STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2018AP1496-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JOHN E PAUL,

Defendant-Appellant.

# PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH #15, THE HONORABLE STEPHEN EHLKE, PRESIDING

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**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

**CASES CITED** **PAGE(S)**



**STATUTES CITED**

## STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The plaintiff-respondent, State of Wisconsin, does not request oral argument or publication.

## SUPPLEMENTAL STATEMENT OF THE CASE

The defendant-appellant, John E. Paul, was convicted of operating a motor vehicle while under the influence of an intoxicant (OWI) and with a prohibited alcohol concentration (PAC), both as fourth offenses. A jury found him guilty of OWI and PAC.

## SUPPLEMENTAL STATEMENT OF FACTS

It does not appear that any of the material facts of the case are in dispute. As respondent, the State will present any additional facts in the argument section of this brief.

## ARGUMENT

### I. The circuit court correctly denied Paul's motion for a mistrial following voir dire.

#### A. Applicable legal principles and standard of review

A motion for mistrial is directed to the discretion of the trial court and an appellate court will not reverse unless there has been abuse of discretion. *Oseman* v. *State,* 32 Wis. 2d 523, 528, 145 N.W.2d 766, 770 (1966). It is the trial court that must determine, in light of the entire proceeding, whether any claimed error is so seriously prejudicial to warrant a new trial. *State* v. *Grady,* 93 Wis. 2d 1, 13, 286 N.W.2d 607 (Ct. App. 1979). The trial court's decision shall only be reversed upon a clear showing of an erroneous use of discretion. *Johnson* v. *State,* 75 Wis. 2d 344, 365, 249 N.W.2d 593 (1977).

An error is harmless unless the error is so prejudicial that a different result might have been reached had the error not been made. *State* v. *Albright,* 98 Wis. 2d 663, 677, 298 N.W.2d 196, 20.4 (Ct. App. 1980)(citing *Jax* v. *Jax,* 73 Wis.2d 572, 582, 243 N.W.2d 831, 837 (1976)).

**B. The State's question in voir dire about a 0.02 standard did not create a substantial risk that the jury would presume Paul is a repeat offender.**

The State charged Paul with operating a motor vehicle with a prohibited alcohol concentration. In general, persons are prohibited from operating a motor vehicle in Wisconsin with a blood alcohol concentration in excess of 0.08. Wis. Stat. § 340.01(46m)(a). However, persons with 3 or more prior OWI-related convictions are prohibited from driving with a blood alcohol concentration in excess of 0.02. Wis. Stat. § 340.01(46m)(c). Because Paul had three prior OWI-related convictions, he was subject to the 0.02 standard.

In his motion for a new trial, Paul argued that the State focused on Paul's 0.02 standard in voir dire and this created an unfair risk that the jury would conclude that he was a repeat offender. Before the State began asking questions of jurors, the circuit court informed prospective jurors that "[c]ount 2 alleges . that Mr. John Paul did operate a motor vehicle with a prohibited alcohol concentration of more than .02." In his motion, Paul is not arguing that the circuit court's statement to prospective jurors was unfair. When in fact, it was the court that

first made prospective jurors aware of Paul being subject to this lower standard.

The prosecutor told jurors during voir dire that the prohibited alcohol concentration in Paul's particular case was 0.02. He then asked if any juror thought it was unfair for someone to be prosecuted or convicted of the offense w.ith the 0.02 standard. Defense counsel promptly objected and preserved a motion. This was the only time the prosecutor mentioned or asked anything related to the 0.02 standard during voir dire.

After excusing the jury, the court heard Paul's argument for a mistrial. Paul as erted that the State provided irrelevant and inappropriate information to the jurors that "usually the amount is .08, but this one is a .02." The court denied the motion for mistrial. In its reasoning, the court noted that the prosecutor did not belabor the 0.02 standard. Additionally, the court noted the prosecutor asking about the 0.02 standard could be to the defense's benefit because a prospective juror may raise their hand and say they do have a problem with the 0.02 standard. The court reasoned that the average juror probably does not know why the standard is 0.02 in this case and there are

numerous reasons why it could be a 0.02, such as a commercial driver's license.

