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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

COUNTY OF WAUKESHA,

Plaintiff-Respondent,

v.

Appeal No. 2016AP000554
Circuit Court Case Nos. 2015TR000801, 2015TR000868

Kimberly A. Ridl,

Defendant-Appellant.

An Appeal From a Judgment of Conviction for OWI-1st and Refusal Entered by the Honorable Michael J. Aprahamian, Circuit Judge, Branch 9, Waukesha County

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BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

1. Was there sufficient evidence to prove by clear, convincing, and satisfactory evidence that Ms. Kimberly Ridl was guilty of Operating a Motor Vehicle While Under the Influence of an Intoxicant?

   Circuit Court Answer: Yes.

2. Was Judge Aprahamian's opinion that the alcohol Ms. Ridl consumed may have affected her differently than it usually does outside the realm of common knowledge and require an expert?

   Circuit Court Answer: No.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent submits that oral argument is unnecessary because the issues can be set forth fully in the briefs. Publication is unnecessary as the issues presented relate solely to the application of existing law to the facts of the record.

STATEMENT OF THE CASE AND FACTS

Ms. Kimberly Ridl was cited for Operating While Under the Influence of an Intoxicant (OWI), First Offense, contrary to section 346.63(1)(a), Wisconsin Statutes, Driving Too Fast for Conditions, contrary to sec. 346.57(3), Wis. Stats., and Refusal to Take Test for Intoxication After Arrest, contrary to sec. 343.305(9)(a), Wis. Stats., after an incident occurring on January 27, 2015. On December 18, 2015, a court trial was held in front of the Honorable Michael J. Aprahamian where Ms. Ridl was convicted of OWI-1st, Driving Too Fast for Conditions, and the Refusal. (R. 20: 125-127; County's Appendix, App-4 – App-6.) Ms. Ridl filed an appeal arguing that the trial court erred when it convicted her of OWI, and is requesting that this Court reverse the trial court's decision and dismiss the OWI on the merits with prejudice. (*See* Brief of Defendant-Appellant, 11-12.) The County requests that this Court affirm Ms. Ridl's conviction for OWI.

At the court trial in front of Judge Aprahamian on December 18, 2015, the County presented testimony from Lieutenant Marc Moonen with the Waukesha County Sheriff's Department. (R. 20: 6.) Lieutenant Moonen testified that he has been with the Waukesha County Sheriff's Department since

February 2009, and as part of his training as a law enforcement officer, was trained to administer standardized field sobriety tests. (*Id.* at 7-8.) In addition to Lieutenant Moonen's training for standardized field sobriety tests, he testified that he is also a certified Drug Recognition Expert, which requires additional training above and beyond the training for standardized field sobriety tests. (*Id.* at 8.)

Lieutenant Moonen further testified that on January 27, 2015, around 12:41 a.m., he was dispatched to an accident involving a vehicle in a ditch near the Dover Bay Subdivision off of Silvernail Road in the Town of Delafield. (*Id.* at 11-12.) That night it was around 25 degrees and there was about "half inch of slushy-type snow" on the ground. (*Id.* at 13.)

Upon arrival, Lieutenant Moonen observed a four-door Lexus SUV in the ditch. (*Id.* at 12.) Based on the tire marks, Lieutenant Moonen believed that the vehicle was driving west on Silvernail when it tried to make a left-hand turn into the Dover Bay subdivision, slid across the entrance way, and ended up in the ditch. (*Id.*at 12-13.) Lieutenant Moonen made contact with the sole occupant and operator of the Lexus, who was identified as Ms. Ridl. (*Id.* at 13-14.) When Lieutenant Moonen

made contact with Ms. Ridl, the vehicle's engine was still on and running. (*Id.* at 14.)

Ms. Ridl was crying and very upset, and when she opened the door, Lieutenant Moonen smelled the odor of consumed intoxicants emitting from the vehicle. (*Id.* at 14-15.) While speaking with Ms. Ridl, Lieutenant Moonen noted that she had thick and slurred speech, was crying, and making incoherent sentences. (*Id.* at 15.) Ms. Ridl initially indicated that she was coming from a few blocks away, but Lieutenant Moonen knew based on his training and experience that there were no bars a few blocks away. (*Id.*) When asked again, Ms. Ridl indicated she was coming from the Rox bar off of Grandview and Silvernail in the City of Waukesha. (*Id.* at 15-16.) Ms. Ridl indicated that she had two Ketel One Vodka and seltzer drinks at the bar. (*Id.* at 16.) Ms. Ridl indicated that she started drinking around 7:00 p.m. and stopped approximately one to two hours prior to her contact with Lieutenant Moonen, and did not have any intoxicants since her vehicle had crashed into the ditch. (*Id.* at 16-17.)

