COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0225 **Cir. Ct. No. 02TR002034**

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

VILLAGE OF GERMANTOWN,

PLAINTIFF-RESPONDENT,

V.

HAROLD T. DOEG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: ANDREW T. GONRING, Judge. *Affirmed.*

¶1 NETTESHEIM, J.[1] Harold T. Doeg appeals from a forfeiture judgment of conviction for operating a motor vehicle while intoxicated (OWI), contrary to WIS. STAT. § 346.63(1)(a). Doeg raises three issues on appeal. First,

[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.

the evidence presented at trial was insufficient to sustain a conviction. Second, the court committed a reversible error when instructing the jury. Third, the court permitted the introduction of opinion testimony from a lay witness contrary to WIS. STAT. § 907.01. We reject these arguments and affirm the forfeiture judgment.

FACTS

¶2 In the early morning of February 13, 2002, Nancy McQuaid was working as a waitress at George Webb Restaurant in Germantown. McQuaid was concerned that one of her customers, later identified as Doeg, was feeling sick. He ordered food, but did not eat much of it, and then went to his car, turned the lights on and off, but did not leave. Concerned for Doeg's safety, McQuaid called the Village of Germantown Police Department at approximately 2:14 a.m.

¶3 Officer Daniel Delmore arrived at the scene, began to investigate, and located the car. After backup assistance arrived, Delmore and another officer observed that Doeg appeared to be asleep in the car, and the keys were in the ignition. After several attempts, the officers awoke Doeg and identified him. Delmore then asked Doeg several questions, and Doeg responded that he had driven from the Trysting Place Pub to the George Webb Restaurant to get something to eat before driving home. Noticing several indicators that Doeg might be intoxicated, Delmore asked Doeg to submit to field sobriety testing and Doeg complied.

¶4 After completing the field sobriety tests, Delmore arrested Doeg for OWI and transported him to the police department for processing. There, Doeg submitted to an evidentiary chemical test of his breath that produced a quantitative alcohol content of .15 grams of alcohol in 210 liters of breath.

¶5 Sometime after his arrest, Doeg had a conversation at his home with Officer Raymond Borden, a member of the Village of Germantown Police Department. Borden testified that during the conversation, Doeg told him that "they could not prove how his vehicle got to George Webb's from the Trysting Place." Based on this statement, Borden concluded that Doeg had driven to George Webb from the Trysting Place, and he so testified at the trial. The jury found Doeg guilty. Doeg appeals.

DISCUSSION

¶6 Wisconsin law holds that an appellate court cannot reverse a conviction unless 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 the defendant guilty beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Therefore, the test for determining whether a verdict of guilty is sustained by the evidence is not whether this court is convinced of the defendant's guilt, but whether the jury, acting reasonably, could be so convinced. ***State ex rel. Hussong v. Froelich***, 62 Wis. 2d 577, 585-86, 215 N.W.2d 390 (1974).

¶7 Doeg first contends that the evidence presented at trial was insufficient. Specifically, he argues that the jury's verdict was premised solely on his admission to Delmore that he had driven to George Webb from the Trysting Place. Doeg concludes that this evidence is insufficient because the remainder of the evidence did not provide any corroboration of this admission. ***State v. Hauk***, 2002 WI App 226, ¶20, 257 Wis. 2d 579, 652 N.W.2d 393, *review denied*, 2002 WI 121, 257 Wis. 2d 122, 653 N.W.2d 893 (Wis. Sept. 18, 2002) (No. 01-1669-

CR) ("In Wisconsin, as in the federal courts, there is a common law rule that 'conviction of a crime may not be grounded on the admission or confessions of the accused alone.' Rather, there must be corroboration of a 'significant fact' in order to sustain a conviction." (Citations omitted.)) Corroboration is required in order to reinforce the confidence in the truth of the confession. ***Holt v. State***, 17 Wis. 2d 468, 480, 117 N.W.2d 626 (1962).[2]

