STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2014AP001463

COUNTY OF TAYLOR,

Plaintiff-Respondent,

-v-

DEAN T. WOYAK,

Defendant-Appellant.

On Notice of Appeal from a Judgment of Conviction
Entered in Taylor County,
the Honorable Ann N. Knox-Bauer Presiding

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

KRISTI S. TLUSTY
Taylor County District Attorney
State Bar No. 1055842

Taylor County District Attorney's Office
Taylor County Courthouse
224 South Second Street
Medford, WI 54451
(715) 748-1450

Attorney for Taylor County

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Wisconsin Supreme Court

Wisconsin Court of Appeals

WISCONSIN STATUTES

Wisconsin Jury Instructions

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. Stat. §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 FACTS

The defendant-appellant, Dean Woyak, was charged with Keeping Open Intoxicants in a Motor Vehicle, Operating a Motor Vehicle While Under the Influence of an Intoxicant, and Operating a Motor Vehicle with a Prohibited Alcohol Concentration. (R42:137-138, R-App. 140-142). On March 27, 2014, a jury trial was held and the jury found the defendant-appellant guilty of all three charges. (R42:153, R-App. 143).

At trial, the County called Cody Hodgson to testify. (R42:10, R-App. 101). Mr. Hodgson testified that on February 12, 2013, as he was trimming trees for his employment, he observed a gold colored truck traveling at a fast rate. (R42:13, R-App. 102). Hodgson got into his vehicle and traveled in the direction that he had observed the gold truck headed and observed the truck in the ditch about a quarter of a mile from his original location. (R42:13, R-App. 102). As Hodgson assisted the lone occupant of the vehicle, he noticed several beer cans on the seat and floor of the truck. (R42:15, R-App. 104). Hodgson stated that the truck "smelled like a brewery." (R42:15, R-App. 104). Hodgson left the driver and went to locate his boss who was half of a mile away. (R42:20, R-App. 106). Hodgson testified that he and his boss both returned to the location of the accident within five minutes. (R42:20, R-App. 106). Hodgson and his boss traveled to a nearby farmhouse to contact law enforcement and returned within approximately 15 minutes. (R42:21-22, R-App. 107-108). Hodgson and his boss stayed in a position where they could observe the driver of the gold truck until law enforcement arrived. (R42:24, R-

App. 110). Hodgson testified that at no point did he observe the driver consuming any alcohol. (R42:25, R-App. 111).

On February 12, 2013, at approximately 1:53 p.m., Taylor County Deputy Chad Kowalczyk was dispatched to the accident scene on Konsella Road in the Township of Cleveland, Taylor County, Wisconsin. (R42:38, R-App. 112). Upon arrival at the scene of the accident, the driver verbally identified himself as the defendant-appellant, Dean T. Woyak. (R42:44, R-App. 113). Deputy Kowalczyk observed that Mr. Woyak had difficulty maintaining his balance while standing and also detected a strong odor of intoxicants coming from his person and that his speech was slurred. (R42:44, R-App. 113) When Deputy Kowalczyk asked Mr. Woyak if he had been traveling northbound prior to entering the ditch, Mr. Woyak stated that he was heading east, which was impossible because Konsella Road runs north and south. (R42:46, R-App. 115). Mr. Woyak told Deputy Kowalczyk that he had been in the ditch for half an hour. (R42:47, R-App. 116). He further stated that he had consumed three or four beers in the last hour or so. (R42:47, R-App. 116). Deputy Kowalczyk then conducted standardized field sobriety tests with Mr. Woyak and based upon the clues he observed, he placed Mr.Woyak under arrest. (R42:53-67, R-App. 117-131). Deputy Kowalczyk then transported Mr. Woyak to Memorial Health Center, where he consented to a chemical test of his blood. (R42:69, R-App. 132). The blood was collected at 4:15 p.m. (R42:73, R-App. 133).

Thomas Neuser, an advanced chemist with the State Laboratory of Hygiene analyzed the samples of Woyak's blood and determined that the blood ethanol concentration was .222 grams per 100 mililiters. (R42:101, R-App. 134).

