COURT OF APPEALS
DECISION
DATED AND FILED

August 30, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP582 **Cir. Ct. No. 2009TR28845**

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

CITY OF SOUTH MILWAUKEE,

PLAINTIFF-RESPONDENT,

V.

WILLIAM M. HART,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DOMINIC S. AMATO, Judge. *Affirmed*.

¶1 FINE, J. William M. Hart appeals the judgment entered on a jury's verdict convicting him of driving a car with a prohibited blood-alcohol concentration exceeding .10, as a first offense. *See* WIS. STAT. § 346.63(1)(b). He complains that the trial court: (1) improperly excluded a blood-alcohol chart

prepared by the Department of Transportation, and (2) erroneously excluded a witness whom he wanted to call as an expert. We affirm.

I.

¶2 A police officer stopped Hart in the City of South Milwaukee at, according to the officer's testimony, "approximately 12:47 a.m." for crossing a roadway's center line. According to the officer, Hart appeared drunk. Hart testified that he arrived at a South Milwaukee club called "Spirits" at around 8:30 p.m. the previous evening, had two beers with colleagues from work, and that the last time he had anything to drink at the club was "[a]bout 45 minutes before I left the place."[1] The officer arrested Hart for drunk driving after Hart failed to adequately do the field-sobriety tests.

¶3 Another officer gave Hart two successive "intoximeter" breath tests at the police station. The first, at 1:28 a.m., indicated a blood-alcohol-concentration of .129. The second, at 1:33 a.m., indicated a blood-alcohol-concentration of .126. Hart does not dispute that he was properly observed for at least twenty minutes before he took the breath tests. *See* WIS. ADMIN. CODE § TRANS 311.06(3)(a) (Law enforcement must observe "test subject for a minimum of 20 minutes prior to the collection of a breath specimen, during which time the test subject did not ingest alcohol, regurgitate, vomit or smoke."). He claims, however, that he had periodontal disease and that after he left the club but

[1] The transcript is confusing at this point, because Hart's lawyer then asked, "When was that?" Hart responded: "Eleven thirty." It is not clear whether Hart testified that he had what he said was his last drink forty-five minutes before he left at 11:30, or that the 11:30 was when he had his last drink. This ambiguity does not affect either Hart's assertions of claimed trial-court error or our resolution.

before he started to drive he rinsed his mouth for some thirty seconds with an alcohol-containing prescription medication. He contends that this made the breath-test results inaccurate. The officer who gave Hart the two breath tests testified that he did not recall that Hart had said anything about rinsing his mouth with the medicine, and that he would have made a note of it if Hart had mentioned it.

¶4 One of the City's witnesses, employed by the Department of Transportation's "chemical test section," testified that Hart's breath-test readout did not reveal any mouth-alcohol contamination, and that it would have if there were any. She also explained the reason for the pre-breath-test twenty-minute observation. She told the jury that the National Safety Council "many, many years ago, actually back in the 1980's [*sic*], determined through much testing that actually a fifteen minute observation period or deprivation period would be enough to ensure that there is no mouth alcohol content in the [breath] sample. We in Wisconsin take it one step further and do a 20 minute observation." (Paragraphing altered.)

II.

¶5 As noted, Hart claims that the trial court improperly excluded from evidence the blood-alcohol chart prepared by the Department of Transportation. He also contends that the trial court improperly prevented him from calling an expert witness to testify that Hart's periodontal disease would have affected the blood-alcohol test results. We look at these contentions in turn after we summarize the applicable standard of review.

¶6 The receipt or exclusion of evidence is within the trial court's discretion. ***State v. Sullivan***, 216 Wis. 2d 768, 780, 576 N.W.2d 30, 36 (1998).

We will sustain a discretionary determination if "the circuit court examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." ***Id.***, 216 Wis. 2d at 780–781, 576 N.W.2d at 36. Further, and significantly here, we will sustain a trial court's evidentiary ruling if it was correct, albeit for the wrong reason. ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262, 265 (Ct. App. 1992) ("If the trial court's decision is supportable by the record, we will not reverse even if the trial court gave the wrong reason.").

A. *Chart.*

¶7 Hart proffered a blood-alcohol chart similar to the one proffered in ***State v. Hinz***, 121 Wis. 2d 282, 284–285 n.2, 360 N.W.2d 56, 58 n.2 (Ct. App. 1984). The City objected, arguing that an expert was needed to interpret the chart. The trial court sustained that objection. On appeal, however, the City abandons that contention, and asserts that Hart did not lay a proper foundation for the chart's receipt. We agree.

