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DISTRICT II

June 22, 2022

To:

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Clerk of Circuit Court
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You are hereby notified that the Court has entered the following opinion and order:

2021AP29-CR

State of Wisconsin v. Russell L. Zuerner (L.C. #2018CF621)

Before Gundrum, P.J., Neubauer and Grogan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Russell L. Zuerner appeals from a judgment convicting him of operating while intoxicated (OWI) as a seventh offense. He contends that there was insufficient evidence to support his conviction. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).¹ We affirm.

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

Just after noon on December 8, 2018, Patricia Wilke called 911 to report that her roommate, Zuerner, was intoxicated and driving. Although Wilke did not see Zuerner consume alcohol that morning, she believed he was intoxicated based upon his behavior, which she described as “very juvenile like.” Wilke indicated that Zuerner was headed to the grocery store.

Police Chief Jeremy Swendrowski was volunteering for a charity event at a grocery store when he heard the dispatch about Zuerner. He had seen Zuerner drive by him outside the store. Later, he had seen Zuerner again inside the store. Swendrowski radioed another officer, Aaron Hackett, to report that Zuerner was at the store.

Hackett arrived at the store and encountered Zuerner exiting it. He noticed that Zuerner’s eyes were bloodshot, his breath smelled like alcohol, and his speech was slurred. Hackett conducted field sobriety tests, which Zuerner failed. He then placed Zuerner under arrest. A subsequent blood draw revealed a blood alcohol concentration of 0.118.

The State charged Zuerner with OWI as a seventh offense, and the matter proceeded to trial. There, Wilke, Swendrowski, and Hackett all testified for the State. The State also called a toxicologist from the state crime lab and two store employees.² Zuerner, meanwhile, called two witnesses—his sister and an old friend—who briefly saw him on his drive to the store and did not believe he was intoxicated.

Ultimately, the jury found Zuerner guilty. The circuit court sentenced him to three years of initial confinement and five years of extended supervision. This appeal follows.

² The store employees testified about their observations—both personal and via the store’s surveillance video. They denied seeing Zuerner go near the liquor department or consume alcohol at the store.

On appeal, Zuerner contends that there was insufficient evidence to support his conviction. He claims that the State failed to prove the second element of the offense, i.e., that he was under the influence of an intoxicant at the time he drove his motor vehicle. *See* WIS JI-CRIMINAL 2669; WIS. STAT. § 346.63(1)(a).³

In reviewing the sufficiency of the evidence to support a conviction, we may not substitute our judgment for that of the trier of fact unless the evidence, viewed most favorably to the State and the conviction, is so lacking in probative value and force that no trier of fact acting reasonably could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Therefore, if more than one reasonable inference can be drawn from the evidence, we must adopt the inference that supports the verdict. *Id.* at 506-07.

Here, we are satisfied that there was sufficient evidence to support Zuerner's conviction. Again, there was no dispute that Zuerner drove to the store and was intoxicated at the point of his arrest shortly after exiting it. Although there was no direct evidence that he was under the influence of an intoxicant at the time he drove his motor vehicle, there was circumstantial evidence⁴ through the testimony of Wilke, who believed Zuerner was intoxicated when he left their home that morning, and the two store employees, who denied seeing Zuerner go near the liquor department or consume alcohol in the store. From this, the jury could reasonably

³ Zuerner does not contest the other element of the offense, i.e., that he drove a motor vehicle on a highway. *See* WIS JI-CRIMINAL 2669; WIS. STAT. § 346.63(1)(a).

⁴ "Circumstantial evidence is evidence from which a jury may logically find other facts according to common knowledge and experience." WIS JI-CRIMINAL 170. "A conviction may be supported solely by circumstantial evidence[.]" *State v. Mertes*, 2008 WI App 179, ¶11, 315 Wis. 2d 756, 762 N.W.2d 813.

conclude that Zuerner was under the influence of an intoxicant at the time he drove his motor vehicle, notwithstanding the testimony of his two witnesses.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals