STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2018AP002300-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT

V.

KARI E. MRAVIK,

DEFENDANT-APPELLANT.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR LA CROSSE COUNTY IN CASE NO. 2017CT111, THE HONORABLE ELLIOT M. LEVINE, PRESIDING

BRIEF AND APPENDIX OF THE PLAINTIFF-RESPONDENT

JOHN W. KELLIS
Assistant District Attorney
State Bar #1083400

Attorney for Plaintiff-Respondent

La Crosse County District Attorney's Office
333 Vine Street, Room 1100
La Crosse, Wisconsin 54601-3296
(608) 785-9604
(608) 789-4853 (Fax)
john.kellis@da.wi.gov

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2018AP002300-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT

V.

KARI E. MRAVIK,

DEFENDANT-APPELLANT.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR LA CROSSE COUNTY IN CASE NO. 2017CT111, THE HONORABLE ELLIOT M. LEVINE, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication is precluded by Wis. Stat. § 809.23(1)(b)(4) as this appeal shall be decided by one judge. Oral argument is not requested.

SUPPLEMENTAL STATEMENT OF THE CASE

In accordance with Wis. Stat. § (Rule) 809.19(3)(a)2, the State exercises its option not to present a supplemental statement of the case. Relevant facts will be set forth in the Argument section.

ARGUMENT

I. The circuit court properly denied Mravik's repeated requests to modify the standard jury instruction concerning unlawful intoxication while operating a motor vehicle.

A. Applicable legal principles and standard of review

"'A trial court has broad discretion in instructing a jury but must exercise that discretion in order to fully and fairly inform the jury of the applicable rules of law.'" *State v. Sanders*, 2011 WI App 125, ¶ 13, 337 Wis.2d 231, 806 N.W.2d 250 (quoting *State v. Ellington*, 2005 WI App 243, ¶ 7, 288 Wis. 2d 264, 272, 707 N.W.2d 907). "Whether a jury instruction is appropriate, under the given facts of a case, is a legal issue subject to independent review." *Id.*

Mravik correctly recognizes her claim warrants relief only to the extent that this court is persuaded the jury instructions presented at trial, when viewed as a whole, either misstated the law or misdirected the jury. Mravik's Br. at 12 (citing *State v. Ziebart*, 2003 WI App 258, 268 Wis.2d 468, 673 N.W.2d 269).

B. The circuit court's jury instructions neither misstated the law nor misdirected the jury.

Mravik maintains two Wisconsin Supreme Court decisions, *State v. Hubbard*, 2008 WI 92, 313 Wis.2d 1, 752, N.W.2d 839, and *State v. Waalen*, 130 Wis.2d 18, 386 N.W.2d 47 (1986), should guide this court to find the circuit court erred by not modifying standard jury instruction JI-CRIM 2663 to insert the term "materially" before the word "impaired" as it appears in the instruction. Mravik's Br. at 11-18.

The facts and the court's analysis in each of those two cases are readily distinguishable from those present in the instant case, and as a result, the State maintains that neither decision should lead this court to disrupt the circuit court's decision denying Mravik's request to modify the standard jury instruction used at trial.

In *Hubbard*, the defendant was tried and convicted of injury by the intoxicated use of a vehicle, a violation of Wis. Stat. § 940.25(1)(a). 2008 WI 92, ¶ 2, 313 Wis.2d 1, 752 N.W.2d 839. The definition of the phrase, "[u]nder the influence of an intoxicant," which included Mravik's requested terms, "materially impaired," expressly applied only to Chapters 939 to 948 and 951 of the Wisconsin statutes. Wis. Stat. § 939.22(42).

Because the violation of Wis. Stat. § 940.25(1)(a) fell squarely within Chapter 940 of the prescribed statute list, that particular statutory definition was applicable to the offense

tried before the jury. Conversely, Mravik was convicted of a violation of Wis. Stat. § 346.63(1)(a), and as a result, the definition set forth by Wis. Stat. § 939.22(42) expressly did not apply to that violation.

Mravik even concedes the circuit court was not mandated by *Hubbard* to modify standard jury instruction JI-CRIM 2663 to require the State prove not only that she was impaired when she operated a motor vehicle but that she was "materially impaired." Mravik's Br. at 14.

The circuit court, too, recognized this when it concluded that *Hubbard* did not support Mravik's request (32:5; R-Ap. 105). The circuit court also concluded adding the additional undefined term "materially" before the word "impaired" would only introduce confusion into the standard jury instruction (32:5; R-Ap. 105).

Supporting its own decision, the circuit court also referenced the Criminal Jury Instructions Committee's comment that qualifying the word "impaired" with the term "materially" could not be helpfully defined without running afoul of legislative intent (32:5; R-Ap. 107).

Mravik's reliance upon *Waalen* is also misplaced. In *Waalen*, the circuit court found no statutory basis existed for requiring "material impairment" of a person charged for violating Wis. Stat. § 346.63(1)(a) – the same offenses of which Mravik was convicted – instead substituting language based largely upon a 1981 version of the standard jury instruction that . 130 Wis.2d 18, 22.

Though the circuit court did not utilize the "materially impaired" language, the Wisconsin Supreme Court found the instruction used was not inconsistent with the Criminal Code definition of "under the influence." *Id.* at 28.

The Court recognized the circuit court's explanation defining "under the influence" as any "abnormal mental or physical conditions … which tends to deprive one of the clearness of intellect or self control which one would otherwise possess" accurately described the circumstances which a jury could infer an operator's ability to operate a vehicle was "materially impaired" or when a driver is "incapable of safely driving," despite neither phrase appearing in the instruction. *Id.*

At the conclusion of Mravik's trial, the circuit court instructed the jury:

> Under the influence of intoxicant means that the Defendant's ability to operate a vehicle was impaired because of the consumption of an alcoholic beverage.
>
> Not every person who has consumed alcoholic beverages is under the influence as that term is used here. What must be established is that the person has consumed a sufficient 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.
>
> It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. While it is required that a person's ability to safely control the vehicle be impaired.

(32:373).

This instruction was consistent with Wis. Stat. §346.63(1)(a) which prohibits an individual from operating a motor vehicle while under the influence of an intoxicant to a degree which renders him or her incapable of safely driving. Notably absent from Wis. Stat. § 346.63(1)(a) is a requirement that the person be determined to be "materially impaired" to constitute a violation of the statute.

This instruction read to the jury at trial provided a clear context in which to view the evidence. The instruction explained that evidence of mere alcohol consumption was not adequate to convict Mravik, instead requiring the State to demonstrate she had consumed a sufficient amount of alcohol rendering her less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

Mravik's policy arguments advanced on appeal that (1) she was "entitled" to a jury instruction consistent with Wis. Stat. § 939.22(42), even when that statutory subsection is expressly not applicable to violations of Wis. Stat. § 346.63(1)(a), or (2) that it makes little sense an individual accused of causing injury by the intoxicated would be entitled to a higher threshold for impaired driving than one who does not injure another, are supported by neither *Waalen* nor *Hubbard*.

Ultimately, the circuit court exercised its discretion when it reviewed the authority Mravik maintained supported her request but determined injecting additional terms as requested into the standard jury instruction would only serve to confuse the jury.

The instructions presented to the jury at trial, like those utilized in *Waalen*, provided a clearer description of what exactly constituted unlawful behavior, more so than Mravik's request to merely insert the term "materially" before every incidence of the word "impaired" in the standard jury instruction. Because the instructions presented to the jury neither misstated the law nor misdirected the jury, this court should conclude the circuit court properly declined Mravik's request to modify the jury instructions used at trial.

II. Even if this court were to ignore the mootness of Mravik's second claim, the jury verdict finding Mravik operated with a prohibited alcohol concentration was sufficiently supported by trial evidence.

A. Applicable legal principles and standard of review

An issue is moot when its resolution will have no practical effect on the underlying controversy. *State ex rel. Milwaukee Cty. Pers. Rev. Bd. v. Clarke*, 2006 WI App 186, ¶28, 296 Wis. 2d 210, 723 N.W.2d 141. This court will generally will not consider moot issues unless that issue raises constitutional questions, demonstrates a need to provide guidance to the circuit courts, or is "likely of repetition and yet evades review." *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶ 3, 233 Wis.2d 685, 608 N.W.2d 425.

In the event of appellate review, in order to overturn a conviction on the basis of insufficient

evidence, appellate courts must determine whether the evidence, "viewed most favorably to the State and to the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis.2d 493, 501, 451 N.W.2d 752 (1990).

B. As Mravik was neither convicted of nor sentenced for operating with a prohibited alcohol concentration, her claim concerning that count is moot.

Mravik advances her second claim on appeal maintaining that evidence presented at trial was insufficient to sustain her *conviction* of operating with a prohibited alcohol concentration. Mravik's Br. at 20 (emphasis added).

However, as Mravik concedes, in accordance with Wis. Stat. § 346.63(1)(c), once the jury returned verdicts of guilty to both Counts 1 and 2 of the Criminal Traffic Complaint, the circuit court entered a judgment of conviction as to only Count 1: Operating a Motor Vehicle While Intoxicated (32:428).

As Mravik was neither convicted of nor sentenced on Count 2 of the Criminal Traffic Complaint, her claim on appeal as it relates to this offense is moot. Because Mravik makes no attempt to explain how her claim falls within any of the generally accepted exceptions permitting appellate review of issues rendered moot, nor does

it appear that the claim could arguably fall within any of those exceptions, this court should decline to review this claim.

C. The State presented sufficient evidence to support the jury's verdict as it relates to operation with a prohibited alcohol concentration.

Even if this court were to permit review of Mravik's second claim, the State maintains the jury's verdict of guilt concerning Count 2 of the Criminal Traffic Complaint was supported by sufficient evidence offered at trial.