The defendant-appellant testified that he had consumed one Milwaukee's Best Ice beer prior to the accident. (R42:109, R-App. 136). Woyak testified that the accident occurred at 12:46 p.m. (R42:111, R-App. 137). Woyak further testified that he consumed beer and a half pint of Seagrams 7 whiskey outside of the vehicle at the accident scene. (R42:113, R-App. 138).

During the jury instruction conference, the defense objected to the reading of JI Criminal 2668 based upon the defendant-appellant's testimony that he had engaged in post-driving consumption. (R42:129, R-App. 139). The court slightly modified the standard instruction to add the following language: "If you find that the defendant's blood sample was taken within three hours of operating a motor vehicle and you are satisfied that there was .08 grams or more of alcohol. . ." (R42:132, R-App. 140).

STANDARD OF REVIEW

A circuit court has broad discretion in deciding whether to give a particular jury instruction. A court shall exercise its discretion to "fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence." *State v. Coleman*, 206 Wis.2d 199, 212, 556 N.W.2d 701 (1996). However, a reviewing court is to independently review whether a jury instruction is an accurate statement of the law applicable to the

facts of a given case. *State v. Groth*, 2002 WI App 299, 258 Wis.2d 889, 655 N.W.2d 163.

> "The validity of [a] jury's verdict [is affected by] the correctness of the jury instructions." *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). "An error is prejudicial if it probably and not merely possibly misled the jury." *Id.* at 850. A conviction will not be reversed "if the overall meaning communicated by the jury instructions was a correct statement of the law." *State v. Paulson*, 106 Wis.2d 96, 108, 315 N.W.2d 350 (1982).

ARGUMENT

WHETHER THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT INCLUDED JI-CRIMINAL 2668 IN THE INSTRUCTIONS TO THE JURY

The trial court properly exercised its discretion when it instructed the jury using JI-Criminal 2668. "A permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof." *Ulster County Court v. Allen*, 442 U.S. 140, 99 S.Ct. 2213, 2224, 60 L.Ed.2d 777, 792 (1979). Wis. Stat. §885.235(1g) creates a such a presumption when there is evidence that a chemical analysis of a person's blood has been conducted, if the sample was taken within 3 hours after the event to be proven. Specifically, Wis. Stat. §885.235(1g)(c) states: "The fact that the analysis shows that the person had an alcohol concentration of 0.08 or more is prima facie evidence that he or she was under the influence of an intoxicant and is prima facie evidence that he or she had an alcohol concentration of 0.08 or more." The Supreme Court has interpreted the language of JI-Criminal 2668, which reflects the language of Wis. Stat. §885.235

to be a permissive inference or presumption. *State v. Vick*, 104 Wis.2d 678, 694, 312 N.W.2d 489 (1981).

The Supreme Court analyzed the chemical analysis presumption in *State v. Vick*, 104 Wis.2d 678, 312 N.W.2d 489 (1981). In reaching its decision, the Court analyzed the issue as "whether the presumed fact that the defendant 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." *Id.* at 695. The Court found that, viewing all of the evidence, the test was satisfied and that the trial court did not abuse its discretion in issuing the jury instruction.

Applying the same analysis to the present case, the County introduced sufficient evidence to support a rational connection between the fact that Woyak was intoxicated at the time of testing and the inference that he was also intoxicated at the time he operated his motor vehicle. Specifically, the County introduced the following evidence in support of this position: 1) Woyak was driving his vehicle at a fast speed and ultimately was involved in a one-vehicle accident (R42:13, R-App. 102); 2) Cody Hodgson located the vehicle in the ditch and observed several beer cans on the seat and floor of Woyak's vehicle (R42:14-15, R-App. 103-104); 3) Hodgson stated that Woyak's truck "smelled like a brewery;" (R42:15, App. 104); 4) Other than being away from the scene for a few minutes to locate his boss (R42:19-20, R-App. 105-106) and then to travel to a nearby residence to contact law enforcement (R42:22, R-App. 108), Hodgson stayed in a position where he could observe Woyak and at no point did he observe Woyak

