COURT OF APPEALS DECISION DATED AND FILED

September 18, 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. 03-1237

Cir. Ct. No. 03TR001401

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

DANE COUNTY,

PLAINTIFF-RESPONDENT,

V.

ROBERT L. BOVEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: GERALD C. NICHOL, Judge. *Affirmed*.

¶1 VERGERONT, J.[1] Robert Bovee appeals the judgment of conviction for inattentive driving in violation of WIS. STAT. § 346.89(1) entered after a trial to the court. The charges arose out of a one-car accident involving Bovee's vehicle. He contends: (1) the trial court erred in allowing a police officer

[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 unless otherwise noted.

to testify on certain points relating to the accident because he was not an accident reconstruction expert; (2) the trial court erred in admitting and relying on a police officer's testimony concerning statements he, Bovee, made to the officer when he was injured; and (3) there was insufficient evidence to support the trial court's determination that Bovee was guilty of inattentive driving. We conclude the trial court did not err in its evidentiary rulings and the evidence was sufficient to support the determination of guilty. Accordingly, we affirm.

¶2 The accident occurred on December 28, 2002, at approximately 1:30 p.m. on Highway 18/151 just east of the County Highway J/G overpass. Jeffrey Heil, a deputy sheriff with the Dane County Sheriff's Department, arrived at the scene of the accident shortly after it occurred and testified as follows at the trial to the court. He observed tire tracks of the vehicle which indicated that the vehicle had come from the eastbound lane, across the median through the westbound lane and come to rest against a rock wall on the westbound side of the highway. The tracks went to the left through the median at a gradual angle, not perpendicular to the travel lanes. He observed no indication the vehicle hit any objects until it hit the wall on the westbound side of the highway; there were no other damaged vehicles in the area; and he observed no skid marks for Bovee's vehicle. He spoke to Bovee, who had been injured in the accident and was being taken to the hospital in an ambulance. Bovee said that he had been feeling sleepy prior to the accident and he thought he must have fallen asleep. He said he had been feeling sick, suffering from a cold, and had been sleepy and tired prior to the accident occurring. Bovee told the officer he had no recollection of going across the median or of the crash.

¶3 Bovee testified as follows at the trial. He had been driving for an hour and one-half to two hours before the accident, coming from his aunt's house.

It was daylight, it was a highway that he was familiar with, his vision was not obstructed, he was not on medication, and he had consumed no alcohol. The last thing he remembered was driving in the right lane eastbound at a normal speed; the speed limit in that area was sixty-five miles per hour. He did not remember going across the eastbound lane, the median, or the westbound lanes, or how he ended up there, and he did not know how the accident occurred. When asked whether he recalled telling the officer anything about being tired, he answered, "I don't remember, but who knows?" He did not recall telling the officer that he thought he might have fallen asleep. He was in the ambulance, a lot was going on, and he was in pain. At trial, he did not recall feeling tired on that trip. He did remember talking to the officer and that the officer asked him a bunch of questions, but he could not recall at trial what the questions were. He knew that he had had a cold, but he was getting over it at the time of the accident, and he was not overly tired. When asked whether he had any hypothesis to offer on how the accident could have happened other than falling asleep, he answered, "I don't remember anything about it."

¶4 After hearing the evidence and argument, the trial court determined that Bovee was guilty of inattentive driving.

DISCUSSION

¶5 WISCONSIN STAT. § 346.89(1) provides that "no person while driving a motor vehicle shall be so engaged or occupied as to interfere with the safe driving of such vehicle." The trier of fact must be satisfied to a reasonable certainty by evidence that is clear, satisfactory, and convincing that the defendant is guilty. WIS JI—CRIMINAL 140A. Because this is a traffic forfeiture action, the

procedure is governed by WIS. STAT. ch. 799. WIS. STAT. § 345.20(2)(a). WISCONSIN STAT. § 799.209(2) provides:

> (2) The proceedings shall not be governed by the common law or statutory rules of evidence except those relating to privileges under ch. 905 or to admissibility under s. 901.05. The court or circuit court commissioner shall admit all other evidence having reasonable probative value, but may exclude irrelevant or repetitious evidence or arguments. An essential finding of fact may not be based solely on a declarant's oral hearsay statement unless it would be admissible under the rules of evidence.

In addition, WIS. STAT. § 911.01(4)(d) provides that the rules of evidence do not apply to proceedings under ch. 799 unless the trial is to a jury.

