

RECEIVED

07-07-2016

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

WAUKESHA COUNTY,

Plaintiff-Respondent,

Court of Appeals case no.:
2016AP000554

v.

KIMBERLY A. RIDL,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION OF THE
CIRCUIT COURT FOR WAUKESHA COUNTY, BRANCH 9,
THE HONORABLE MICHAEL J. APRAHAMIAN PRESIDING

Andrew Mishlove
State Bar Number: 01015053

MISHLOVE & STUCKERT, LLC
4425 N. Port Washington Road, Suite 110
Glendale, WI 53212
(414) 332-3499
Fax: (414) 332-4578

TABLE OF CONTENTS

STATEMENT OF ISSUES.....	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	2
ARGUMENT	7
The Trial Court Lacked the Expertise and the Basis to Make Findings Regarding Pharmacology; Hence, the Trial Court Erred in Rendering Speculative, Quasi-Expert Opinions	7
SUMMARY AND CONCLUSION.....	11
CERTIFICATION	13
APPENDIX CERTIFICATION.....	15
APPENDIX	16
INDEX TO APPENDIX.....	17

TABLE OF AUTHORITIES

Cases

<i>Cramer v. Theda Clark Memorial Hospital</i> , 45 Wis. 2d 147, 150, 172 N.W.2d 427 (1969)	8, 9
<i>Grace v. Grace</i> , 195 Wis. 2d 153, 159, 536 N.W.2d 109 (Ct. App. 1995)...	7
<i>Netzel v. State Sand & Gravel Co.</i> , 51 Wis. 2d 1, 7, 186 N.W.2d 258 (1971)	8
<i>Simonson v. Hepp</i> , 2007 US Dist. Lexis 78942	9
<i>State v. Bailey</i> , 54 Wis.2d 679, 196 N.W.2d 664 (1972)	8
<i>State v. Doerr</i> , 229 Wis.2d 6165999 N.W.2d 897 (Ct.App. 1999).....	8
<i>State v. Goralski</i> , 246 Wis.2d 671, 630 N.W.2d 276, 2001 WI App 146....	9
<i>Weiss v. United Fire & Cas. Co.</i> , 197 Wis. 2d 365, 378, 541 N.W.2d 753 (1995)	8

Statutes

Wis. Stat. §343.305(9).....	1, 6
Wis. Stat. §346.57(3).....	1, 6
Wis. Stat. §346.63(1)(a)	1, 6

STATEMENT OF ISSUES

Did the trial court err in finding that Dr. Ridl committed the offense of operating a motor vehicle while under the influence of an intoxicant, holding that although the alcohol she consumed would not have caused intoxication “on a typical day,” that it did on the day in question?

The trial court answered, no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant-appellant takes no position on oral argument and publication.

STATEMENT OF THE CASE

Shortly after midnight, on January 27, 2015, Dr. Kimberly Ridl, the defendant-appellant, was arrested and charged with driving too fast for conditions¹, operating a motor vehicle while under the influence of an intoxicant,² and refusal to submit to a chemical test of her breath.³

On December 18, 2015, the matter was tried to the Waukesha County Circuit Court, the Honorable Michael J. Aprahamian, presiding. The trial court found Dr. Ridl guilty of all three charges. Dr. Ridl appeals only the findings and judgment that she committed the offense of operating

¹ Contrary to Wis. Stat. §346.57(3).

² Contrary to Wis. Stat. §346.63(1)(a).

³ Contrary to Wis. Stat. §343.305(9).

a motor vehicle while under the influence of an intoxicant, in Waukesha County case number 2015TR000801.

STATEMENT OF FACTS

On January 26, 2015, Kimberly Ridl spent most of the day at Aurora Hospital, with her elderly father. Kimberly Ridl, who is a medical doctor, was accompanied by her friend, Trudy Stolpa, a nurse. (R:20, p.65). Her father's health crisis was significant. As Dr. Ridl stated, "He almost died." (R:20,p.65, l. 10.) She arrived at the hospital about 7:15 a.m., and stayed until 2:00 p.m. She then left, but returned again at about 5:15 p.m. (R:20, p.65). She stayed with her father as long as she was allowed, until about 8:00 p.m. (R:20, p.65, l.22).