Based on the circumstances, Lieutenant Moonen did have her exit the vehicle as he believed Ms. Ridl could be operating while impaired. (*Id.* at 17.) When Ms. Ridl exited the vehicle

and initially stood up, she fell back into the vehicle, and had to stabilize herself against the car in order to get out. (*Id.*) While exiting the car, Ms. Ridl stated she was a physician at the VA Center, and that her father was in the hospital and Aurora killed her father. (*Id.* at 18.)

Because of the weather conditions, including that it was snowing, Lieutenant Moonen told her that for the field sobriety tests, it would be to Ms. Ridl's benefit to go to a location that was dryer and warmer, but Ms. Ridl refused to leave the location. (*Id.* at 18.) Ms. Ridl indicated that she did not want to leave that location as she was only a few blocks from her house, and she just wanted to go home. (*Id.*)

Lieutenant Moonen had Ms. Ridl walk from the back of her vehicle to the front of his squad vehicle for field sobriety tests, and during that walk, Lieutenant Moonen noted that Ms. Ridl had a very unsteady gait and had to catch her to prevent her from falling. (*Id.* at 19.) The first test Lieutenant Moonen administered was the Horizontal Gaze Nystagmus (HGN) test. (*Id.* at 19-20.) During the time that Lieutenant Moonen was placing her in the instructional stance, Ms. Ridl was continually stating that she cares for people like Lieutenant Moonen, including cops and fire fighters. (*Id.* at 20.) During Lieutenant

Moonen's administration of the HGN test, he observed lack of smooth pursuit in both of Ms. Ridl's eyes, and distinct and sustained nystagmus at maximum deviation in both eyes. (*Id.* at 20-21.) Lieutenant Moonen tried to perform the last part of the test (checking for nystagmus prior to 45 degrees), but was unable to complete that part because Ms. Ridl was not directly following the stimulus and was unable to follow directions. (*Id.* at 21-22.) Lieutenant Moonen further stated that the HGN test usually takes about five minutes to administer, but for Ms. Ridl, it took about 15 minutes because of the amount of times he had to restart the test or urge Ms. Ridl to follow directions. (*Id.* at 22.) Based on the results of the HGN test, Lieutenant Moonen explained that if Ms. Ridl's eyes were not tracking properly, it would cause an inability to focus on the road, oncoming traffic, or maintaining their position in the lane. (*Id.* at 22-23.)

After stopping the HGN test, Lieutenant Moonen asked Ms. Ridl to perform the walk and turn test. (*Id.* at 24.) After setting Ms. Ridl up in the instructional stance for the walk and turn test, and during explanation of the rest of the test, Ms. Ridl was unable to maintain that stance and was told to just stand normal for the sake of moving forward. (*Id.*) When Ms. Ridl was asked to perform the test, she stated that she just wanted to

go home and started walking towards her house. (*Id.* at 24-25.) Ms. Ridl had to be physically stopped because she would not obey Lieutenant Moonen's directions. (*Id.* at 25.) After Ms. Ridl would not follow directions or perform the walk and turn test, she was placed under arrest for OWI. (*Id.*) Lieutenant Moonen stated that he believed she was impaired, because of Ms. Ridl's inability to safely operate her vehicle on the roadway to the point that she ended up in a ditch, her reluctance to perform the field sobriety tests, and the signs of impairment he observed during his interaction with her. (*Id.* at 25-26.)

In the back of Lieutenant Moonen's squad prior to leaving the scene of the accident, he read her the Informing the Accused form and asked if she would submit to an evidentiary chemical test of her breath, which she refused. (*Id.* at 26-28; R. 11, County's Exhibit #1—Informing the Accused Form.) After Lieutenant Moonen's testimony, the County rested. (R. 20: 59.)