Near the end of jury selection, the court addressed the defendant directly as to why he denied the motion for mistrial. The court explained that the charge itself contained the 0.02 standard. The court did not feel the State had done enough to cause the jury to know Paul had prior convictions.

Voir dire often involves questions about whether jurors could follow the law even if they do not agree with the law. A defendant is entitled to an impartial jury. U.S. Const. amend. VI. An impartial jury is composed of jurors who "conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case." *Lockhart v. Mccree,* 476 U.S. 162, 184 (1986). Those jurors who think the law is unjust may only serve on juries if they clearly state a willingness to temporarily set aside their own beliefs in deference to the law. *Id.* At 176. This is exactly what the State's question required of the jurors. The State wanted to ensure that jurors would apply the law to the facts of the case even if individual jurors did not agree with the law.

On appeal, Paul appears to also argue that this case is similar to *State v. Alexander,* 214 Wis. 2d 628, 571 N.W.2d 662 (1997). (Paul's Br. 5.) The prosecutor's question was not like the situation in *Alexander.* There, the circuit court admitted evidence of Alexander's prior convictions at trial. *Alexander,* 214 Wis. 2d at 638. The circuit court here did not admit evidence of Paul's three prior OWI convictions and no one told the jury about these convictions. The prosecutor merely asked prospective jurors if they would have a problem with the 0.02 standard.

As the circuit court recognized, the prosecutor did not inform the jury that Paul had prior OWI convictions. The court correctly informed the jury of the two charges at issue and that they were required to follow the law. Paul has not shown the circuit court was incorrect when it denied his motion for mistrial following voir dire.

### C. Even if the State's voir dire question constituted plain error, it was harmless

Even if Paul's claim were sufficient to meet his burden and to prove a plain error requiring a new trial, this court should find that the error was harmless. *State v. Jorgenson,* 2008 WI 60, 310 Wis. 2d 138, 754 N.W.2d 77. The

error is harmless because the State can prove beyond a reasonable doubt that a rational jury would have found Paul guilty absent the error. *See Jorgenson* at 138, 123.

The State presented sufficient evidence to convict. Paul was subject to a 0.02 blood alcohol limit. He advised the officer that he had driven the subject vehicle that was still running and parked on a curb at Monkeyshines Bar with the front wheels off the ground. At trial, the parties stipulated to Paul's blood alcohol level of 0.292.

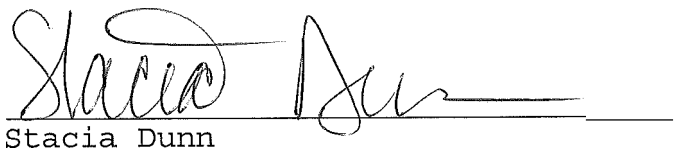
The jury heard the instruction twice, "[i]f you are satisfied beyond a reasonable doubt that all of the elements of this offense have been proved, you *should* find the defendant guilty" (emphasis added). By reading that instruction, the court told the jury that they were not required to convict Paul, even if the State had met its burden.

## CONCLUSION

For the reasons explained above, the State respectfully requests that this court affirm the judgment convicting the defendant-appellant John E. Paul of OWI, and the order denying his motion for a new trial.

Dated this 18th day of April, 2019.

Respectfully submitted,



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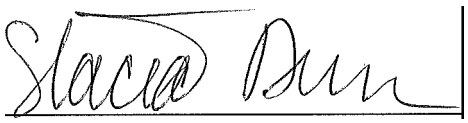
## CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

> Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 7 pages.

Dated: April 18th, 2019

Signed,



Attorney

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. St.at. § (Rule) 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.

Dated this 18th day of April, 2019.

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