STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2018AP1496-CR

JOHN E. PAUL,

Defendant-Appellant.

ON APPEAL OF JUDGMENT OF CONVICTION,
ENTERED IN THE DANE COUNTY CIRCUIT COURT,
THE HONORABLE STEPHEN E. EHLKE, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUE

1. **DID THE CIRCUIT COURT ERRONEOUSLY EXERCISE ITS DISCRETION BY DENYING THE DEFENDANT'S MOTION FOR A MISTRAIL AFTER THE STATE EMPHASIZED MR. PAUL'S .02 PAC LEVEL TO THE JURY**

The trial court found that a mistrial was not warranted.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The appellant does not request oral argument, but is fully willing to provide oral argument if the court deems it helpful in addressing the merits of the appellant's claims.

The appellant does not believe publication is warranted. The factual questions raised by this case can be resolved by applying settled law.

STATEMENT OF THE CASE

In the early morning of September 21, 2014, Fitchburg Police Officer Jason Marthe was riding along with probationary officer Gustavo Gonzalez on routine patrol when the officers decided to drive through the parking lot of Monkeyshines Bar to see if anything might be amiss (R. 1; R. 59 26:12-27:1.) That location had previously "had a few issues," so officers from Fitchburg PD would drive through periodically to check for trouble. (R. 59 27:4-8.) On this occasion, the officers noticed a black Honda Accord that appeared to be straddling a concrete parking block with its front wheels up in the air, and they decided to investigate. (R. 59 27:13-21.) What happened after that was disputed at trial, but the officers ultimately concluded that Mr. Paul had driven the Accord to the bar and he was charged with operating a motor vehicle while intoxicated and operating a motor vehicle with a prohibited blood alcohol concentration (BAC), both as a fourth offense. (1:1-6.) The case proceeded to trial.

During *voir dire*, the state inquired of potential jurors the following:

> Now, the other thing is the prohibited alcohol concentration in this particular case is .02. Now, many of you may have heard of the .08, but in this instance, the prohibited alcohol concentration is .02. Now, is there any person here who thinks it's unfair that somebody could be prosecuted or convicted of the offense of operating a motor vehicle with a prohibited alcohol concentration of .02 ... ? So it's a .02 standard. Is there any person here who thinks that would be unfair?

(R. 58 37:7-18.) Mr. Paul's counsel moved for a mistrial (R. 58 37:7-20), and the court denied the motion after holding the following colloquy:

> THE COURT: Mr. Schilling, you said you had an objection to the emphasis of the .02 level and moved for a mistrial. Did you have any further argument in that regard?
>
> MR. SCHILLING: I believe the State provided irrelevant and inappropriate information to the jurors that usually the amount is .08, but this one is a .02. I believe that on that basis, this jury should be dismissed and we should start over.

> THE COURT: Mr. Jambois, any argument from the State?
>
> MR. JAMBOIS: No, your Honor. Well, yes. Your Honor, clearly, the prohibited alcohol concentration amount has to be addressed with this jury because it's only .02, which is one-fourth the normal rate, and the .08 standard has been engrained in everybody's mind, any adult's mind. They all know that the level is .08. So in this case it's a .02. And I just wanted to make sure that if any person on the jury had a problem with that, they'd let me know about it at this stage. So I don't believe there's anything that I did that was inappropriate. I know in some cases in the past I would ask the jury if anybody knew what the prohibited alcohol concentration is in the state of Wisconsin generally, and everybody would say .08. In this instance, I didn't poll the jury on the question of what they knew; I just worked on the assumption that they all know because nowadays they do.
>
> THE COURT: All right. I do think it's fairly well known that the standard was -- is .08. Mr. Jambois didn't belabor the point. You know, it could inure to the defense benefit to know that someone raises their hand and says they have a problem with it. You know, also I think the general juror probably doesn't know why it's a .02. There are a lot of reasons why it could be -- numerous offenses or a commercial driving license, I believe. I think there are other reasons. But your objection is preserved certainly, Mr. Schilling. But I don't think there's enough to cause a mistrial in this case, so the motion -- the specific motion for mistrial is denied.

(R. 58 56:6-57:24.) The parties proceeded to make their case to the jury.