Ms. Ridl also testified, and indicated that she had been ill with nausea, vomiting, and a bad migraine for three to four days prior to the date of this offense. (*Id.* at 64.) Prior to this offense, Ms. Ridl was with her father at the hospital from around 7:00 a.m. to 2:00 p.m., and again from around 5:30 p.m. to 8:00 p.m. (*Id.* at 64-65.) Ms. Ridl then left the hospital and went to get

something to eat at the Rox Bar with her friend Trudy. (*Id.* at 66.) Ms. Ridl stated that she had not eaten much the last three to four days due to her illness. (*Id.*) Ms. Ridl and her friend Trudy arrived at the Rox around 9:15 p.m., and left around 10:25 p.m. (*Id.* at 67.) While there, Ms. Ridl ate a bowl of chicken dumpling soup and some eggplant appetizer, and also drank two Ketel One Vodka and seltzer tall drinks. (*Id.*)

While driving home, Ms. Ridl admitted that she slid off the road near her subdivision and into a ditch around 10:30 p.m. and could not get her vehicle out of the ditch. (*Id.* at 71-72.) Ms. Ridl then called her friend Trudy for help multiple times between 10:30 p.m. and 11:07 p.m., and once she did get a hold of Trudy, after being in the ditch for 37 minutes, Trudy called a tow truck to respond to Ms. Ridl's location. (*Id.* at 72-73.) Ms. Ridl stated she was only about a block away from home, but did not want to leave the vehicle in the ditch because her father loved that the vehicle. (*Id.* at 73-74.) Ms. Ridl was still waiting for the tow truck when Lieutenant Moonen arrived on scene around 12:41 a.m. (*Id.* at 77.)

Ms. Ridl testified that prior to field sobriety testing, she told Lieutenant that she had nystagmus naturally in her eyes when she had migraines, and had numbness in her foot. (*Id.* at

78-79, 91.) But, Lieutenant Moonen testified that he did not observe any resting nystagmus, and that when he asked Ms. Ridl about any physical impairments, she indicated that she was a VA physician and that Aurora killed her father. (*Id.* at 17-20.)

Ms. Ridl next stated that after a short period of time, she was placed in the back of a squad car. (*Id.* at 79.) Ms. Ridl stated that she "cursorily" remembered being read the Informing the Accused form and refusing to take the breath test, because, based on her experience as an ER doctor, the breathalyzer was not valid as it had been three hours since she was drinking. (*Id.* at 80.) Ms. Ridl then offered her opinion that based on her experience as a doctor and a phone app, her Blood Alcohol Concentration (BAC) would have been between 0.022 to 0.033 (*id.* at 80-83), but such information was objected to by the County, was initially excluded by Judge Aprahamian, and was testified to as an offer of proof (*id.* at 81-82.) At the end of the court trial, Judge Aprahamian ruled he considered Ms. Ridl's estimation of her BAC but did not believe it was material. (*Id.* at 128.)

Ms. Ridl was also asked by the County and the Court whether she should be drinking alcohol with the medications she was on for her bad migraine. (*Id.* at 93-94.) Ms. Ridl stated she

was using Toradol, Benadryl, Compazine, Zofran, and Dexamethasone the four days prior for her migraine. (*Id.* at 94.) The Court then asked if she should be mixing any of those medications with alcohol, and Ms. Ridl responded:

> 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.

(*Id.* at 95.)

The defense also presented testimony from Ms. Ridl's friend she was with the night of the offense, Ms. Trudy Stolpa, who testified similarly to Ms. Ridl about when and what occurred leading about to Ms. Ridl ending up in the ditch. (*See id.* at 96-115.) Ms. Stolpa stated that when she left the Rox Bar with Ms. Ridl, she believed Ms. Ridl was not impaired by the two alcoholic drinks she consumed. (*Id.* at 105.) Ms. Stolpa stated that she spoke with Ms. Ridl on the phone around 11:35 p.m., and Ms. Ridl stated she was in a snow bank and could not get out. (*Id.* at 107.) Ms. Stolpa could not come all the way to where Ms. Ridl was to assist her, so Ms. Stolpa called her insurance company and asked for a tow truck go to Ms. Ridl's location. (*Id.* at 108.) The tow truck was unable to find Ms. Ridl, so after some time, Ms. Stolpa was worried for Ms. Ridl

and called the Waukesha non-emergency number. (*Id.* at 110.) Ms. Stolpa stated that she was close friends with Ms. Ridl and did not want to see her in trouble. (*Id.* at 112-13.) She further stated that even though she was worried Ms. Ridl could be hurt, she still did not call 911 because it was not a life or death situation. (*Id.* at 112.) After Ms. Stolpa's testimony, the defense rested. (*Id.* at 118.)