¶8 We reject Doeg's argument that there is no corroboration of his admission. The police observed Doeg in the vehicle and the keys were in the ignition. Common sense would indicate that Doeg had used that vehicle to arrive at George Webb Restaurant. Furthermore, Doeg's admission to Delmore was corroborated by Borden's testimony that Doeg told him that "they could not prove how his vehicle got to George Webb's from the Trysting Place." In ***Hauk***, the court of appeals looked to a separate, subsequent admission made by the defendant to another person as corroborating evidence of the original admission. ***Hauk***, 257 Wis. 2d 579, ¶¶22-23. While Doeg's statement might also be construed as evidence that he did not drive *after* consuming alcohol, another reasonable interpretation is that it reflects a guilty mind, implying that Doeg had in fact driven the vehicle while intoxicated**.**

¶9 In his reply brief, Doeg argues that his statement to Delmore that he had driven to George Webb to get something to eat was not an admission of

[2] While Doeg correctly states the corroboration requirement, his brief offers no citations in support of that rule.

operating while intoxicated.[3] He contends that this statement does not indicate any act of driving on his part *after* he had consumed alcohol. While Doeg accurately recites Delmore's testimony, he conveniently overlooks the question that prompted that testimony. The question to Delmore was: "And did Mr. Doeg tell you anything else about what happened *after he left Trysting Place?*" (Emphasis added.) Doeg's "out of context" representation of Delmore's answer borders on the misleading. While Doeg's counsel is entitled to advocate zealously, "zealous advocacy has its limits." ***Geneva Nat'l Cmty. Assn'n, Inc. v. Friedman***, 228 Wis. 2d 572, 586, 598 N.W.2d 600 (Ct. App. 1999). Furthermore, false and misleading statements in briefs filed in court contravene not only WIS. STAT. § 802.05(1)(a) but also SCR 20:3.3(a) which requires candor toward tribunals. We admonish Doeg's counsel to be more forthright in the future.

¶10 Doeg next contends that the trial court improperly instructed the jury under the "operate" language of the Uniform Jury Instruction instead of the "drive" language of the instruction. He contends that the Village of Germantown's theory of the case was that Doeg drove the vehicle. Based on a review of the record, we hold that this issue is waived. The trial court expressly advised the parties that it intended to use the "operate" and not the "drive" provisions of the instruction during a pretrial meeting. Both parties expressly agreed and consented to this proposal. Furthermore, during the jury instruction conference at the close of evidence, defense counsel expressly agreed to the form and substance of the instructions. Therefore, the issue is waived.

[3] This argument was not raised in Doeg's brief-in-chief. On this basis alone, we could reject it. ***Swartwout v. Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981) ("We will not, as a general rule, consider issues raised for the first time in a reply brief."). However, we choose to address the argument on the merits since it is so patently worthless.

¶11 As his final argument, Doeg contends that his statement to Borden that the police could not prove he drove the car did not allow for Borden's opinion testimony that Doeg had driven to George Webb Restaurant from the Trysting Place. Doeg contends that this testimony represented inadmissible opinion testimony by a lay witness contrary to WIS. STAT. § 907.01.

¶12 But here again, Doeg has waived the issue. Doeg's only objection in the trial court was that Borden was a surprise rebuttal witness. Now, for the first time, Doeg argues that Borden's testimony is inadmissible under WIS. STAT. § 907.01. Because this issue was not raised at the trial level, we do not need to decide the merits of this issue. ***State v. Wolter***, 85 Wis. 2d 353, 373, 270 N.W.2d 230 (Ct. App. 1978).

CONCLUSION

¶13 Doeg's admission to Delmore was sufficiently corroborated. Therefore, the evidence presented at trial was sufficient for a reasonable jury to find that Doeg had operated the vehicle while intoxicated. We deem Doeg's other challenges waived. We affirm the forfeiture judgment of conviction.

By the Court.—Judgment affirmed.

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