The state's evidence that Mr. Paul did in fact drive his car that night focused on Officer Marthe's observations at the scene, his interactions with Mr. Paul, a video recording that captured some, but not all, of Mr. Paul's activities after arriving at the location (*see* R. 59 21:18-22:8), and testimony by bartender Jessica Northwood attesting to seeing Mr. Paul exit the driver's side of the car (R. 59 87:3-11.) According to Officer Marthe, after a number of initial denials, Mr. Paul admitted in a "roundabout" way to driving. (R. 59 73:24-74:7.) Ms. Northwood testified—for the first time at trial (R. 91:11-92:19.)—that she personally observed Mr. Paul exit the driver side of the Accord after entering the bar parking lot while she was outside on a cigarette break. (R. 59 85:21-87:23.) Finally, the state called another responding officer

from Fitchburg, Nicholas Clemons, who testified that Mr. Burkle told him that Mr. Paul admitted to driving when he approached Burkle in the bar. (R. 59 121:3-20.) When testifying at trial, Burkle denied making this statement to Officer Clemons. (R. 59 110:7-10.)

Mr. Paul's trial defense conceded that Mr. Paul was impaired and over the PAC limit, but argued that he did not drive his car to the bar that night. (***See, e.g.,*** R. 59 20:7-15, 24:12-13.) The defense focused on Officer Marthe's failure to record the conversation with Mr. Paul in which he reportedly admitted to driving after a period of initial denials, as well as inconsistencies in Officer Manthe's prior testimony and report regarding the number of witnesses, if any, who informed him that Mr. Paul drove his car that night. (***See, generally,*** R. 59 67:23-75:17.) The defense further noted that Ms. Northwood, the bartender, had spoken to police at the scene and never informed them that she had allegedly watched the car drive into the lot and saw Mr. Paul exit the driver's side, and the video recording contradicted her surprise testimony. (R. 59 91:11-92:19; 153:1-23.) The defense also highlighted Mr. Burkle's trial testimony that he did not tell Officer Clemens that Mr. Paul told Burkle he had driven that night. (R. 59 110:7-10.) The defense stipulated to Mr. Paul's prior OWI offenses (R. 59 61:22-62:4) as well as to the accuracy of his blood result (***see*** R. 59 80:19-81:2).

The jury resolved any questions of guilt in favor of the state, and returned guilty verdicts on both counts. (R. 38, 39.) Mr. Paul filed a timely Notice of Intent to Seek Postconviction Relief (R. 46), and, following this Court's rejection of a no merit report by prior appellate counsel, filed a timely Notice of Appeal on August 6, 2018 (R. 52.) This appeal now follows.

ARGUMENT

I. THE TRIAL COURT ERRONEOSLY DENIED THE DEFENSE MOTION FOR A MISTRIAL BECAUSE THE STATE'S EMPHASIS ON MR. PAUL'S .02 PAC CREATED A SUBSTANTIAL

RISK THE JURY WOULD PRESUME MR. PAUL IS A REPEAT OFFENDER

A. Standard of Review

The decision whether to grant a motion for a mistrial is a discretionary determination. ***See State v. Ross***, 2003 WI App 27, ¶47, 260 Wis. 2d 291, 659 N.W.2d 122. The trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial. ***Id.*** The denial of a motion for mistrial will be reversed only on a clear showing of an erroneous use of discretion by the trial court. ***Id.***

The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction. ***See State v. Alexander***, 214 Wis. 2d 628, 653-54, 571 N.W.2d 662 (1997) (emphasis added). If it did so contribute, the decision must be reversed and a new trial ordered. ***Id.*** The court must be able to conclude beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. ***State v. Harvey,*** 2002 WI 93, ¶48 n. 14, 254 Wis. 2d 442, 647 N.W.2d 189 ***(quoting Neder v. United States,*** 527 U.S. 1, 18, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). The state must establish that there is no reasonable possibility that the error contributed to the conviction. ***Alexander,*** 214 Wis. 2d 628, 653-54 (emphasis added).

