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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2014AP0001463
Taylor County Circuit Court Case Nos.
2013TR000188

COUNTY OF TAYLOR,

Plaintiff-Respondent,

v.

DEAN T. WOYAK,

Defendant-Appellant.

AN APPEAL FROM THE JUDGEMENT OF CONVICTION IN THE CIRCUIT COURT FOR TAYLOR COUNTY, THE HONORABLE ANN N. KNOX-BAUER, PRESIDING

THE BRIEF AND APPENDIX OF THE DEFENDANT-APPELLANT DEAN T. WOYAK

By: Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

Piel Law Office
500 W. Silver Spring Drive
Suite K-200
Milwaukee, WI 53217
(414) 617-0088
(920) 390-2088 (FAX)

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STATEMENT OF THE ISSUES

Did the trial court erroneously exercise its discretion by reading JI Criminal 2668?

The trial court answered: No.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Because this is an appeal within Wis. Stats. Sec. 752.31(2), the resulting decision is not eligible for publication. Because the issues in this appeal may be resolved through the application of established law, the briefs in this matter should adequately address the arguments; oral argument will not be necessary.

STATEMENT OF THE CASE/FACTS

The defendant-appellant, Dean T. Woyak, (Mr. Woyak) was charged in Taylor County Circuit Court with having operated a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited alcohol concentration contrary to Wis. Stat. §346.63(1)(a) and (b) on February 12, 2013. On March 11, 2013, in writing, Mr. Woyak entered a not guilty plea to both charges. On March 11, 2013, Mr. Woyak filed a motion for suppression of evidence challenging his arrest. On July 8, 2013, a hearing on the defendant's motion was held before the Honorable Ann N. Knox-Bauer, Judge, Taylor, Taylor County Circuit Court. The Court orally denied the defendant's motion on said date.

On March 27, 2014, a jury trial was held. The jury returned verdicts of guilty on the charges of operating a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited alcohol concentration. The defendant timely filed a Notice of Appeal on June 24, 2014. The appeal stems from the judgment of conviction, and the court ruling at trial denying the defendant's motion to modify substantive Jury Instruction Criminal 2668.

The pertinent facts to this appeal were adduced at the jury trial held on March 27, 2014 through the testimony of the following witnesses. The relevant testimony is summarized below. Cody Hodgson, a citizen witness, testified that on February 12, 2013, he was working trimming trees for power line maintenance. (R.42:12/ A.App. 1). He was working on a "back dirt road" in an area in which he was unfamiliar. The road was covered in four inches of snow. ***Id.***

While working, Mr. Hodgson observed a vehicle driven by Mr. Woyak drive past him at what Mr. Hodgson thought was a fast speed. (R.42:13/ A.App. 2). Mr. Hodgson had to travel in the same direction as the vehicle, and when he had traveled about a quarter mile, he observed the vehicle in the ditch. ***Id.***

Mr. Hodgson approached the vehicle and observed Mr. Woyak as the only person in the vehicle lying on the passenger side floor. (R.42:14/ A.App. 3). Because of the accident, the driver's side door would not open, so Mr. Hodgson approached the passenger side of the vehicle, and helped Mr. Woyak up. ***Id.*** Mr. Hodgson testified that he observed empty beer cans on the floor of Mr. Woyak's vehicle. (R.42:15/ A.App. 4). Hodgson described the smell in the vehicle as similar to a brewery. ***Id.*** Hodgson then left the area of the accident and went to advise his

boss as to what he found. (R.42:16/ A.App. 5). Hodgson also observed Mr. Woyak to have knocked some of the beer cans out of the vehicle and stomped them into the snow. (R.42:18/ A.App. 6). Hodgson also observed Mr. Woyak to have some balance problems when he was outside of the vehicle. ***Id.***

When Hodgson and his boss came back to the truck, Mr. Woyak was asleep. (R.42:20/ A.App. 7). Both Hodgson and his boss walked up to the vehicle to check on Woyak. When Mr. Woyak woke up, Hogdson testified that he began revving the truck. ***Id.*** Hodgson testified that about three to five minutes had elapsed between the time that they left to the time that Hodgson and his boss returned to the vehicle. ***Id.*** After checking on Mr. Woyak, and because they did not have cellular phone reception, Mr. Hodgson and his boss traveled about three quarters of a mile to a farmhouse to use the phone to call law enforcement. (R.42:21/ A.App. 8). Hodgson and his boss were away from Mr. Woyak and his vehicle for approximately 15 minutes. (R.42:22/ A.App. 9). After making the call to law enforcement, they decided to return back to the scene to check on Mr. Woyak. ***Id.***