¶8 As Hart points out, the chart was *admissible* without expert testimony. *See* ***id.*** 121 Wis. 2d at 284–285, 360 N.W.2d at 58–59. But that does not end the inquiry because the proponent of evidence must show how and why it should be received in the specific case—that is, the proponent must lay the proper foundation for the evidence, and the burden does not shift to the opponent unless the proponent does so. *See* ***Jenkins***, 168 Wis. 2d at 187–188, 483 N.W.2d at 266. The chart Hart wanted in evidence says that it "can be used to estimate blood or breath alcohol concentration," provided that the person using the chart knows: the subject's (1) "weight and the number of drinks" the person had, and (2) "the time of the first drink." (Italics removed.) Hart testified that he weighed about one-

hundred and eighty-one pounds on the night he took the breath test, but he never said *when* he had his first drink, although he testified that he arrived at the club at 8:30 p.m. Further, the chart defines a "drink" as, as material, "12 oz. of 4.2% beer (a typical 'lite' beer)." No one testified as to what kind of beer ("lite" or otherwise) Hart drank that night. Although Hart complains that the City sandbagged him by changing legal theories, and he claims that if the City had asserted a lack-of-foundation contention at trial, he could have plugged the foundational hole, the chart is clear on its face as to what has to be shown before the chart can be used to "estimate" the blood-alcohol level based on the number of drinks a person has over a specified time; Hart knew or should have known what was needed before the chart could be relevant. *See* WIS. STAT. RULES 904.01 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."), 904.02 ("Evidence which is not relevant is not admissible."). Further, Hart makes no offer of proof on this appeal what proper foundation he would have laid. *Cf.* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343, 349–350 (Ct. App. 1994) (A defendant who alleges that his lawyer was ineffective because the lawyer was deficient in his or her representation must show what the lawyer should have done and how it would have accomplished the result the defendant now seeks.). Stated another way, the chart would not have "any tendency" to estimate Hart's blood-alcohol level that night unless the jury had all of the information the chart required: weight, type of drink or drinks, number of drinks consumed, and when Hart had the first one. Thus, we affirm the trial court's exclusion of the chart.

B. *Hart's proffered expert.*

¶9 Hart wanted to call a witness at trial to testify that, based on her review of Hart's dental records, Hart, as phrased by her letter to Hart's lawyer, "has several missing teeth, decaying enamel on several remaining teeth and what are often termed 'pockets' in the gum line holding the teeth" and that this created "a potentially problematic situation for breath alcohol analysis" because "Mr. Hart has been documented as having indicated that food often becomes trapped between teeth and under the gum line," and if "food and/or alcohol becomes trapped within the pockets and is subsequently expelled or exposed to the surface during a breath test[,] the breath sample would be contaminated and the test results become questionable." She further wrote that "[t]he problem I am seeing is that it cannot be reasonably assumed that there is not any alcohol trapped under the gum line at the start of the breath testing," and "[t]he release of even the most minuscule amount of alcohol during the breath sampling would contaminate and elevate the alcohol readings."

¶10 Hart's proposed expert witness has an impressive résumé as a chemist, and, as her résumé notes, she works as a "consultant in forensic testing for alcohol." (Uppercasing omitted.). Before that, she worked in the "Chemical Test Section" of the Wisconsin State Patrol, and has held similar jobs. (Uppercasing in her résumé.) She also has training and certifications in the alcohol-testing field. As the trial court pointed out, however, she has no education, training, or experience in assessing periodontal disease *and* whether alcohol could or would be retained in the mouth as a result. Although Wisconsin had, before the new amendments to WIS. STAT. RULE 907.02, a wide-open gate for the receipt of expert testimony, ***State v. Jones***, 2010 WI App 133, ¶22, 329 Wis. 2d 498, 510–511, 791 N.W.2d 390, 396–397, any witness proffered as an expert

still had to have sufficient knowledge in the specific subject of his or her testimony, ***Green v. Smith & Nephew AHP, Inc.***, 2000 WI App 192, ¶¶21–23, 238 Wis. 2d 477, 497–500, 617 N.W.2d 881, 890–891, *aff'd*, 2001 WI 109, ¶¶92–95, 245 Wis. 2d 772, 834–836, 629 N.W.2d 727, 756–757. The trial court correctly observed that Hart's proffered witness did not have the requisite expertise; it did not erroneously exercise its discretion in excluding her proposed testimony.[2]

¶11 We affirm.

By the Court.—Judgment affirmed.

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

[2] Hart's proposed expert witness did not testify at the trial court's hearing on the City's motion *in limine*. Rather, Hart relied on her letter/report and her résumé.