ct. App. 1998) (Evasion of police may indicate a guilty mind thereby raising reasonable suspicion to support a brief investigative stop.).

¶14 Hoff's challenges to the evidence are conclusory at best. He contends that the field sobriety tests were "performed wrong," but does not explain how. For example, at trial Nedegaard testified that when administering the HGN, he shines the flashlight in the accused's neck/chest area. Hoff now argues in his brief that Nedegaard shined the flashlight in his eyes and that "could have affected the number of clues." But Hoff did not testify to that at trial and thus there is no evidence in the record to support his claim. For the same reason we

reject Hoff's new allegation that he did not make the number of missteps in the walk and turn and one leg stand tests that Nedegaard reported. There is simply no evidentiary basis for Hoff's conclusion that Nedegaard incorrectly scored the field sobriety tests, and we will not second-guess the jury's credibility determinations.

¶15 Finally, Hoff asserts that the City omitted a "key piece of evidence" from its case because it did not offer the videotape of the field sobriety tests. According to Hoff, the videotape would have shown that his speech and balance were fine, thereby proving that he was not intoxicated, although even in his brief Hoff concedes that "[t]he only thing [the videotape] showed was that I missed a couple steps and I touched a couple of times." Further, he claims that he requested a copy of the videotape from the police department but the tape was never provided to him.

¶16 The flaw in Hoff's argument is that the City is not required to use every available piece of evidence to prove its case at trial. It is up to the City to determine what evidence it will rely upon and what strategy it will pursue. The City believed, correctly as it turns out, that Nedegaard's testimony without the videotape would be enough to convince the jury. If Hoff was unable to obtain the videotape for use in his own case, he should have raised that issue before the trial court and not waited until this appeal to argue it. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980) (generally appellate court will not review issue raised for first time on appeal). Had he chosen to do so, he could have subpoenaed the videotape and shown it to the jury himself.

¶17 The jury is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony, and we will not second-guess its determinations on appeal. ***Richards v. Mendivil***, 200 Wis. 2d 665, 671, 548

N.W.2d 85 (Ct. App. 1996). Considering the record as a whole, there is sufficient evidence from which the jury could reasonably infer that Hoff's ability to drive was impaired by his intoxication.

Jury Verdict

¶18 Next we consider Hoff's contention that the trial court erred by using a verdict form that contained two blank lines for dissenting jurors to write their names. Hoff suggests that the verdict form intimidated jurors who might have voted "not guilty" if they could have remained anonymous. This argument is without merit.

¶19 Hoff did not object to the jury instructions at trial and so he raises this issue for the first time on appeal.[3] Appellate courts have no authority to reach waived issues concerning unobjected to jury instructions. ***State v. Ward***, 228 Wis. 2d 301, 596 N.W.2d 887 (Ct. App. 1999). "Failure to object to an alleged improper instruction is more than a waiver of the right to thereafter object to the instruction. If no objection is made, this court is without the power to consider the objection." ***Id.*** at 305. Only when the real controversy has not been tried may we exercise our discretionary power of reversal under WIS. STAT. § 752.35 and

[3] WISCONSIN STAT. § 805.13(3), provides in relevant part:

> The court shall inform counsel on the record of its proposed action on the motions and of the instructions and verdict it proposes to submit. Counsel may object to the proposed instructions or verdict on the grounds of incompleteness or other error, stating the grounds for objection with particularity on the record. Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict.

review an unobjected to jury instruction. ***Id.*** at 306; ***Vollmer v. Luety***, 156 Wis. 2d 1, 13, 456 N.W.2d 797 (1990).

¶20 Even if Hoff had objected to the form of the verdict and thereby preserved the issue for appeal, we would find no error in a verdict form that provides lines for identifying dissenting jurors. *See* ***Lievrouw v. Roth***, 157 Wis. 2d 332, 361, 459 N.W.2d 850 (Ct. App. 1990) (verdict form containing place for names of two dissenting jurors does not force jury to agree to verdict); ***Kowalke v. Farmers Mut. Auto. Ins. Co.***, 3 Wis. 2d 389, 401-03, 88 N.W.2d 747 (1958) (verdict with space to identify dissenting jurors "does not coerce or restrict the right of individual jurors to express disagreement" and therefore no error resulted from use of verdict form). The standard jury instructions and verdict used at Hoff's trial were proper and do not support any claim of bias.

Bias By Trial Judge

¶21 Finally, Hoff asserts that the trial judge was biased. In support, he notes that when giving the jury instructions, the trial judge asked the jurors to return a unanimous verdict if possible. Hoff sees this statement as possibly swaying some of the jurors to find him guilty. In his reply brief, Hoff appears to be adding a new claim of bias, based upon the judge not permitting redundant questioning of Nedegaard regarding when the officer noticed that Hoff's headlight was out. We reject this argument.

¶22 Nothing in the record reveals any bias by the trial judge. It is entirely proper for a judge to inform a jury that a unanimous verdict is desirable. Moreover, Hoff cannot show any prejudice resulted from the judge's statement, as a unanimous verdict could be either guilty or not guilty. The judge did not tell the jury what result they were to reach and thus her comment in no way infringed

upon the jury's role as factfinder. Nor has Hoff explained how he was prejudiced by not being allowed to further question Nedegaard about when the latter first observed Hoff's vehicle. In short, Hoff's argument alleging bias is conjecture, unsupported by the record and fails to show that any of the identified statements prejudiced his case.

By the Court.—Judgment affirmed.

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