Upon returning, they observed Mr. Woyak revving the engine trying to get the truck unstuck. For approximately 20

minutes Mr. Woyak tried removing the vehicle in this manner. (R.42:23/ A.App. 10). Hodgson acknowledged that it took quite some time for officers to arrive. (R.42:24/ A.App. 11). Hodgson also testified that he "pretty much" could see Mr. Woyak the entire time that he was in the area, and he did not observe Mr. Woyak consume any alcohol. (R.42:25/ A.App. 12).

On cross-examination, Hodgson admitted that when the officer drove up to the area, Mr. Woyak's truck was behind him. (R.42:29/ A.App. 13). Hodgson also testified that when the officer arrived in the area, the officer drove up to Hodgson and his boss and spoke to them through the window. (R.42:33/ A.App. 14). Hodgson claimed that at that point he was 20 -30 yards from the vehicle. ***Id.*** Hodgson also testified that neither he nor his boss had advised the officer that Mr. Woyak's vehicle was up the road a bit. (R.42:34/ A.App. 15).

Taylor County Sheriff Deputy Chad Kowalczyk also testified. Deputy Kowalczyk testified that he was dispatched to the vehicle in the ditch at 1:53 p.m. Kowalczyk testified that it took him approximately forty minutes to get to the location. (R.42:39/ A.App. 16). When he arrived he observed the vehicle that Hodgson and his boss were in. Contrary to Mr. Hodgson's testimony, Deputy Kowalczyk said he was one

quarter to one half of a mile away from Mr. Woyak's vehicle when he made contact wth Mr. Hodgson and his boss (R.42:81-82/ A.App. 17-18). Kowalczyk testified that he did not think he could see Mr. Woyak's vehicle from where he was when he first had contact with Mr. Hodgson and his boss. ***Id.***

Kowalczyk also testified that when he drove up to Mr. Woyak's vehicle, Mr. Woyak was outside of the vehicle. Furthermore, Deputy Kowalczyk acknowledged that from his location as he was approaching Mr. Woyak's vehicle, he could not see Mr. Woyak. He testified that he had to exit his squad and walk around the vehicle to see him. (R.42:83/ A.App. 19).

Deputy Kowalczyk testified that he did not observe any beer cans buried in the snow, but did observe some on top of the snow. ***Id.*** In conversation with Mr. Woyak, Mr. Woyak admitted to Deputy Kowalczyk that he had consumed three to four beers within the last hour. (R.42:84/ A.App. 20).

Mr. Woyak testified that prior to the accident on that February 12, 2013, he had consumed one twelve ounce can of Milwaukee Best Ice beer. (R.42:109/ A.App. 23). Woyak testified that while driving to Gilman on Konsella Road, he was searching for his cell phone and his wallet, as he did that he lost control of his vehicle and ended up in the ditch. (R.42:110/

A.App. 24). Initially, he did not feel pain, but as he sat at the location he started to feel pain, and the pain intensified. (R.42:111/ A.App. 25). Mr. Woyak testified that the accident occurred at approximately 12:46 p.m. and that Deputy Kowalczyk arrived around 2:40 p.m. ***Id.*** Mr. Woyak explained that the accident caused him to be knocked out. He also testified that as he stood outside the vehicle, he had consumed alcohol after the accident. (R.42:113/ A.App. 26). Mr. Woyak also testified that he consumed a half pint of Seagram's whiskey and tossed the whiskey bottle in front of the vehicle. (R.42:115/ A.App. 27). Thomas Neuser, Chemist from the State Laboratory of Hygiene, testified that one beer would raise a 180 pound man alcohol concentration by .030 grams per 100 milliliters. (R.42:103/ A.App. 21). The defendant's argument at trial was that he was not impaired at the time of driving, in as much as he had consumed only one twelve ounce beer prior to the accident (R.42:108-109/ A.App. 23-24). The majority of the alcohol consumption occurred during the time period after the accident and while he was waiting for help.

During the jury instruction conference, the defendant objected to the reading of pattern Jury Instruction, JI-Criminal 2668. Counsel argued that based on the fact that post-driving

consumption had occurred, reading the pattern jury instruction would be inappropriate because it would allow the jury to find Mr. Woyak guilty even if all drinking occurred after the driving, so long as the test was taken within three hours of driving. (R.42:129/ A.App. 28).