The circuit court instructed the jury to evaluate the weight to give to each expert's opinion by examining the qualifications and credibility of the witnesses, the facts upon which the opinion is based, and the reasons given for the opinion (32:382). JI-CRIM 200. Of particular importance to addressing Mravik's second claim, the circuit court accurately instructed the members of the jury that they were not bound by any expert's opinion at trial (32:382-83).

The State presented the testimony of Wisconsin State Laboratory of Hygiene analyst Stephanie Weber who confirmed that the blood sample drawn from Mravik following her arrest revealed an unlawful blood alcohol concentration of 0.09 (32:179).

The State also cross-examined Dr. Steven Oakes regarding a number of factors that cast doubt on the validity of his conclusion that

Mravik's blood alcohol concentration at the time of driving fell below 0.08. The State brought to the jury's attention potential bias in that Oakes received $3,000.00 from the defense every time he was consulted to prepare a report in connection with an impaired driving case (32:325-26; R-Ap. 110-11). The State also accentuated that despite the ability to do so, Oakes never completed any testing on Mravik to determine how quickly she absorbed ethanol (32:332; R-Ap. 117).

The State also questioned Oakes' confidence in his conclusions, referencing his ambiguous positions that it was only "pretty likely" that Mravik's blood alcohol concentration was below 0.08 at the time of vehicle operation while also rendering that same opinion to a "reasonable certainty" or "scientific certainty" (32:333; R-Ap. 118).

Ironically, Oakes' own testimony concerning standardized field sobriety testing actually discredited his own blood alcohol concentration calculations, bolstering the State's theory at trial that Mravik indeed operated a motor vehicle with a prohibited alcohol concentration.

Oakes explained that standardized field sobriety tests are validated to predict an individual's blood alcohol concentration rather than a level of impairment (32:308-09). Oakes described the accuracy of the tests at various alcohol concentrations (32:310) and even concluded that when all three standardized field sobriety tests are utilized together, they would be closer to 90 percent accurate in detecting an unlawful blood alcohol concentration (32:313).

Deputy McAuliffe testified at trial that he observed four of six possible clues of impairment detected during the Horizontal Gaze Nystagmus test (32:67), five of eight possible clues of impairment detected during the Walk-and-Turn test (32:75), and three of four possible clues of impairment detected during the One-Leg-Stand test (32:78).

Consequently, if the jury accepted as true both Oakes' testimony concerning the scientific validity of standardized field sobriety tests and the results of those tests when administered by Deputy McAuliffe, they would arrive at a conclusion consistent with the State's theory at trial: the physical manifestations of intoxication observed at the time of Deputy McAliffe's investigation were more reliable than Oakes' calculations using information susceptible to advantageous manipulation by Mravik, an individual who maintained to law enforcement that she had consumed merely one drink the entire evening.

Ultimately, members of the jury were able to supplement their own first-hand knowledge of alcohol consumption with expert testimony concerning the manner in which alcohol was absorbed into the human body, the rates in which this occurs, the possible factors that could influence this biological action, and the common manifestations of alcohol consumption by humans.

The jury was entitled to reject as unpersuasive any and all evidence which they believed defied logic and their own experiences with alcohol, including the testimony of a paid analyst who maintained numerous commonly-recognized signs of intoxication such as slurred speech, odors of

alcohol, glassy, bloodshot eyes, and unsteadiness on one's feet, were not reliable indicators of intoxication (32:335-41; R-Ap. 120-26).

That the jury concluded, to the contrary, that the laboratory testing of the blood sample taken following Mravik's arrest and the results of the standardized field sobriety tests together convinced them beyond a reasonable doubt that Mravik had a prohibited alcohol concentration at the time of driving was well within their purview.

As this logical conclusion was supported by the evidence offered by both parties at trial, this court cannot and should not find "as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *Poellinger*, 153 Wis.2d at 501.

CONCLUSION

For the reasons explained above, the State respectfully requests that this court affirm the judgment of conviction.

Dated this 25th day of March, 2019.

Respectfully submitted,

_____

John W. Kellis
Assistant District Attorney
State Bar #1083400

Attorney for Plaintiff-Respondent

La Crosse County District Attorney's Office
333 Vine Street, Room 1100
La Crosse, Wisconsin 54601-3296
(608) 785-9604
(608) 789-4853 (Fax)
john.kellis@da.wi.gov

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,395 words.

_____

John W. Kellis
Assistant District 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. Stat. § (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 at La Crosse, Wisconsin, this 25th day of March, 2019.

_____

John W. Kellis
Assistant District Attorney

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, 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 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.

Dated this 25th day of March, 2019.

_____

John W. Kellis
Assistant District Attorney

CERTIFICATION OF MAILING

I hereby certify in accordance with Wis. Stat. 809.80(4), on March 25, 2019, I deposited in the United States mail for delivery to the clerk by first-class mail, the original and ten copies of the plaintiff-respondent's brief and appendix.

Dated this 25th day of March, 2019.

_____

John W. Kellis
Assistant District Attorney