B. The State's Emphasis on Mr. Paul's .02 PAC Created a Substantial Risk the Jury Would Presume Mr. Paul is a Repeat Offender

Wisconsin courts have long recognized that disclosing prior convictions to a jury creates an unacceptable risk that the jury might be improperly influenced to enter a guilty verdict based on prior conduct. ***See, e.g., State v. Coleman***, 2015 WI App 38, 362 Wis. 2d 447, 865 N.W.2d 190 (Ct. App. 2015) (disclosure of prior convictions by defense counsel constitutes deficient performance); ***Mulkovich v. State***, 73 Wis. 2d 464, 473, 243 N.W.2d 198 (1976) (unnecessarily informing a jury of a defendant's prior convictions can constitute prejudicial error, mandating either

a mistrial or reversal). This improper influence is particularly problematic in OWI cases. ***See Alexander***, 214 Wis. 2d 628.

The State's emphasis on the .02 PAC level served no purpose other than to prove elements of the charges that were not contested. Mr. Paul's sole defense at trial was that he was not the driver. (***See*** R. 59 20:7-15.) The defense contested neither the PAC element of Count 2 nor the impairment element of Count 1. Under these particular circumstances, where PAC and impairment were not contested, the State's focus on Mr. Paul's .02 PAC created an unfair risk that the jury would conclude that Mr. Paul was subject to a lower PAC standard because he was a repeat offender.

In opposing grant of a mistrial, the trial court and state both suggested that the average juror would know that a typical driver would be subject to a higher, .08 PAC level. (R. 58 56:17-57:24.) However, this observation primarily cuts in favor of the defense. Accepting as true the contention that the average jury would be aware of the usual .08 PAC standard, it follows that the jury would be left to speculate as to why Mr. Paul would be subject to a much lower standard. An obvious explanation for this discrepancy, and the reason for the discrepancy in the first instance, is that Mr. Paul had previously been convicted of several OWI offenses. The state's emphasis on the lower PAC standard encouraged such speculation and created an unacceptable risk that the jury would conclude that Mr. Paul was a repeat OWI offender, and as such, he probably drove drunk that night. In a case involving no direct observation of Mr. Paul driving, the fact that he was a repeat offender likely tipped the scale in favor of finding him guilty.

Granting a mistrial at jury selection would not have posed a significant hurdle to the efficient administration of justice. The trial court presumably could have dismissed the venire and drawn a new one that very same day. The trial would not have been substantially delayed, and Mr. Paul's right to a fair trial would have been preserved.

The Court's opinion in ***Alexander*** demonstrates the grave risk of allowing any evidence of prior convictions to taint a jury trial:

> Evidence of prior convictions may lead a jury to convict a defendant for crimes other than the charged crime, convict because a bad person deserves punishment rather than based on the evidence presented, or convict thinking that an erroneous conviction is not so serious because the defendant already has a criminal record. [...] A jury is likely to relay on the prior convictions as evidence of a defendant's bad character so as to 'deny him a fair opportunity to defend against a particular charge.

214 Wis. 2d at 644 (citations omitted). The Court further elaborated that:

> Weighing the probative value of the evidence of the defendant's prior convictions, suspensions or revocations against the unfair prejudicial effect to the defendant, where the sole purpose of the evidence is to prove the status element, we conclude that the probative value is virtually nil. Second, the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Because the prior convictions are of the same nature and character of the charged offense, the jury is likely to engage in propensity or bad character reasoning.

Id. at 651. Therefore, admitting any evidence of prior convictions merely to prove a status element is particularly problematic.

In that case, the Court found that the trial court's error was harmless due to the overwhelming nature of the evidence against the defendant. ***Id.*** at 652. In that case, the arresting officer had observed the driver operating his car inattentively or recklessly, weaving in and out of his lane, and nearly striking a curb. ***Id.*** at 653. When the officer approached, he noticed a strong smell of intoxicants coming from the driver, bloodshot eyes, and slurred speech. ***Id.*** The driver failed field sobriety testing, had a high alcohol concentration, and admitted to being under the influence while driving in an "alcohol influence report." ***Id.***

In this case, however, the officer never observed Mr. Paul driving. There was a video recording, but it had gaps and did not clearly show who exited the driver's side of the Accord (***see*** R. 59 154:18-155:4.) There was a surprise disclosure—for the first time at trial—by a lay witness that Mr. Paul was the driver, but that witness did not initially

report her alleged observations to police at the time of the incident, even though she was questioned about the incident, and the video recording seemed to undermine her assertion (***see*** R. 59 152:23-153:23.) Finally, there was an unrecorded "roundabout" admission to driving by Mr. Paul alleged by Officer Marthe (***see*** R. 59 156:15-16.), but a denial by Mr. Burkle under oath that he had heard Mr. Paul admit the same as reported by Officer Clemons (***see*** R. 59 108:11-16.). Put simply, there was a defense available to Mr. Paul that was not available to the defendant in ***Alexander***. Mr. Paul is entitled to have a jury consider his defense without having been tainted by the suggestion that Mr. Paul is a repeat OWI offender and therefore was likely to have driven drunk that night.