Furthermore, defense counsel argued that the court should have modified the pertinent language of JI-Criminal 2668 describing how the jury should use the test result to comport with the "curve defense" JI-Criminal 234. While the court modified the three hour language of said jury instruction, the court did not add the language of JI-Criminal 234. (R.42:143-144/ A.App. 29-30). The appeal herein stems from the court failing to modify JI-Criminal 2668. Mr. Woyak timely filed a Notice of Appeal on June 24, 2014.

STANDARD OF REVIEW

A trial court has broad discretion in determining what jury instruction to give, the appellate court review is limited to whether the trial court erroneously exercised its discretion. ***State v. Coleman***, 206 Wis.2d 199, 556 N.W.2d 701 (1996). Whether to give a jury instruction lies within the specific discretion of the trial court. ***State. v. Miller*** , 231 Wis.2d 447, 464, 605 N.W.2d

567 (Ct. App. 1999). The court "will reverse and order a new trial only if the instruction, taken as a whole, communicated an incorrect statement of law or otherwise probably misled the jury. ***State v. Randall***, 222 Wis.2d 53, 59-60, 586 N.W.2d 318 (Ct. App. 1998). "The validity of [a] jury's verdict [is affected by] the correctness of the jury instruction." ***State v. Dodson***, 219 Wis.2d 65, 87, 580 N.W.2d 181 (1998). 'A challenge to [a conviction based on] an allegedly erroneous jury instruction warrants reversal and a new trial only if the error [is] prejudicial.' ***Fischer v. Ganju,*** 168 Wis.2d 834, 849, 485 N.W.2d 10 (1992). ***Id.*** at 850, 485 N.W.2d 10. We will not reverse a conviction if the overall meaning communicated by the jury instruction was a correct statement of the law. *See* ***State v. Paulson***, 106 Wis.2d 96, 108, 315 N.W.2d 350 (1982)." ***State v. Fonte***, 2005 WI 77, ¶15, 281 Wis. 654, 698 N.W.2d 594.

ARGUMENT

THE TRIAL COURT ERRONEOUSLY EXERCISED ITS DISCRETION WHEN IT READ JI-CRIMINAL 2668 WHERE THE EVIDENCE ESTABLISHED THAT THE MAJORITY OF CONSUMPTION OCCURRED AFTER THE DRIVING

"A defendant is entitled to an instruction on a valid theory of defense, but not to an instruction that merely highlights

evidentiary factors." ***State v. Morgan,*** 195 Wis.2d 388, 448, 536 N.W.2d 425 (Ct.App. 1995). Here, the Court instructed the jury that if they found the test was taken within three hours of driving, that the jury could find from that fact alone that Mr. Woyak was under the influence of an intoxicant or had a prohibited alcohol concentration at the time of driving. (R.42:143-144/ A.App. 29-30). The Court afforded the County the presumptions under Wis. Stat. §885.235. Mr. Woyak's entire defense was premised around the fact that the majority of the alcohol consumption occurred after the driving, and that while at the time of the offense, Mr. Woyak had consumed one twelve ounce beer, the remainder of the consumption occurred subsequent to the driving.

Wis. JI-Criminal 2668 creates a permissive presumption. ***State v. Vick,*** 104 Wis.2d 678, 688-689, 312 N.W.2d 489 (1981). If a test result shows an alcohol concentration above .08, the presumption permits the jury to specifically find that a defendant was under the influence of an intoxicant and had a prohibited alcohol concentration at the time of driving if the test was taken within three hours of the alleged driving.

Wis. Stat. §885.235(1)(g) specifically states that "In any action or proceeding in which it is material to prove that a

person.. had a prohibited alcohol concentration...evidence of the amount of alcohol in the person's blood at the time in question...is admissible on the issue of whether he or she had a prohibited alcohol concentration if the sample was taken within three hours after the event to be proved. The chemical analysis shall be given the effect as follows without requiring any expert testimony as to the effect." "The issue …is whether the presumed fact that [Mr. Woyak] was under the influence of an intoxicant at the time of driving "more likely than not" flows from the proven fact of intoxication at the time of testing." ***State v. Vick***, 104 Wis.2d 678, 695, 312 N.W.2d 489 at 498 (1981). The ***Vick*** court found that based on the evidence "a reasonable jury could have drawn the permissive inference from all the facts before it that it was more likely than not that if defendant were intoxicated at the time of testing, that he was intoxicated at the time of the arrest." ***Id.*** at 695.