This was Dr. Ridl's first day out of the house in four days, as she had been suffering from migraine headaches, with nausea and vomiting. (R:20, p.64, ll. 11-16). The previous day, January 25, she had taken several medications: toradol, described as an IB nonsteroidal anti-inflammatory, Compazine, an anti-nausea medication, and Zofran, also an anti-nausea medication. That morning, on January 26, she had taken Benadryl and dexamethasone. She took no medication after the morning of January 26. (R:20 p. 94, l. 7 – p. 95, l. 25).

Dr. Ridl has significant health problems, including stage 4 lymphoma (in remission), a nerve problem at the C2 vertebrae, and migraine headaches. (R:20, p. 63, ll. 9-13; p. 64, ll 11-13). She also suffers from sciatica related to a disc herniation, causing numbness in her left foot. (R:20, p. 76, ll 17-21.).

About 8:15 p.m. on the evening of January 26, Dr. Ridl and Ms. Stolpa left the hospital and went to dinner together at the Spring City Rox Grill. Dr. Ridl ate, and both Dr. Ridl and Ms. Stolpa had two mixed drinks. (R:20, p. 67). Dr. Ridl's receipt shows that five mixed drinks were purchased by the two of them, but both parties testified that the last drink was not consumed. (R: 11, exh.6).

Dr. Ridl left the restaurant at approximately 10:30 p.m., immediately after paying the bill. (R:11, exh. 6). The weather was cold and wet. The roads were slush covered and slippery. Dr. Ridl drove from the restaurant to her subdivision in Delafield, where she lived. Within sight of her home, she slid into a snowbank. She was unhurt, the car was undamaged, but her vehicle was stuck. (R:20, p. 71). She called Ms. Stolpa, who arranged for a tow truck to assist. (R:20, pp. 72-73).

Dr. Ridl was driving her father's car, which was why she waited with the car, even though she was within walking distance to her home:

Q: Did you consider walking, leaving your car there and going home?

A: I thought about it because the vehicle was very low on gas and I was worried but I didn't want to leave my dad's vehicle because he loves that vehicle. I bought it for him in '06 and you know he spit polishes the thing and I wanted to make sure that when the town truck came that I was there to answer any question or give them the keys or help them in any way I could to make sure that everything was be (*sic*) okay for dad.

(R:20, p.73).

She waited for several hours, but the tow never arrived. While waiting, she periodically called Ms. Stolpa, a total of ten times. (R:20, p. 109, 123). Ultimately, after several hours, Ms. Stolpa called the police. (R:20, p. 110, 1.14).

At about 12:40 a.m., on January 27, 2015, Waukesha County Deputy Mooney responded. He found Dr. Ridl seated in the car. She was distraught, crying, and at times illogical. She was upset regarding the treatment received by her father at the hospital. (R:20, pp. 11-18).

Dr. Ridl told Deputy Mooney that she had consumed two mixed drinks (Ketel One and Seltzer); and Deputy Mooney noted her eyes, her speech, and an odor of consumed alcoholic beverage. (R:20, pp 11-18).

He decided to perform field sobriety tests. He noted that she had difficulty getting out of her car and onto the road; but the car was off the road on a slope, and the surface was slippery. (R:20, pp 18-25). Deputy Mooney conducted standardized field sobriety tests, and arrested Dr. Ridl for operating a motor vehicle while under the influence of an intoxicant, and operating too fast for conditions. (R: 20, p. 25, R:1: citations issued).

Dr. Ridl was distraught, not only at her situation, but also with her father's medical crisis. She made no overt threat to harm herself or others; but, she made statements of such despair that Deputy Mooney decided to have her evaluated for an emergency mental health detention. He drove to Waukesha Memorial Hospital where he believed she would get a mental status evaluation. That evaluation, however, never occurred. Rather, Deputy Mooney parked his squad car in the hospital parking lot and had a telephone conversation with Terry Herzog, a nurse from the Waukesha County Mental Health agency. Based on that conversation, Deputy Mooney took no further action regarding a mental status examination, or a mental health detention of Dr. Ridl. (R:20. pp 28-33).

