COURT OF APPEALS
DECISION
DATED AND FILED

November 12, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0897-CR **Cir. Ct. No. 01-CT-695**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ELIJIO M. SERVANTEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed.*

¶1 BROWN, J.[1] A jury found Elijio M. Servantez not guilty of driving with a blood alcohol content of .08 or more as a third-time or subsequent offender, but guilty of operating while intoxicated. The .08 charge was based on

[1] This case 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 unless otherwise noted.

results from an intoxilizer test. Servantez claims that, without the intoxilizer, there is insufficient other evidence of driving while intoxicated and he asks this court to acquit him on the intoxicated driving charge as a matter of law. Correlatively, he argues that the acquittal on the BAC charge is inconsistent, as a matter of law, with the intoxicated driving conviction. We hold, however, that while the jury found reasonable doubt that Servantez was driving with a blood alcohol content of .08 or more, this does not mean that the jury was likewise convinced that he had not been drinking and was not drunk at the date and time in question. The verdicts are not inconsistent and we have found other credible evidence to uphold the intoxicated driving conviction. We affirm.

¶2 The pertinent facts are as follows: Mitchell Maloney, a citizen witness, testified that on August 18, 2001, at about 8:50 p.m., he observed a motorcycle pull out of a tavern parking lot with no lights on. It was dark. Maloney was about five to seven feet away when making this observation. Maloney and the motorcyclist were going in the same direction and Maloney was therefore in a position to continue his observation of the motorcyclist. He observed that as the motorcyclist let the clutch out, he lost his balance and appeared to lose control of the motorcycle. Maloney continued to observe the motorcycle as they drove. During this time, the motorcyclist's exercise of control was "sporadic." The lights to the motorcycle remained off. Maloney further observed that as the motorcyclist got into the left lane, the rear tire "actually locked up and squealed and there was a puff of blue smoke that came out from the tire." About a minute later, after the motorcyclist and Maloney parted ways, Maloney spotted a police officer. Maloney alerted the officer to what he had just observed.

¶3 Officer James Beller of the Kenosha Police Department testified that he was the officer whom Maloney encountered. He said that Maloney described what happened, described the motorcycle and the person riding it and where he last saw the motorcycle. Beller immediately left to investigate and soon located the suspect motorcycle at another tavern. It was illegally parked. Beller went inside the bar and saw five patrons, including a man matching the description Maloney had given him. He asked the patrons generally who owned the motorcycle. The person matching the description raised his hand and volunteered that he owned the motorcycle. That person was Servantez. Subsequently, Beller asked to speak with Servantez outside of the tavern. Servantez had a beer in front of him at the time. As he rose, Beller observed that he had unstable balance. He also noted that Servantez' speech was slightly slurred. Once outside, Beller again noted that Servantez' speech was slurred and that he had bloodshot, glassy eyes.

¶4 Another officer, Kenneth Clelland, then arrived to assist Beller and Beller then conducted field tests of Servantez. Servantez was told to recite the English alphabet without singing it, but he did not follow instructions and instead sang it twice, with slurred speech. Servantez was also instructed on how to perform a "stand-and-balance" test. Again, he did not follow instructions. When reinstructed, he did perform the test and swayed from side-to-side when doing so. He flunked the next test, the "finger-to-nose" test, by using his knuckle rather than his finger. The fourth test was the "one-legged stand." Again, he failed to follow instructions at first. When he finally attempted to perform it as instructed, he lost his balance. The final test was the "walk-and-turn" test. Again, he needed to be reinstructed. When he did try to perform the test as instructed, he missed the heal with his toe and flunked.

¶5 Clelland also testified. At the scene, he observed that Servantez had slurred speech and poor balance. Servantez was walking in "not what I would call a straight line." Clelland testified that during the field sobriety tests, he stayed close to Servantez because he was concerned for Servantez' safety in light of his poor balance. Clelland opined that based on his observation, Servantez appeared "pretty intoxicated" to him. Clelland also testified that he is the officer who performed a sixth field test—the "horizontal gaze nystagmus" test. Servantez performed poorly on this test.

¶6 Servantez was arrested for operating while intoxicated and was brought to the station house where an intoxilizer test was performed. The reported value of the test was .14. Because this was a third or subsequent OWI for Servantez, his limit was .08 and he was charged with having a blood alcohol content of over .08. He was also charged with operating a vehicle while intoxicated. As we previously iterated, the jury found Servantez not guilty of the blood alcohol content charge and guilty of the intoxicated driving charge. And now we have his appeal.

¶7 Servantez first argues that since the jury obviously rejected the worth of the intoxilizer result, and since that is the only evidence of Servantez' intoxication, there is no credible evidence to convict of intoxicated driving. But as we have carefully detailed above, there is plenty of other evidence of Servantez' intoxication even absent the intoxilizer results. He was driving erratically, he slurred his speech, he had trouble with his balance, his eyes were bloodshot and glassy, he had trouble following the officers' directions when performing the field sobriety tests and he flunked six tests. Surely, this is enough evidence to convict beyond a reasonable doubt of operating a vehicle while intoxicated.

¶8 In the same breath, Servantez argues that the acquittal of the blood alcohol content charge is inconsistent with the guilty verdict on the intoxicated driving charge. It is his view that since the State must establish that Servantez had alcohol in his system at the time he was driving, and since the "only evidence" that he was driving his vehicle while intoxicated *prior* to his driving his motor vehicle was the intoxilizer test, without the test there is no evidence that he was intoxicated prior to his driving. Thus, he claims, the verdicts are inconsistent.

¶9 The argument does not wash. First, simply because the jury could not find beyond a reasonable doubt that he had .08 of alcohol in his system, this is not the same thing as finding that he did not have any alcohol in his system or that he had less than an amount needed to be intoxicated. A person can have less than a .08 and still be intoxicated. Second, there are cases far too numerous to mention that show how a person can be convicted of operating while intoxicated without a test. A fact-finder can find that erratic driving plus slurred speech, plus unsteady gait, plus glassy and bloodshot eyes, plus failure to perform field sobriety tests, is circumstantial evidence that an accused was driving while intoxicated. That is what we have here.[2]

¶10 Servantez makes much of his witness who testified that his speech was not slurred, that he was perfectly sober. He also points to his own portrayal of

[2] Servantez attempts to square the facts of his case with the facts and result in ***State v. Griffin***, 220 Wis. 2d 371, 584 N.W.2d 127 (Ct. App. 1998), in support of his inconsistency argument. In ***Griffin***, a jury found Griffin guilty of cocaine possession. ***Id***. at 379. But the cocaine possession was founded upon certain cocaine paraphernalia located at a certain residence. Since another aspect of the jury verdict had obviously determined that Griffin did not live at the residence in question, but at a different residence, the verdicts were deemed inconsistent because there was no testimony showing "knowing possession." ***Id***. at 383-84. As we state in the body of our opinion, the verdicts in the case at bar are not inconsistent. Thus, ***Griffin*** is easily distinguished.

the incident with Maloney, which he classified as road rage on Maloney's part. He also points to his own testimony that he was having mechanical problems with his bike and suggests that what Maloney observed was not erratic driving, but attempts by Servantez to control a mechanical defect on his bike. However, the jury heard contrary evidence from the State and also heard from Clelland, who stated that he had observed the motorcycle and it did not appear to have any mechanical problems. The jury decides the weight and credibility of each witness. The jury obviously believed the State's witnesses, not Servantez' witness or Servantez himself. This was within the province of the jury and it will not be disturbed.

By the Court.—Judgment and order affirmed.

This case will not be published in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.