consuming any alcohol after the accident (R42:22-25, R-App. 108-111); 5) Deputy Kowalczyk observed several clues of impairment, including difficulty maintaining balance, a strong odor of intoxicant emanating from Woyak, and Woyak's slurred speech (R42:44-45, R-App. 113-114); 6) Woyak admitted that he had consumed three or four beers but never mentioned consuming whiskey (R42:47, R-App. 116); 7) Woyak showed clues of impairment when he performed the standardized field sobriety tests. (R42:57-67, R-App. 121-131) Finally, the County introduced the chemical analysis of Woyak's blood, which was .222 grams of ethanol per 100 mililiters, an amount which is nearly 3 times the legal limit. (R42:101, R-App. 134).

Woyak testified on his own behalf and introduced evidence that was contradictory to the testimony provided by the County's witnesses. Woyak testified that he had engaged in post-driving consumption of alcohol, specifically, beer and a half pint of Seagrams 7 whiskey. The defense argues that "the evidence was clear that there was post-driving consumption." (Br. 10). However, although Woyak presented evidence alleging that he had consumed alcohol subsequent to his driving, the evidence does not clearly support that conclusion. The jury was free to accept or reject Woyak's testimony. The jury obviously felt that the evidence presented by the County was more credible than the testimony of Woyak. It is reasonable that the jury considered the evidence presented by the County to draw a permissive inference that it was more likely than not that since Woyak was intoxicated at the time of testing, that he was also intoxicated at the

time he operated his vehicle. Thus, because there is a rational connection between the proven fact that the defendant had a prohibited alcohol concentration at the time that Woyak's blood was drawn for chemical analysis and the inference that he was under the influence of an intoxicant at the time he operated his motor vehicle, the trial court properly exercised its discretion in issuing the jury instruction.

Furthermore, the defense has failed to prove that there was any prejudice caused by the alleged error of the trial court in reading the presumptive inference instruction and by denying the request to read the portion of the instruction pertaining to the blood alcohol curve. The instruction relating to the blood alcohol curve was of no benefit to the jury in this case. The defense theory in this case was that Woyak only consumed one Milwaukee's Best Ice beer prior to his driving. The defense asked the State's expert witness, Thomas Neuser, what the maximum alcohol concentration would be for a 180-pound male who had consumed one Milwaukee's Best Ice beer, to which Neuser replied .03 grams per 100 milliliters. (R42:103, R-App. 135). This was not a situation where there was evidence that required complicated testimony regarding retrograde extrapolation. If the jury had found Woyak's testimony to be credible, they would have certainly returned verdicts of not guilty because Woyak's alcohol concentration at the time of driving could have only been .03.

CONCLUSION

The trial court did not abuse its discretion in issuing JI-Criminal 2668 and Woyak did not suffer any prejudice. Therefore, the County requests that this Court affirm the convictions in these matters and deny Woyak's request for a new trial.

Dated this 24th day of October, 2014.

Respectfully Submitted

Kristi S. Tlusty
Taylor County District Attorney
Attorney for Plaintiff/Respondent

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,662 words.

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 §809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 24th day of October, 2014.

Respectfully submitted,

KRISTI S. TLUSTY
Taylor County District Attorney
State Bar No. 1055842

Taylor County District Attorney's Office
Taylor County Courthouse
224 South Second Street
Medford, WI 54451
(715) 748-1450
Kristi.tlusty@da.wi.gov

Attorney for Plaintiff-Respondent

APPENDIX

CONTENTS OF APPENDIX

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 Wis. Stat. §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 take from a circuit court order or a judgment entered in to 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 person, 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 24th day of October, 2014.

Respectfully submitted,

KRISTI S. TLUSTY
Taylor County District Attorney
Attorney for Plaintiff-Respondent
State Bar No. 1055842