Judge Aprahamian found Ms. Ridl guilty of the OWI and Driving Too Fast For Conditions citations, and that the refusal in the case was improper. (*Id.* at 125-127; County's Appendix, App-4 – App-6.) Judge Aprahamian found Lieutenant Moonen to be credible, and Ms. Ridl was generally credible but there were certain aspects where he found Lieutenant Moonen to be more credible. (R. 20: 123, 125; County's Appendix, App-2, App-4.)

Judge Aprahamian held that he believed the evidence proved by clear and convincing evidence that Ms. Ridl was intoxicated and found her guilty of OWI. (R. 20: 126; County's Appendix, App-5.) The Court mentioned several factors in making its finding, including that: (1) Ms. Ridl's vehicle had an odor of intoxicants; (2) Ms. Ridl had thick and slurred speech; (3) Ms. Ridl was speaking incoherently and behaving erratically;

(4) Ms. Ridl admitted to drinking two tall Ketel One and seltzers; (5) Lieutenant Moonen observed clues on the HGN test; (6) when Lieutenant Moonen tried to administer the remaining field sobriety tests, Ms. Ridl behaved erratically, walked away, and would not perform the remainder of the tests; and (7) Ms. Ridl had been sick and vomiting the last four days, was going through a stressful situation with her father, and that caused her to be impacted by the alcohol in a way she was not necessarily suspecting. (R. 20: 122-26, County's Appendix, App-1 – App-5.)

Ms. Ridl now appeals the conviction for the OWI offense, and argues that Judge Aprahamian's finding regarding the effect of the alcohol along with Ms. Ridl's illness and medications she was taking could only be done by an expert, for which there was no basis in the record. (*See* Brief of Appellant-Defendant, 7.)

ARGUMENT

I. THERE WAS SUFFICIENT EVIDENCE PRESENTED AT THE COURT TRIAL TO FIND MS. RIDL GUILTY.

a. Standard of Review

"The test for determining sufficiency of the evidence is whether a reasonable trier of fact could be convinced of the defendant's guilt to the required degree of certitude by the evidence which it had a right to believe and accept as true." *City of Milwaukee v. Wilson*, 96 Wis. 2d 11, 21, 291 N.W.2d 452 (1980). A "reviewing court is limited to determining whether the evidence presented could have convinced a trier of fact, acting reasonably, that the appropriate burden of proof had been met." *Id.*

b. Relevant Law

The Wisconsin Court of Appeals iterated the standard for reviewing whether there was sufficient evidence of guilt in *State v. Hayes*, 2003 WI App 99, ¶ 13, 264 Wis. 2d 377, 390, 663 N.W.2d 351:

> When [a] [. . .] court reviews a challenge to the sufficiency of the evidence, the court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the State and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt [. . .]. If any possibility exists that the trier of fact could have

> drawn the appropriate inferences from the evidence at trial to find guilt, the court must uphold the conviction. If more than one inference can be drawn from the evidence, the reviewing court must accept the inference drawn by the [fact finder].

(Internal citations omitted) (citing *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)).

Additionally, a trial court may require expert testimony if "unusually complex or esoteric issues are before the [trier of fact]." *Weiss v. United Fire and Casualty Co.*, 197 Wis. 2d 365, 379, 541 N.W.2d 753 (1995) (internal quotations omitted) (quoting *White v. Leeder*, 149 Wis. 2d 948, 960, 440 N.W.2d 557 (1989)). "But the court has simultaneously emphasized that requiring expert testimony rather than simply permitting it represents an extraordinary step." *Id.*

When deciding whether expert testimony is needed, the Court in *Cramer v. Theda Clark Memorial Hospital*, 45 Wis. 2d 147, 153, 172 N.W.2d 427 (1969) explained:

> In everything pertaining to the ordinary and common knowledge of mankind [the triers of fact] are supposed to be competent, and peculiarly qualified to determine the connection between the cause and effect established by common experience, and to draw the proper conclusions from the facts before them; and if the matter can be decided from ordinary experience and knowledge, the [fact finders] are allowed to decide it unaided.

(internal quotations omitted) (quoting *Jones v. Hawkes Hospital of Mt. Carmel*, 175 Ohio St. 503, 196 N.E.2d 592, 595 (Ohio Supreme Ct. 1964)).

c. <u>It was not error for Judge Aprahamian to find Ms. Ridl guilty of OWI-1st as there were sufficient facts and inferences to make that conclusion; and Judge Aprahamian's finding about Ms. Ridl's intoxication was within the realm of common knowledge, and thus, no expert opinion was needed.</u>

When looking at the evidence presented and the inferences from that evidence, in the light most favorable to the County, there was sufficient evidence for Judge Aprahamian to find Ms. Ridl guilty of OWI by clear and convincing evidence. Further, Judge Aprahamian's finding that Ms. Ridl was intoxicated, and that the alcohol ingested by Ms. Ridl on the date of the offense caused intoxication, which may not have caused the same intoxication on a typical day, was not an expert opinion and instead was within the realm of common knowledge.