Deputy Mooney read the Informing the Accused form to Dr. Ridl, and she declined to give a breath sample, preferring to do a blood test.

Deputy Mooney then issued a Notice of Intent to Revoke Operating Privilege. (R:20, p. 28).

Dr. Ridl was charged with driving too fast for conditions⁴, operating a motor vehicle while under the influence of an intoxicant,⁵ and refusal to submit to a chemical test of her breath.⁶

On December 18, 2015, the matter was tried to the Waukesha County Circuit Court, the Honorable Michael J. Aprahamian, presiding.

As to the charge of operating a motor vehicle while under the influence of an intoxicant, the trial court found as follows:

I think as to the intoxication whether she was operating while intoxicated for all the factor I identified it does support a level of intoxication that would lead to a violation by clear and convincing evidence.

I'm also influenced by the fact that she did have two tall Ketel One and seltzers. She testified she had been sick for four days, vomiting. I can imagine how maybe in a typical day that would not have affected as it would on this day but having gone through that level of physical stress from the migraines she was having, taking the medications that she was taking, being under emotional stress of what was going on through her father, alcohol impacted her in a way that maybe she wasn't expecting and I think she was intoxicated as a result and I do believe that she was operating while under the influence of intoxicants.

(R:20, p. 126).

⁴ Contrary to Wis. Stat. §346.57(3).

⁵ Contrary to Wis. Stat. §346.63(1)(a).

⁶ Contrary to Wis. Stat. §343.305(9).

Dr. Ridl appeals that finding, asserting that the trial court's findings of fact were in the nature of expert opinions, for which there was no basis in the record. Specifically, there was no factual basis to allow any finding regarding how Dr. Ridl's migraine headache and vomiting would cause her to become intoxicated upon consumption of an amount of alcohol that would not cause intoxication on a "typical" day. Similarly, there was no factual basis to allow any finding as to the effect of her use of prescription medications; nor was there a basis for the court to make any finding regarding whether her level of physical or emotional stress would facilitate intoxication beyond what would otherwise normally occur.

Simply put, the trial court rendered expert opinions, without the benefit of evidence or expert testimony.

ARGUMENT

The Trial Court Lacked the Expertise and the Basis to Make Findings Regarding Pharmacology; Hence, the Trial Court Erred in Rendering Speculative, Quasi-Expert Opinions

Determining whether expert testimony is necessary in a given situation presents a question of law subject to *de novo* review. *Grace v. Grace*, 195 Wis. 2d 153, 159, 536 N.W.2d 109 (Ct. App. 1995). Certain kinds of evidence are difficult for the finder of fact to evaluate without the

benefit of expert testimony. *Weiss v. United Fire & Cas. Co.*, 197 Wis. 2d 365, 378, 541 N.W.2d 753 (1995). For example, a trial court may decline to permit the case to go to the jury in the absence of expert testimony. Expert testimony may be required when complex or esoteric issues are presented. *Weiss, id.* Expert testimony is required when the matter involved is ‘... not within the realm of the ordinary experience of mankind’” *Id.*, quoting *Cramer v. Theda Clark Memorial Hospital*, 45 Wis. 2d 147, 150, 172 N.W.2d 427 (1969). Expert testimony is required when cases are so complex or technical that the fact-finder would be merely speculating without it. *Cramer, supra*, at 152. Whether expert testimony is required in a given situation must be answered on a case-by-case basis. *Id.* at 380-81, quoting *Netzel v. State Sand & Gravel Co.*, 51 Wis. 2d 1, 7, 186 N.W.2d 258 (1971).

Thus, in *State v. Doerr*, 229 Wis.2d 6165999 N.W.2d 897 (Ct.App. 1999), a case of battery to an officer, the court found that expert testimony was required as a foundation for the admission of a portable breath test result. See also, e.g., *State v. Bailey*, 54 Wis.2d 679, 196 N.W.2d 664 (1972), requiring expert testimony that a particular alcohol level would negate the element of intent, and disallowing such testimony from a

chemist; *State v. Goralski*, 246 Wis.2d 671, 630 N.W.2d 276, 2001 WI App 146, requiring expert testimony that the alcohol content of a can of Budweiser was 5%; and, *Simonson v. Hepp*, 2007 US Dist. Lexis 78942, requiring expert testimony to establish that an attempt to relieve constipation could damage the hymen of a 7-year girl (appended).

