STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2015AP1014 - CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

RONALD MARSHALL JEWETT,

Defendant-Respondent.

On Appeal from a Judgment of Conviction,
Entered in the St. Croix County Circuit Court,
the Honorable Eric J. Lundell, Presiding.

RESPONSE BRIEF OF DEFENDANT-RESPONDENT

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CASES CITED

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ISSUES PRESENTED

1. Do the Double Jeopardy Clauses of the Federal and State Constitutions Bar the State's Appeal in this case?

   The circuit court did not address this issue.

2. Was the circuit court's decision to not consider the DOT driving record erroneous?

The circuit court concluded it would not consider the record because the defense challenged it and showed that the Minnesota driving records no longer existed.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This is a one-judge appeal under Wis. Stat. § 752.31(2) and (3), and a request for publication is therefore prohibited by Wis. Stat. § 809.23(4)(b). Mr. Jewett anticipates that the issues will be fully presented in the briefs, but would welcome oral argument if the court would find it helpful to resolving the case.

STATEMENT OF CASE AND FACTS

As Respondent, Mr. Jewett exercises his option not to include separate statements of the case and facts. *See* Wis. Stat. (Rule) 809.19(3)(a)2. Relevant facts will be included where appropriate in Mr. Jewett's argument.

ARGUMENT

I. The Double Jeopardy Clauses of the Federal and State Constitutions Bar This Appeal.

The State begins its brief by explaining that it is challenging the issue of whether the evidence it presented of Mr. Jewett's past driving record was sufficient to convict him of Operating While Intoxicated as a Third Offense. (State's Brief at 1). The State argues that the driving record it presented was sufficient evidence of his prior convictions. (State's Brief at 5).

However, the State cannot argue that the evidence was sufficient to convict Mr. Jewett of the offense charged after the court has convicted the defendant of a lesser offense without violating Mr. Jewett's constitutional protection against double jeopardy.

The double jeopardy clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." Similarly, the Wisconsin Constitution provides, "no person for the same offense shall be put twice in jeopardy of punishment…" Wis. Const.. art. 1, sec. 8.

The double jeopardy clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." ***North Carolina v. Pearce***, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076 (1969).

Although not an element of the offense, the prior convictions were facts necessary to punish Mr. Jewett for the crime of operating while intoxicated as a third offense.

As noted above, the State frames the issue in this case and argues the facts by calling this a sufficiency of the evidence case. (State's Brief at 1, 5). The court of appeals should not develop arguments or evaluate issues not raised by the parties as doing so would require it to act as both an advocate and an impartial judge. ***State v. Longcore***, 226 Wis. 2d 1, 10 593 N.W.2d 412 (Ct. App. 1999).

The United States Supreme Court has previously decided that a prosecution's challenge to the sufficiency of the evidence after an acquittal violates the double jeopardy clause. ***Sanabria v. U.S.***, 437 U.S. 54 (1978). In ***Sanabria***, the Supreme Court did not allow the prosecution to appeal following an acquittal for insufficient evidence, even though that acquittal was based on what the court characterized as an erroneous evidentiary ruling. ***Id.*** at 68-69. Therefore, even though the State argues that the circuit court's decision not to consider the DOT driving record was erroneous, that argument does not overcome the protections of the double jeopardy clause.

Finally, it is notable that the standard of review for the sufficiency of the evidence focuses on the defendant's right to appeal not the State's. The standard for reviewing the sufficiency of the evidence on appeal is that "an appellate court may not reverse a conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (WI 1990). The phrasing of this standard emphasizes that defendants, and not prosecutors, will be appealing based on the sufficiency of the evidence.

Because the prosecution's appeal would violate the defendant's protection against double jeopardy, the State's appeal should be dismissed.

II. The Circuit Court's Ruling Was Not Erroneous.

The State argues that the court incorrectly declined to rely on Mr. Jewett's DOT driving record when determining whether Mr. Jewett was guilty of a first or third offense. (State's Brief at 5-6). However, the admissibility of evidence is a matter within the trial court's discretion. ***State v. Pharr***, 115 Wis.2d 334, 342, 340 N.W.2d 498 (1983).

Here, the circuit court properly exercised its discretion in declining to consider the two convictions listed on the DOT driving record. The State analogizes this case to ***State v. Van Riper***, 2003 WI App 237, 267 Wis.2d 759, 672 N.W.2d 156, in arguing that the DOT record should have been considered. (State's Brief at 5-6). However, the two cases are distinguishable.

The State argues that ***Van Riper*** should control because it involved and out-of-state prior conviction. However the defense objection to the use of the DOT record was based on more than simply the fact the convictions listed were from out of state. The defense also argued that it had attempted to investigate Mr. Jewett's alleged prior convictions and because of their age, no record existed. (24:38). So, the challenge was not simply that the prior convictions were from Minnesota, but that there was no additional record of them. The court deemed this "exculpatory" and exercised its discretion not to admit the evidence. (24:41).

CONCLUSION

For the reasons set forth in this brief, Ronald Marshall Jewett, respectfully requests that the court dismiss the State's appeal or affirm the decision of the circuit court and allow the conviction for operating while intoxicated as a first offense to stand.

Dated this 16th day of December, 2015.

Respectfully submitted,

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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 font, 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 1,008 words.

CERTIFICATE 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 16th day of December, 2015.

Signed:

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