STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2018AP000216CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

KRISTY L. MALNORY, Defendant-Appellant

APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE, AND ORDER DENYING POSTCONVICTION RELIEF, IN THE WOOD COUNTY CIRCUIT COURT, THE HONORABLE GREGORY J. POTTER PRESIDING.

DEFENDANT-APPELLANT'S REPLY BRIEF

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Argument

The "phlebotomist's"[1] absence went to the admissibility of the evidence.

On pages 13-14 of the State's brief, the State argues that the "phlebotomist's" absence went to credibility rather than admissibility. See State's brief at p.13. Not true. As discussed in Malnory's brief-in-chief at pages 22-23, the State could not properly introduce the results of the analysis of Malnory's blood without first establishing that her blood was drawn in in accordance with Sec. 343.305. Specifically, the State had to establish that Pulham was "physician, registered nurse, medical technologist, physician assistant, phlebotomist, or other medical professional who is authorized to draw blood, or person acting under the direction of a physician." Wis. Stat. Sec. 343.305(5)(b). If Pulham was not a "physician, registered nurse, medical technologist, physician assistant, phlebotomist, or other medical professional who is authorized to draw blood, or person acting under the direction of a physician," then Malnory's blood was not properly admissible under Sec. 343.305(5)(b).

[1] Malnory puts this term in quotes because there is no evidence in the record that the person who drew her blood was a "phlebotomist."

On page 14 of its brief, the State argues that "whether a person drawing the defendant's blood is a qualified person under the statute," is not a material issue for the jury to decide and that it is not an element of the offenses of operating while intoxicated or operating with a prohibited alcohol concentration. That is true. However, whether Malnory had a prohibited blood alcohol concentration at the time she operated the vehicle was a material issue and a specific element of the PAC offense. Pulham's statements on Exhibit 4 helped establish that issue and element for the State. They did so by establishing the evidentiary predicate for the admission of the analyst's report and testimony. Pulham's statements on Exhibit 4, likewise helped the State to establish the OWI offense. In this regard, even though Malnory's blood alcohol concentration was not an element of the OWI offense, the introduction of Weber's report and testimony tended to make more probable that Malnory was under the influence of an intoxicant at the time of operation by demonstrating an excessive blood alcohol concentration. After all, the circuit court

specifically instructed the jury that with respect to the OWI charge, "[w]hat must be established is that the person has consumed a significant amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle." 35:194. Weber's report and testimony, to the extent that they quantified the amount of alcohol in Malnory's blood, were probative of whether Malnory had consumed "a significant amount" of alcohol. Finally, the State cites no case that holds or suggests that a defendant's right to confrontation only extends to testimonial evidence that bears upon an element of the offense or a material issue. The general rule from *Crawford* is that "[t]estimonial statements of witnesses absent from trial [can be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine. See *Crawford*, 541 U.S. at 59. As discussed in Malnory's brief-in-chief at pages 12-20, Pulham's statements were testimonial. They were also admitted into evidence. 35:118,173. Given that there was no

showing that Pulham was unavailable and that Malnory had no opportunity to cross-examine Pulham, the admission of her statements violated Malnory's right to confrontation.

Trial court's finding of an "implied objection" is clearly erroneous; trial counsel admittedly did not object as to confrontation.

On pages 14-16 of its brief, the State argues that the trial court's finding that trial counsel made an "implied objection" as to confrontation, is not clearly erroneous. The State similarly argues that a confrontation argument was "implied by counsel's statements." State's brief at p.16. This court should reject these arguments. First, trial counsel testified that she did not consider the "Blood/Urine Analysis" form to be testimonial. 38:9. It would seem to follow that if trial counsel did not consider the form to be testimonial, she would not have made a confrontation objection. And she did not. Trial counsel admitted that she did not make such objection. 38:9. Trial counsel's express testimony that she did not consider the form to be testimonial and that she did not object as to confrontation conflicts with a finding that she made an "implied objection" as to confrontation.

Additionally, Malnory would note that an "implied" objection, even if trial counsel made one, which she did not, is insufficient. The Supreme Court has stated that "[t]he necessity of lodging an adequate objection to preserve an issue for appeal cannot be overstated. *State v. Agnello*, 226 Wis.2d 164, 173, 593 N.W.2d 427 (1999). In order to maintain an objection on appeal, the objector must articulate the specific grounds for the objection unless its basis is obvious from its context. *Id.* This rule exists in large part so that both parties and courts have notice of the disputed issues as well as a fair opportunity to prepare and address them in a way that most efficiently uses judicial resources. *Id.* Trial counsel did not make a sufficiently specific objection as to confrontation grounds. The trial court's finding that trial counsel made an "implied objection" as to confrontation is clearly erroneous.

Mattox and Griep are distinguishable from this case.