Mulkovich v. State, lends further support to Mr. Paul's position that jurors must not be alerted to a defendant's repeat offender status. 73 Wis. 2d 464. That case involved a burglary conviction, but the principles espoused apply with equal force to the present charges. In that case, the trial court disclosed to the jury that the defendant was a repeat offender. The Court found that disclosure created an impermissible risk of juror bias:

> That it was error to read this repeater charge to the jury is without question. A repeater charge is relevant only to the action of the trial judge in imposing sentence after the jury has made the finding of guilt in respect to the crime tried before it. It must be withheld from the jury's knowledge. Since at least 1909 this court has held that a defendant charged under a repeater statute has the right to have all evidence of any prior conviction kept from the jury trying the instant offense. Prejudicial error is committed when such information is given to the jury.

Id. at 201. Therefore, an offender's repeat offender status must not be disclosed in any way. Likewise, in this case, the state's emphasis on Mr. Paul's .02 PAC limit served as a proxy for his status as a repeat offender. The average juror, knowing full well that the usual PAC level is .08, would likely conclude that Mr. Paul was subject to a much lower level because he was previously convicted of operating under the influence. Of course, that is indeed the case, as Mr. Paul stipulated at trial. This disclosure impermissibly tipped the scales against Mr. Paul and in favor of guilt.

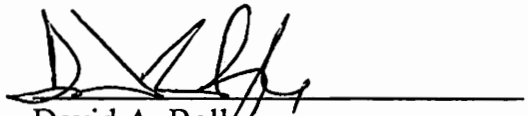
State v. Coleman further illustrates the real danger of unfair prejudice to a defendant posed by disclosure of prior convictions to a jury. In that case, the defendnat's own counsel disclosed to the jury that his client had "been convicted of a crime before," and had "spent time in prison." 2015 WI App 38, ¶4-5. There the court found the attorney's performance to be deficient, and the court concluded that was a substantial factor—combined with counsel's unfulfilled promise that the defendant would testify, and failure to explore a potentially fruitful avenue of cross-examination—warranting reversal. ***Id.*** at ¶40-46. Here, just as in **Coleman**, the jury was primed from the very beginning to view Mr. Paul's defense through a tainted perception that he is a repeat offender, and therefore likely to have committed the instant offenses. There is a substantial possibility that the jury convicted him based not on the evidence at trial, but instead on its perception of him as a repeater.

Mr. Paul is entitled to have his case tried before an impartial jury. Unfortunately, the state's emphasis on his .02 PAC level provided information to the jury that was irrelevant to the merits of the state's case, while creating an impermissible likelihood that the jury would infer that he is a repeat offender and therefore would resolve any questions of guilt against him. The scales of justice were tipped to benefit the state from the outset, and the only way to address this serious deficiency is to vacate the judgment of conviction and order a new trial before an untainted jury.

CONCLUSION

The trial court improperly refused to grant a mistrial after the jury was alerted to the fact that Mr. Paul was likely a repeat OWI offender due to his .02 PAC level because that disclosure created an unacceptable risk that the jury would find him guilty because he had been convicted of drunk driving in the past. Granting a mistrial would have had a very limited—if any—impact on judicial efficiency, while obviating the need for appellate litigation. Unfortunately, the trial proceeded with a tainted jury pool, and the jury verdict must be reversed and a new trial ordered to vindicate Mr. Paul's right to be tried before an impartial jury.

Respectfully submitted: 11/5/2018:



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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3,579 words. I further certify that this brief conforms to the rule contained in s. 809.86(4) relating to identification of alleged victims.

Signed 11/5/2018:

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CERTIFICATION OF COMPIANCE WITH RULE 809.19(2)(b)

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 s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) 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 one or more initials or other appropriate pseudonym or designation 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.

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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 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 with the paper copies of this brief filed with the court and served on all opposing parties.

Signed 9/5/2017:

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