

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 16, 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. 02-2991
STATE OF WISCONSIN**

Cir. Ct. No. 02-TR-442

**IN COURT OF APPEALS
DISTRICT II**

CITY OF RIPON,

PLAINTIFF-RESPONDENT,

V.

BRUCE M. BRISKIE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: STEVEN W. WEINKE, Judge. *Affirmed.*

¶1 NETTESHEIM, P.J.¹ Bruce M. Briskie was convicted by a jury of operating a motor vehicle while intoxicated (OWI). The jury acquitted Briskie of a companion charge of operating with a prohibited alcohol concentration (PAC).

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

Briskie argues that because the jury found him not guilty of the PAC charge, the evidence was insufficient to support the conviction for OWI. We reject Briskie's argument. We conclude that the evidence presented at trial, including the results of a breathalyzer test, was sufficient to support the OWI conviction. We affirm the judgment.

FACTS

¶2 Briskie pled not guilty to charges of OWI and PAC arising out of an incident that occurred on December 20, 2001. The matter proceeded to a jury trial on August 1, 2002. At the jury trial, the City of Ripon presented the testimony of one witness, the arresting officer, Michael W. Fredin of the City of Ripon Police Department.

¶3 Fredin testified that at 11:00 p.m. on December 20, 2001, he was on general patrol when he heard "a lot of loud squealing tires" as he approached an intersection. Fredin went through the intersection, stopped his vehicle and observed three vehicles stopped at the red light at the intersection. In his rearview mirror, Fredin observed that when the light turned green, two vehicles proceeded through the intersection, while the third vehicle went through the intersection "at a higher rate of speed and accelerated rapidly." Fredin turned around, stopped the vehicle and approached the driver who was identified as Briskie. As Fredin talked to Briskie, he could smell the odor of intoxicants coming from the vehicle and he observed some slurring of Briskie's speech. Briskie admitted to having consumed several drinks. Fredin returned to his squad car and wrote a citation for disorderly conduct with a motor vehicle. He was still concerned about Briskie's ability to drive so he requested that Briskie perform field sobriety tests.

¶4 Briskie first performed the finger-to-nose test. Prior to doing so, Fredin explained the test, demonstrated the test and Briskie indicated that he understood how to do it. Fredin observed that instead of touching the tip of his nose, Briskie touched the bridge of his nose each time. Fredin next administered the heel-to-toe test during which Briskie sidestepped three times to catch his balance. Finally, Fredin asked Briskie to recite the alphabet in a straightforward manner without singing it or saying it in a rhythmic way. On at least two occasions, Briskie stopped and appeared to be thinking of what letter came next. Fredin noticed that Briskie's speech was slurred during his recitation. Fredin placed Briskie under arrest for operating while intoxicated.

¶5 Fredin testified that in completing the Alcoholic Influence Report, he noted that he had detected the odor of intoxicants, Briskie's speech was "slightly slurred," he felt Briskie's ability to drive was impaired and that Briskie was under the influence of intoxicants. Fredin also noted Briskie's responses to his questions. Briskie indicated that he was operating a motor vehicle, that he was coming from Michael's Supper Club, that he had been drinking and had consumed six drinks of "Kessler and Coke," that he had started drinking at 6:00 p.m. and stopped drinking at 10:30 p.m. and that he was under the influence of intoxicants.

¶6 On cross-examination, Fredin acknowledged that Briskie did not have any problems with balance during the finger-to-nose test, was able to walk in a straight line during the heel-to-toe test, followed directions and did not have to use his arms to balance and was able to recite the alphabet in the correct order.

¶7 With respect to the PAC and the breathalyzer test, Fredin testified that he administered the test approximately one hour after he initially stopped Briskie. The result of the first breath sample was .145 and the result of the second

breath sample was .146. Fredin then testified as a witness for the defense regarding the effect that a lapse in time between the stop and the breathalyzer test could have on test results due to alcohol absorption.

¶8 Briskie testified that he had had three Kessler and Cokes while out with friends prior to 7:00 p.m. that evening. Briskie testified that he then went home, where he did not consume any alcoholic beverages, and then went out again at 9:00 p.m. to meet friends at a bowling alley. Briskie testified that while at the bowling alley, he consumed only one whiskey and Coke before proceeding to Michael's Supper Club where he consumed one more Kessler and Coke and two shots of tequila just prior to leaving. Briskie testified that he did not feel intoxicated when he was leaving Michael's, nor did he feel less able to operate a motor vehicle. Briskie was pulled over approximately one mile from Michael's. Briskie testified that it was the truck next to him that squealed its tires at the intersection and that he had performed well on the field sobriety tests. Finally, Briskie testified that he weighs 253 pounds and lives only three to four minutes from the place where he was pulled over.

¶9 Following closing arguments, the jury returned verdicts of guilty on the OWI citation and not guilty on the PAC citation. Briskie appeals his OWI conviction.

