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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-985**

State of Minnesota,
Respondent,

vs.

Mark Brian Riesgraf,
Appellant.

**Filed March 15, 2011
Reversed
Klaphake, Judge**

Clay County District Court
File No. 14-CR-10-429

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Brian J. Melton, Clay County Attorney, Matthew D. Greenley, Assistant County Attorney, Moorhead, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Renée Bergeron, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Klaphake, Presiding Judge; Larkin, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellant Mark Brian Riesgraf challenges his DWI conviction under Minn. Stat. §§ 169A.20, subd. 1(1); .25, subd. 1(a) (2008) (driving under the influence with two aggravating factors present). He claims that the evidence is insufficient because the state failed to prove that he was driving a vehicle while he was under the influence of alcohol. Because there was no direct evidence that appellant was driving his vehicle while under the influence of alcohol and any rational inferences from circumstantial evidence were insufficient to satisfy the state's burden of proof, we reverse his DWI conviction.

DECISION

An appellate court of this state “will not disturb a guilty verdict if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that a defendant was proven guilty of the offense charged.” *Staunton v. State*, 784 N.W.2d 289, 297 (Minn. 2010) (quotations omitted); *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). We review the evidence in “a light most favorable to the verdict.” *State v. Buckingham*, 772 N.W.2d 64, 71 (Minn. 2009). But “[a] conviction based on circumstantial evidence receives stricter scrutiny than a conviction based on direct evidence.” *State v. Stein*, 776 N.W.2d 709, 714 (Minn. 2010); *see State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). Circumstantial evidence “is entitled to as much weight as any other kind of evidence so long as the circumstances proved are consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of guilt.” *State*

v. Jones, 516 N.W.2d 545, 549 (Minn. 1994) (quotation omitted). “Circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt.” *Stein*, 776 N.W.2d at 714 (quotation omitted). The inquiry must demonstrate that “there are no other reasonable, rational inferences that are inconsistent with guilt.” *Id.* at 716.

Appellant contends that the evidence was insufficient to prove beyond a reasonable doubt that he was driving his vehicle while under the influence of alcohol because respondent failed to provide a temporal link between his drinking and his driving. The DWI statute appellant was convicted of violating makes it a crime for a person “to drive, operate, or be in physical control of any motor vehicle within this state . . . *when* the person is under the influence of alcohol.” Minn. Stat. § 169A.20, subd. 1(1) (emphasis added).

Respondent provided evidence that appellant drove his vehicle to the Walmart store located in Dilworth, that appellant admitted that he drank a one-ounce bottle of rum, that appellant exhibited indicia of intoxication when he was questioned by police at his vehicle in the Walmart parking lot and subsequently failed field sobriety tests, and that approximately 1-1/2 hours post-arrest he had a blood alcohol level of .20.

The evidence offered by respondent did not include a temporal link between appellant’s driving and his being under the influence of alcohol, and the circumstantial evidence of appellant’s inebriation was not inconsistent with any rational hypothesis other than guilt. The jury heard no evidence to establish at what time appellant drove to

the Walmart store, how long he was in the store, or whether he consumed alcohol after driving to Walmart. Further, the vehicle's keys were not in appellant's possession when he was approached by police. Given that each element of an offense must be proven beyond a reasonable doubt, we agree that respondent failed to meet its burden of proof in this case. *See State v. Pierce*, 792 N.W.2d 83, 85 (Minn. App. 2010).

Respondent cites several cases for the proposition that the state should be permitted to offer circumstantial evidence linking a DWI suspect's post-driving conduct to his ingestion of alcohol. In *State v. Banken*, this court permitted the use of a breath sample taken more than two hours after driving to determine that the driver's alcohol concentration exceeded the legal limit within two hours of driving for purposes of Minn. Stat. § 169A.20, subd. 1(5) (2002) (driving with an alcohol concentration above the legal limit as measured within two hours of driving conduct). 690 N.W.2d 367, 372-73 (Minn. App. 2004), *review denied* (Minn. Mar. 29, 2005). There, this court concluded that the requirement of the phrase "as measured" in Minn. Stat. § 169A.20, subd. 1(5), is the time as of which the driver's alcohol concentration is "accurately ascertained or calculated or determined or measured." *Id.* In *Banken*, the driver also stipulated that his blood alcohol concentration was .10 or more within two hours of driving. *Id.* at 369. *Banken* differs from the factual scenario presented here; appellant was not apprehended while driving his vehicle, and the evidence of the amount of alcohol consumed by appellant bears no relation in time to his driving conduct, other than that the alcohol was consumed on the same day that appellant drove his vehicle.

While *State v. Shepard*, also cited by respondent, involves admission of circumstantial evidence of the driver being under the influence of alcohol, it also involves much stronger circumstantial evidence than is present here. 481 N.W.2d 560, 562-63 (Minn. 1992). In *Shepard*, the driver was involved in a one-car rollover on a straight, familiar road under normal driving conditions; the defendant left the scene of the accident and got a ride home within ten minutes; when the defendant called to report the accident, she admitted the accident had “just occurred” and she exhibited slurred speech; and the defendant admitted to drinking alcohol before the accident. *Id.* Unlike in *Shepard*, the evidence here does not show that appellant’s ability to drive was impaired at the time he was driving.

A case involving facts more analogous to those of this case is *Dietrich v. Comm’r of Pub. Safety*, 363 N.W.2d 801, 802-03 (Minn. App. 1985). There, this court reversed an implied consent driver’s license revocation for insufficiency of evidence when the state did not provide evidence that a driver involved in a one-car accident was under the influence of alcohol at the time of the accident. *Id.* This court stated:

The fact that [the driver] was involved in an accident and was later found to be under the influence establishes a sequence of events but provides no time frame for the sequence. The presence of people near the car when [the arresting officer] arrived suggests proximity in time, but this inference is not sufficient to establish the necessary temporal connection.

Id. at 803. Arguably, the facts of this case are stronger for reversal of conviction given the standard of proof required in criminal cases and the fact that appellant was not

involved in an accident, nor were bystanders present to establish a temporal link between appellant's driving and his consumption of alcohol.

Because respondent was required to prove beyond a reasonable doubt that appellant was under the influence of alcohol "when" he drove, operated, or was in control of his vehicle, the evidence offered by the state was insufficient as a matter of law. Minn. Stat. § 169A.20, subd. 1(1). There was no direct evidence that appellant was driving his vehicle while under the influence of alcohol and any rational inferences from the circumstantial evidence were insufficient to satisfy respondent's burden of proof. Further, the state offered no evidence that the keys to the vehicle were in appellant's possession at any time when he was in police custody. For these reasons, we reverse appellant's conviction.

Reversed.