The State's reliance upon *State v. Mattox*, 2017 WI 9, 373 Wis.2d 122, 890 N.W.2d 256 and *State v. Griep*, 2015 WI 40, 361 Wis.2d 657, 863 N.W.2d 567 is misplaced. In *Mattox*, the court

held that a 'toxicology report was not "testimonial" because its primary purpose was to identify the concentration of the tested substances in biological samples sent by the medical examiner as a part of her autopsy to determine the cause of death — not to create a substitute for out-of-court testimony or to gather evidence against Mattox for prosecution.' *State v. Mattox*, 2015 WI 9 at ¶37. In contrast, as discussed at pages 15-16 of Malnory's brief, the "Blood/Urine Analysis" form and Pulham's statements within it, served only to gather, collect, and create evidence to be used in a criminal prosecution. The State's brief at page 17 seems to acknowledge this in so far as it notes the primary purpose of the form was to document the "date and time of collection" of Malnory's blood sample. *Griep* is also distinguishable. *Griep* involved surrogate testimony by an analyst who had not performed the analysis of Griep's blood or written the report. *State v. Griep*, 2015 WI 40 at ¶10-11. Significantly, *Griep* did not involve the admission of the report itself or any other documents generated by the non-testifying

declarant. See id. at ¶25, n.10 and ¶25, n.12. The court therefore concluded that Griep did not present the "*Melendez-Diaz* problem," where the non-testifying declarant's statements, "certificates of analysis" in *Melendez-Diaz*, were admitted into evidence. See id. at ¶25, n.12. In this case, there is such a problem as the "Blood/Urine Analysis" form, Exhibit 4, was admitted into evidence. 35:118,173. This fact places the case, as discussed at pages 17-19 of Malnory's brief-in-chief, squarely within the holdings of *Melendez-Diaz* and *Bullcoming*.

Malnory would note here that the State's citation to the unpublished opinion of *State v. Barden*, cited as "2008 WI App.36, 308 Wis.2d 396," is improper under Wis. Stat. Sec. 809.23(3)(b) as the opinion was rendered prior to July 1, 2009. Nonetheless, it is also easily distinguishable in that it did not involve confrontation issues.

State's arguments regarding prejudice.

The State argues that there was no prejudice because if Exhibit 4 had not been admitted, the State would have dismissed the prohibited alcohol concentration charge and "the jury would still have found the defendant guilty of the OWI 2nd." See State's brief at page 25. Similarly, the State argues that "even if trial counsel had moved to strike the testimony of the analyst, the jury would still have found the defendant guilty of OWI 2nd." See State's brief at page 25. The State's arguments fail. If the State had dismissed the PAC charge and the analyst's testimony had been stricken, Malnory would have been well-positioned to seek a mistrial. After all, the analyst's testimony and report would have significantly tainted the jury as to its deliberation of the OWI charge.

Next, the State's case depended substantially if not exclusively on the BAC result.[2] At the postconviction hearing,

[2] The State argues on page 22 of its brief that "what the lab analyst testified to was irrelevant to the theory of defense," and that certain aspects of the analyst's testimony "advanced the theory of the defense, and to have it stricken would have been damaging to the defendant's case." Malnory has already discussed on page 28 of her brief-in-chief how the analyst's testimony and report in fact "significantly hampered" her defense.

trial counsel testified that she believed Weber's report was the pivotal piece of evidence by the State. 38:10. Not surprisingly, both the State and defense both repeatedly referred to Malnory's BAC result during closing argument. The State did so no less than five times, 35:205, 206, 207, 209 and 213, and the defense did so at least three times, 35:210, 211 and 212. During closing argument, trial counsel emphasized that other than the BAC result, the State had little if any other evidence against Malnory:

> We don't have the traditional OWI stuff. We don't have swerving. We don't have speeding. We don't have hitting curbs. We don't have running red lights. We have no idea what her driving was like. We saw her parked, we saw the car parked. We don't have her driving…We haven't even heard of anything of how she was driving at the time she was. 35:212.

Indeed, the State presented no evidence regarding Malnory's operation of the vehicle. That Malnory failed field sobriety tests was of little significance. Such fact was entirely consistent with the defense that Malnory only became intoxicated after parking the vehicle and chugging the vodka. 35:210.

Finally, the State asserts in its brief at page 24, that "[t]he court found, through the evidence, that the defendant appellant admitted to consuming large amounts of vodka before getting

behind the wheel, and while driving." This does not accurately characterize the record. The court, in referencing Deputy Marten's testimony, stated as follows:

> He spoke with the defendant who admitted that they started drinking between six thirty and seven. That they finished at approximately nine. That they were consuming small cupfuls of Vodka. Later, she stated that she had two drinks of Gordon's Vodka mixed with club soda. Ap.110.[3]

The court did not find that Malnory "admitted to consuming large amounts of vodka before getting behind the wheel, and while driving." Further, Malnory's statement that they stopped drinking at nine supports the defense that she did not become intoxicated until after she parked the vehicle, "chugged the vodka" and went to look for her phone. 35:210.

Contrary to the State's argument, without the analyst's testimony and report, the State would have had an extremely weak OWI case against Malnory.

[3] The circuit court's use of the term "cupfuls" does not accurately reflect Marten's trial testimony and is clearly erroneous. At trial, Marten testified that Malnory stated that she had "capfuls" of vodka. 35:77.

CONCLUSION

For the above reasons and those discussed in Malnory's brief-in-chief, this court should vacate the judgment of conviction and sentence and remand the case for a new trial.

Dated this _____day of August 2018.

Respectfully submitted,
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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Wis. Stat. Rule 809.19(8)(b) and (c) in that is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 1886 words.

Dated this ___day of August 2018

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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 upon all opposing parties.

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