DISCUSSION

¶10 Briskie contends that because the jury found him not guilty of PAC, the evidence was likewise insufficient to support the OWI conviction. In making this argument, Briskie assumes that the breathalyzer results are off limits because

the not guilty verdict on the PAC charge “removes the test result from consideration as probative evidence of intoxication.”² However, Briskie is wrong. The breathalyzer test results were admitted into evidence in this case and the jury instructions pertaining to the OWI charge advised the jury that it could consider such evidence in deciding on its verdict.

¶11 It is well established that the result of a breathalyzer test is one factor that may be considered in determining whether a defendant is guilty of OWI. *See* WIS JI—CRIMINAL 2668. Here, Briskie was charged with both OWI and PAC based on a single act of driving. He requested and the trial court delivered to the jury WIS JI—CRIMINAL 2668, which instructs the jury as follows regarding the breathalyzer results:

Evidence has been received that, within three hours after the defendant’s alleged (driving) (operating) of a motor vehicle, a sample of the defendant’s (breath) (blood) (urine) was taken. An analysis of the sample has also been received. If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that there was (.10% or more by weight of alcohol in the defendant’s blood) (.10 grams or more of alcohol in 210 liters of the defendant’s breath) at the time the test was taken, *you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating) or that the defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating), or both*, but you are not required to do so. You the jury are here to decide these questions on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating) or that the defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating), or both, unless you are satisfied of that fact to a reasonable certainty by

² The City has taken the bait on this argument and has not relied on the breathalyzer test results in arguing that the evidence supports the OWI conviction.

evidence which is clear, satisfactory, and convincing.
(Emphasis added.)

¶12 This instruction clearly envisions that a jury may find a defendant guilty of OWI solely on the basis of breathalyzer results. We presume that a jury follows the court's instructions. *State v. Adams*, 221 Wis. 2d 1, 12, 584 N.W.2d 695 (Ct. App. 1998). We know of no case law which holds that a not guilty verdict on an accompanying charge of PAC precludes a jury using the chemical test results as the basis for a guilty verdict on the OWI charge.

¶13 In fact, the law is to the contrary. “Juries have always had the inherent and fundamental power to return a verdict of not guilty irrespective of the evidence.” *State v. Thomas*, 161 Wis. 2d 616, 630, 468 N.W.2d 729 (Ct. App. 1991). “The fact that a not-guilty verdict is inconsistent with another verdict finding the defendant guilty does not require, or by itself permit, reversal of a judgment entered on the finding of guilt ... since there is no way of knowing whether the inconsistency was the result of leniency, mistake, or compromise.” *Id.* at 631 (citing *United States v. Powell*, 469 U.S. 57 (1984); *State v. Mills*, 62 Wis. 2d 186, 191-93, 214 N.W.2d 456 (1974)). Therefore, the not guilty verdict on the PAC does not carry weight in the separate analysis of whether there was sufficient evidence to sustain the guilty verdict that the jury did reach. *See Thomas*, 161 Wis. 2d at 630-31.

¶14 Turning to the sufficiency of the evidence to support the OWI conviction, we observe that in order to convict Briskie of OWI the City was required to establish that he had “consumed a sufficient amount of alcohol to cause [him] to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.” *See WIS JI—CRIMINAL 2668*. “Our task as a reviewing court is limited to determining whether the evidence

presented could have convinced a trier of fact, acting reasonably, that the appropriate burden of proof had been met.” *City of Milwaukee v. Wilson*, 96 Wis. 2d 11, 21, 291 N.W.2d 452 (1980). The burden of proof in municipal ordinance cases, which involves acts made criminal by statute, is “clear, satisfactory and convincing evidence.” *Id.* at 22; WIS JI—CRIMINAL 2668. Finally, an appellate court views facts in the light most favorable to sustain the verdict and where more than one inference might be drawn from the evidence presented at trial, we are bound to accept the inference drawn by the jury. *State v. Forster*, 2003 WI App 29, ¶2, No. 02-0602-CR.

¶15 Here, Fredin testified that he detected an odor of intoxicants upon making contact with Briskie and that Briskie’s speech was slightly slurred. Briskie admitted to having consumed approximately seven drinks and the result of his breathalyzer tests were .145 and .146. Fredin testified in detail as to Briskie’s performance on the field sobriety tests and that in his opinion, Briskie’s ability to operate a motor vehicle was impaired. While Briskie testified that he did not feel intoxicated or less able to operate a motor vehicle at the time of his arrest, the credibility of the witnesses and the weight accorded to their testimony are left to the jury. *Richards v. Mendivil*, 200 Wis. 2d 665, 671, 548 N.W.2d 85 (Ct. App. 1996). In summary, the breathalyzer test result, in and of itself, was sufficient evidence upon which the jury could base its guilty verdict. And the remaining evidence further supports that verdict.

CONCLUSION

¶16 We conclude that the jury’s not guilty verdict on the PAC charge did not preclude a finding of guilt on the OWI charge. We further conclude that the evidence presented at trial, including the breathalyzer results, was sufficient to

support a finding that Briskie operated a motor vehicle while under the influence of intoxicants. We affirm the judgment.

By the Court.—Judgment affirmed.

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