In an OWI-1st offense civil forfeiture case, the prosecutor must present evidence to the trier of fact that proves by "clear, satisfactory, and convincing evidence" that (1) the defendant operated a motor vehicle on a highway, and (2) did so while under the influence of an intoxicant. Wisconsin Jury Instruction—Criminal 2663A: Operating a Motor Vehicle While

Under the Influence of An Intoxicant—Civil Forfeiture—§ 346.63(1)(a).

Ms. Ridl does not contest that she was operating the vehicle, and focuses on whether she was impaired by intoxication. As previously noted, Judge Aprahamian found that Ms. Ridl had several clues of impairment by intoxication, including the odor of intoxicants, thick and slurred speech, erratic behavior, admission of drinking two tall vodka and seltzer drinks, clues on the HGN test, refusal of the remainder of field sobriety tests, and being sick for several days prior to drinking. (*See* Respondent-Plaintiff Brief, 13-14.)

As noted in *Hayes*, as long as Judge Aprahamian could reasonably find based on the facts and inferences that Ms. Ridl was guilty, then this Court should affirm the ruling. Even if this Court believed that the evidence presented leads to more than one inference, this Court must accept the inference drawn by Judge Aprahamian unless the finding of such facts and inferences were so lacking in probative value. Such is not the case here. Based on the information presented at the court trial, there was more than sufficient facts for Judge Aprahamian to find Ms. Ridl guilty of OWI by clear and convincing evidence.

Additionally, Judge Aprahamian did not make an expert finding in regards to Ms. Ridl's intoxication because his findings "pertained to the ordinary and common knowledge of mankind." *Cramer*, 45 Wis. 2d at 153.

When Judge Aprahamian was explaining his reasoning for finding that Ms. Ridl was intoxicated, he stated:

> I'm also influenced by the fact that she did have two tall Ketel One and seltzers. She testified that 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 stress in her life, that level of physical stress from the migraines she was having, taking the medications that she was taking, being under the 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: 126; County's Appendix, App-5.)

Judge Aprahamian's comments were made as an observation based on common experience. Ordinary and common people know that being sick prior to drinking alcohol can cause it to affect you differently than normal. Specifically, vomiting, being sick, and not really eating for four days prior to drinking two tall Ketel One and seltzers could impact an individual differently than if she was healthy and eating normal. It is common knowledge that most people do not drink alcohol

while ill, and it is not recommended by medical professionals to do so. Additionally, Ms. Ridl testified that she was taking various medications the days prior, all of which she assumed indicated that you should not mix with alcohol.

It is also imperative to look at Judge Aprahamian's comments as a whole and not in isolation from the remainder of his ruling in this case. Judge Aprahamian discussed Ms. Ridl being affected by the alcohol possibly in a way she did not expect after he emphasized the other signs of intoxication, as have already been noted in this brief.

As the Court noted in *Cramer*, "if the matter can be decided from ordinary experience and knowledge, the [fact finders] are allowed to decide it unaided." *Cramer*, 45 Wis. 2d at 153. That is what was done by Judge Aprahamian in this case.

Because Judge Aprahamian's finding of guilt for OWI was reasonable, and because Judge Aprahamian's comments regarding Ms. Ridl's intoxication were not expert opinions, the County request that this Court affirm Ms. Ridl's conviction for OWI-1st offense.

CONCLUSION

For all the foregoing reasons, the County respectfully requests this Court affirm Judge Aprahamian's finding of guilt and Ms. Ridl's conviction for OWI.

Dated this 8th day of August, 2016.

Respectfully,

_/s/ Melissa J. Zilavy_____
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CERTIFICATION OF BRIEF

I hereby certify that this document conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), for a brief and appendix produced with proportional serif font. The length of this brief is 4,862 words.

Dated this 8th day of August, 2016.

__/s/ Melissa J. Zilavy_____
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § 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 certification has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 8th day of August, 2016.

___/s/ Melissa J. Zilavy_____
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CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. § 809.80(4) that, on the 8th day of August, 2016, I mailed 10 copies of the Brief of the Plaintiff-Respondent, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.

Dated this 8th day of August, 2016.

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