

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 30, 2007

David R. Schanker
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 Nos. 2006AP2715
2006AP2716**

**Cir. Ct. Nos. 2006TR281
2006TR284**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

BUFFALO COUNTY,

PLAINTIFF-RESPONDENT,

V.

SONNY J. STAUFFENECKER,

DEFENDANT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for Buffalo County: JAMES J. DUVALL, Judge. *Affirmed.*

¶1 PETERSON, J.¹ Sonny Stauffenecker appeals his judgment of conviction for operating while under the influence of an intoxicant, first offense,

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

and an order revoking his operating privileges because of an unlawful refusal to submit to a breath test. Stauffenecker argues his due process rights were violated at the refusal hearing when the County could not produce a tape of the informing the accused process. He also argues the trial court erred by not allowing him to testify at trial that he was a commercial truck driver with a commercial driver's license. Finally, he argues the operating while under the influence jury instruction misstated the law. We disagree and affirm the judgment and order.

BACKGROUND

¶2 Stauffenecker received a citation for operating while under the influence, first offense, and a notice of intent to revoke his operating privileges due to refusal to submit to a breath test. Stauffenecker requested a hearing to contest the revocation of his operating privileges. He also filed a motion for discovery requesting any audio or video tape evidence.

¶3 At the refusal hearing, officer Lee Engfer testified that after transporting Stauffenecker to the Buffalo County jail he told Stauffenecker that the informing the accused process would be video and audio taped. Engfer then read the informing the accused form to Stauffenecker and asked him to submit to a breath test. Stauffenecker refused. The County was unable to produce the tape of the booking process and the refusal. Engfer testified that the recording machine in the booking room malfunctioned.

¶4 Stauffenecker did not testify that Engfer improperly read the informing the accused form in jail. In fact, Stauffenecker's only testimony was that after being pulled over, he asked the officer to allow him to put his groceries in his house. The court held Stauffenecker improperly refused, stating: "There

really wasn't anything to contradict the officer's testimony that he read the form. ... There were no other reasons given for the refusal other than the desire to speak to counsel or the desire for a different form of test. Those are not reasonable reasons to refuse."

¶5 The County asked the court to prohibit Stauffenecker from testifying at trial that he was employed as a commercial truck driver. The court ruled that Stauffenecker could testify he was regularly employed but could not state that he was a truck driver or that he held a commercial driver's license. The court concluded that "any probative value or any assistance to the jury on the issue of credibility is outweighed in this case by the danger of jury nullification and the invitation for the jury to make the decision based on inappropriate factors, such as the effect of the citation on his CDL." Stauffenecker chose not to testify and was convicted of operating while under the influence.

DISCUSSION

¶6 Stauffenecker first claims his due process rights were violated when the County could not produce a tape of the informing the accused process at his refusal hearing. Stauffenecker cites criminal cases in support of his claim. Stauffenecker provides no support for his propositions that the criminal standard is required in a civil OWI proceeding and the police had a duty to tape the informing the accused process. Indeed, when the due process right at issue is the property interest in a driver's license, defendants' due process rights may be limited in civil proceedings. See *State v. Nordness*, 128 Wis. 2d 15, 30-34, 381 N.W.2d 300 (1986).

¶7 Even if we were to apply the criminal standard for failing to preserve evidence in this case, Stauffenecker still cannot demonstrate a violation of due process. Under the criminal standard, a defendant's due process rights are violated if the State either (1) acted in bad faith by failing to preserve evidence that is potentially exculpatory, or (2) failed to preserve evidence that is apparently exculpatory. *State v. Greenwold*, 189 Wis. 2d 59, 67-68, 525 N.W.2d 294 (Ct. App. 1994). The evidence must also "be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* at 67.

¶8 Stauffenecker had the opportunity to cross-examine the officer who read him the form to determine whether any irregularities occurred; therefore, he could have obtained the evidence by other means besides playing the actual recording. Even if Stauffenecker were unable to obtain the evidence by other means, he cannot show the County acted in bad faith by failing to preserve apparently exculpatory evidence. Stauffenecker did not testify at the refusal hearing that the officer misread the informing the accused form, and on appeal only states the tape "might have shown that the accused was not properly read his informing the accused form."² Therefore the evidence cannot be classified as apparently exculpatory. Additionally, bad faith can only be shown if "(1) the officers were aware of the potentially exculpatory value or usefulness of the evidence they failed to preserve; and (2) the officers acted with official animus or