In Mr. Woyak's case, the evidence was clear that there was post-driving consumption. (R.42:109, 113/ A.App. 23, 26). In support of his defense Mr. Woyak testified that he had consumed one twelve ounce Milwaukee Best Ice beer prior to driving, and several beers and some Seagram's Whiskey after the accident as he was waiting for help. Furthermore, Deputy

Kowalczyk testified that Mr. Woyak had told him that he had consumed alcohol after the accident. Also, there was an opportunity for post-driving consumption inasmuch as it took over an hour for authorities to be called and respond to the scene, and Mr. Woyak was left unattended at the vehicle for extended periods of time. Additionally, Deputy Kowalczyk testified that upon arrival at the scene, he observed crushed beer cans on the ground outside the vehicle. Finally, the testimony of the County's own expert established that one twelve ounce Milwaukee Best Ice beer would raise Mr. Woyak's alcohol concentration only to .03 grams per 100 milliliters, which is less than half of the prohibited alcohol concentration of .08. Thus, the defendant's position was that a prohibited alcohol concentration could have only been reached after the accident had occurred. All of the above bolstered his claim that impairment occurred only after the driving.

Unlike ***Vick,*** here, the presumed fact that Mr. Woyak was intoxicated at the time of driving does not "more likely than not" flow from the proven fact that Mr. Woyak was impaired at the time of the tests. The evidence adduced at trial does not support the proposition that because Mr. Woyak was impaired at the time of the test, he "more likely than not" was impaired at

the time of driving. Because the record was clear that there was intervening consumption, the trial court erred by not modifying JI-Criminal 2668. The Jury Instruction Committee specifically contemplated a fact pattern similar to that in Mr. Woyak's case. Language in JI-Criminal 2668 under the heading "How to Use the Test Result Evidence" states "where test result showing .08 grams or more have been admitted and there is no issue relating to the defendant's position on the "blood alcohol curve" the jury should be instructed" as the trial court instructed the jury in Mr. Woyak's case. However, in Mr. Woyak's case, there was a problem with Mr. Woyak's position on the blood alcohol curve. If there is a problem with the defendant's position on the curve, the court should instruct the jury using JI Criminal 234. As defense counsel requested, the court should have substituted the language of JI-Criminal 234.

JI-Criminal 234 reads as follows:

> Evidence has been received that, within three hours after the defendant's alleged driving of a motor vehicle, as ample of the defendant's blood was taken. An analysis of the sample has also been received. This is relevant evidence that the defendant had a prohibited alcohol concentration or was under the influence at the time of the alleged driving. Evidence has also been received as to how the body absorbs and eliminates alcohol. You may consider the evidence regarding the analysis of the blood sample and the evidence of how the body absorbs and eliminates alcohol along with all the other evidence in the

> case giving it the weight you believe it is entitled to receive.

Mr. Woyak put forth a valid theory of defense. He was entitled to the above jury instruction. The jury instruction read by the court allowed the jury to find guilt even if they believed that the necessary consumption to impair Mr. Woyak and raise his alcohol concentration above the .08 prohibited alcohol concentration occurred after the operation. Thus, the jury instruction provided an incorrect statement of law, and was prejudicial to Mr. Woyak. Because of this, the trial court erroneously exercised its discretion by reading said instruction.

CONCLUSION

Because of the trial court erroneously exercised its jurisdiction when it instructed the jury using JI Criminal 2668, and because Mr. Woyak was prejudiced by the error, this Court should vacate the judgment of conviction and grant Mr. Woyak a new trial.

Dated this 25th day of August, 2014.

Respectfully Submitted

Piel Law Office

_____

Walter A Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

Mailing Address:
500 W. Silver Spring Drive
Suite K200
Milwaukee, WI 53217
(414) 617-0088
(920) 390-2088 (FAX)

FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 21 pages. The word count is 4314.

Dated this 25th day of August, 2014.

Respectfully Submitted

Piel Law Office

_____

Walter A Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

Mailing Address:
500 W. Silver Spring Drive
Suite K200
Milwaukee, WI 53217
(414) 617-0088
(920) 390-2088 (FAX)

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 25th day of August, 2014.

Respectfully submitted,

Piel Law Office

_____

Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or a judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 25th day of August, 2014.

Respectfully submitted,

_____

Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

APPENDIX

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