¶6 Generally, decisions concerning the admissibility of evidence are committed to the trial court's discretion and we do not reverse unless there is an erroneous exercise of discretion. ***State v. Oberlander***, 149 Wis. 2d 132, 140-41, 438 N.W.2d 580 (1989). When the trial court sits as a finder of fact, the credibility of witnesses and weight of the evidence, as well as the inferences to be drawn from the evidence, are for the trial court to make, not this court. ***Rivera v. Eisenberg***, 95 Wis. 2d 384, 388, 290 N.W.2d 539 (Ct. App. 1980). We affirm the trial court's determination if, accepting the reasonable inferences from the evidence drawn by the fact finder, a reasonable fact finder could have come to the same conclusion. ***Id.***

¶7 Bovee first challenges the trial court's decision to admit certain portions of Officer Heil's testimony regarding the tire tracks of Bovee's vehicle. The prosecutor asked Officer Heil to describe the angle at which the tire tracks moved from the eastbound lane. The officer responded, "It appeared consistent with the very slow transgression to left. As the vehicle would have been traveling eastbound, went very gradually through the median and across --." At this point, Bovee's

attorney objected on the ground that no foundation had been established that the officer was a reconstruction expert. The trial court responded that the officer had simply testified to what he had observed; Bovee's attorney disagreed stating that he understood the officer had said the vehicle was moving slowly, and the prosecutor disagreed with defense counsel's characterization of the officer's testimony. After this exchange, the prosecutor asked the officer to complete "the description" and the officer testified: "[t]he tire tracks went to the left through the median very gradually. They were not perpendicular to the travel lanes. They were at a gradual angle."

¶8 We do not agree with Bovee's characterization of the record—that the officer was testifying about the speed of the vehicle. Rather, it is evident from the record that the officer was testifying to the angle of the tire tracks, and by using the word "gradually," he is not referring to speed, but to the angle. We conclude the trial court properly exercised its discretion when it allowed this evidence. The officer was describing the tire tracks he saw and he did not need to be an expert at accident reconstruction to testify to those observations.

¶9 Bovee's counsel also objected to the officer's testimony of everything Bovee told him on the ground that there was an inadequate foundation to show Bovee was competent because he had just been in a significant crash. The court overruled the objection. Neither in the trial court nor on appeal does Bovee cite any authority for the proposition that a person's statements to an officer just after an accident in which the person was injured should be excluded for lack of competency. At trial and on appeal, Bovee refers by way of analogy to WIS. STAT. § 904.12, which excludes statements of injured persons from evidence in an action for damages caused by personal injury if made within seventy-two hours of the injury unless the statement comes within certain hearsay exceptions, § 904.12(1); statements to a police officer are specifically excepted from this rule. Section

904.12(3). Even if the rules of evidence applied in this proceeding, which they do not, this rule does not apply because this is not an action for damages for personal injury. Even if it were such an action, Bovee's statements to Officer Heil would be admissible under § 904.12(3). Bovee's argument by analogy to this rule is not persuasive. We conclude the trial court did not erroneously exercise its discretion in overruling Bovee's objection to the officer's testimony on Bovee's statements. The accuracy and the reliability of Bovee's statements in light of the fact that he had just been injured go to the weight of that evidence, not to its admissibility.

¶10 Finally, we conclude that the evidence was sufficient to support a finding that Bovee was guilty of inattentive driving to a reasonable certainty by evidence that is clear, satisfactory, and convincing. Bovee argues there is no credible evidence to support the determination that he was "so engaged or occupied as to interfere with the safe driving of such vehicle." WIS. STAT. § 346.89(1). We disagree. A reasonable fact finder could certainly find, as the trial court did, that crossing the median strip and the lanes of oncoming traffic was not safe driving. There was no evidence or even inference from the evidence that any object or event external to Bovee had interfered with the safe driving of his vehicle. There was no evidence from which a reasonable jury could conclude that a medical problem such as a seizure or a heart attack interfered with Bovee's ability to safely drive his vehicle. There is also no evidence to suggest that he intentionally drove his vehicle across the lane of oncoming traffic and into a rock wall. The only reasonable hypothesis that it is consistent with the evidence is that he was not aware that his vehicle was veering out of his lane over the median strip, across a lane of oncoming traffic, and into the wall. There was sufficient evidence from which a reasonable fact finder could conclude that the inattentiveness was due to being tired or sleepy or falling asleep. A reasonable fact finder could choose to credit the officer's testimony

of what Bovee told him, could choose to believe that Bovee had spoken truthfully about his condition at the time, and could rely on those statements even though at trial Bovee could not recall having made them.

By the Court.—Judgment affirmed.

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