² In his reply brief, Stauffenecker states he was "put in the position of not having a tape which he could use both in the refusal hearing and the trial to bolster his credibility of his testimony that he was not given an entirely accurate and complete information advisory...." This is the first time Stauffenecker argues there was any error in the process. We generally do not consider arguments raised for the first time in a reply brief. *Schaeffer v. State Pers. Comm'n*, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989).

made a conscious effort to suppress exculpatory evidence.” *Id.* at 69. Stauffenecker merely claims that the failure to preserve the evidence “would appear to be a kind of gross negligence....”³

¶9 Stauffenecker next argues the trial court erred by ruling that if he testified at the trial, he could not say he was employed as a commercial truck driver with a commercial driver’s license. Stauffenecker argues that the trial court’s ruling violated his right to testify in his own behalf, his right to have a fair trial, and his right to due process of law.

¶10 Stauffenecker fails to cite any relevant case law to support his proposition. Defendants do have a due process right to be heard in civil cases. *See Galpin v. Page*, 85 U.S. 350, 368-69 (1874). However, the trial court did not prevent Stauffenecker from testifying. Rather, the trial court made an evidentiary ruling regarding the relevance of certain testimony.

¶11 We will uphold the trial court’s decision to exclude evidence if the trial court examined the relevant facts, applied a proper legal standard, and reached a reasonable conclusion using a demonstrated rational process. *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. Relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or

³ Stauffenecker also fails to meet the civil standard for sanctions due to the destruction of evidence. The civil standard requires a finding of egregious conduct in the destruction of evidence in order for an action to be dismissed. *See Garfoot v. Fireman’s Fund Ins. Co.*, 228 Wis. 2d 707, 724, 599 N.W.2d 411 (Ct. App. 1999). Egregious conduct “consists of a conscious attempt to affect the outcome of litigation or a flagrant knowing disregard of the judicial process.” *Id.* Stauffenecker has alleged neither.

misleading the jury.” *Johnson v. Kokemoor*, 199 Wis. 2d 615, 635-36, 545 N.W.2d 495 (1996).

¶12 In this case, the trial court determined that “any probative value or any assistance to the jury on the issue of credibility is outweighed in this case by the danger of jury nullification and the invitation for the jury to make the decision based on inappropriate factors, such as the effect of the citation on his CDL.” The trial court applied the appropriate legal standard and made a reasoned decision.

¶13 Finally, Stauffenecker argues the jury instruction misstated the law. The trial court used the standard jury instruction, which states that under the influence of an intoxicant “means that the defendant’s ability to operate a vehicle was impaired because of consumption of an alcoholic beverage.” Stauffenecker asserts this instruction is incorrect because WIS. STAT. § 346.63(1)(a) requires proof that he was “incapable of safely operating a motor vehicle.”

¶14 Stauffenecker admits he did not object to the instruction at conference. WISCONSIN STAT. § 805.13(3) states: “Failure to object [to a proposed jury instruction] at the conference constitutes a waiver of any error in the proposed instructions or verdict.” Therefore, Stauffenecker has waived this argument.

¶15 Even if this argument were not waived, it ignores the plain language of the statute and thus has no merit. WISCONSIN STAT. § 346.63(1)(a) states no person may operate a motor vehicle while:

[u]nder the influence of an intoxicant, a controlled substance, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant

and any other drug to a degree which renders him or her incapable of safely driving.

Thus, the statute addresses three scenarios: (1) under the influence of an intoxicant or controlled substance, (2) under the influence of any other drug to a degree which renders the person incapable of safely driving, and (3) under the combined influence of an intoxicant and any other drug to a degree which renders the person incapable of safely driving.

¶16 The phrase “incapable of safely driving” only applies to the second and third categories, it does not modify the first category. If the phrase “incapable of safely driving” were meant to modify the first category, then the legislature would not have placed the words “under the influence” in front of the second and third categories—to do so would be redundant. This reading of the statute is supported by the commentary in the criminal jury instructions, which states “the ‘incapable of safely driving’ phrase applies only to offenses involving the second two options—those involving the influence of a drug or the combined influence of an intoxicant and a drug.” WIS JI—CRIMINAL 2600 Introductory Comment VIII. B. We view the work of the Criminal Jury Instructions Committee as persuasive. *State v. Gilbert*, 115 Wis. 2d 371, 379, 340 N.W.2d 511 (1983).

By the Court.—Judgment and order affirmed.

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