Where the factual issues are technical, and require a scientific foundation, a lay opinion on the matter may be nothing more than mere speculation. *Cramer, supra*. That is precisely what occurred in this case in three instances. The trial court, acknowledging that she would not have been intoxicated “on a typical day,” nevertheless speculated that she was intoxicated on this day, due to her health history, medications, and stress. In this way, the trial court went above and beyond the realm of proper fact-finding.

The trial court stated that Dr. Ridl’s history of a migraine headache, with nausea and vomiting, caused her to be affected by alcohol in a way that would not have occurred on a typical day. The only evidence in the record regarding this remarkable statement is Dr. Ridl’s testimony that she had suffered from a migraine in the previous days. Whether or not a previous history of a migraine headache had an impact on alcohol

intoxication is a matter of specialized knowledge. It is not the sort of thing about which the law allows a layperson, even the court, to speculate. Further, there is simply no evidence in the record to support the trial court's speculation, which was made up of whole cloth.

The trial court also stated that Dr. Ridl's medication caused her to be affected by alcohol in an atypical way. This was based on Dr. Ridl's testimony that on the previous day, January 26, she had taken toradol, an anti-inflammatory, compazine, an anti-nausea medication, and zofran, also an anti-nausea medication, and that morning, on January 26, she had taken benadryl, and dexamethasone. Interestingly, the trial court questioned her on this point, but obtained no answer in support of its conclusion that the medication interacted with alcohol.

Q: According to the labels on the medications you took you were not supposed to mix it with alcohol, true?

A: I can't answer that. I don't know. I mean I would assume it says it for pretty much every medication but the Benadryl I took in the morning as well and the Benadryl only lasts six hours.

(R: 20, p. 95, ll. 18-24).

Whether or not specific medication such as toradol, compazine, zofran, benadryl or dexamethasone, at the times they were consumed by Dr. Ridl, in the amounts consumed, interacted with alcohol consumed on the

evening of January 26th, is not the sort of thing about which the law allows a layperson, even the court, to speculate. Even if the court had the requisite knowledge and training to evaluate these issues of pharmacology, there is no evidence in the record to support any conclusion regarding this subject.

The same may be said about the effect of physical and emotional stress and its role in the pharmacology of alcohol. The court's statements regarding this issue were mere speculation. Again, even if the court had the expertise to evaluate this issue of pharmacology, there is no evidence in the record to support its conclusion.

SUMMARY AND CONCLUSION

The trial court found, "... in a typical day that (*alcohol consumption*) would not have affected as it would on this day..." The trial court then considered Dr. Ridl's previous migraine headache, use of medication, and physical or emotional stress, holding that these factors enhanced the effect of the alcohol that Dr. Ridl had consumed. These findings were without any basis in the record, were in the nature of expert opinion, and were wholly speculative. The trial court, thus, erred.

Therefore, Dr. Ridl, the defendant-appellant, respectfully prays that this court reverse the findings and judgment of the trial court, and order the

charge of operating a motor vehicle while under the influence of an
intoxicant dismissed on the merits, and with prejudice.

Signed and dated this _5_ day of July, 2016.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

_____/s/_____

BY: Andrew Mishlove
Attorney for the Defendant-Appellant
State Bar No.: 01015053

CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stats. §809.19(3)(b) and (c), for a brief produced with a proportional serif font. The length of this brief is 2,436 words.

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. Stats. §809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or 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.

Additionally, I certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Signed and dated this _5_ day of July 2016.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

_____/s/_____
BY: Andrew Mishlove
Attorney for the Defendant-Appellant
State Bar No.: 01015053

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 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.

Signed and dated this 5 day of July 2016.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

_____/s/_____
BY: Andrew Mishlove
Attorney for the Defendant-Appellant
State Bar No.: 01015053

APPENDIX

INDEX TO APPENDIX

Judgment of Conviction	A
Partial Transcript of Court Trial held December 18, 2015; pages 11-33, 63-76, 94-126	B
<i>Simonson v. Hepp</i>, 2007 US Dist. Lexis 78942	C