STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2018AP2300 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KARI E. MRAVIK,

Defendant-Appellant.

Appeal from a Judgment of Conviction
Entered in the Circuit Court for La Crosse County,
the Honorable Elliott M. Levine Presiding
Circuit Court Case No: 2017CT111

RELPLY BRIEF OF DEFENDANT-APPELLANT

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INTRODUCTION

Kari Mravik was found guilty by a jury of operating while intoxicated (2nd) and operating with prohibited alcohol concentration (2nd). The circuit court entered a judgment of conviction for operating while intoxicated (2nd). Mravik appeals the jury's verdict on both counts.

First, Mravik argues that the circuit court erred by refusing her request to amend the standard jury instruction for operating while intoxicated, JI-CRIM 2663, by including the word "materially" before "impaired" similar to the statutory definition of "under the influence of an intoxicant" found in Wis. Stat. § 939.22(42). Because this error was not harmless, Mravik requests that her conviction of operating while intoxicated (2nd) be vacated and that she receive a new trial on this count.

Second, Mravik argues that the jury had insufficient evidence to support its guilty verdict on the count of operating with prohibited alcohol concentration (2nd). Mravik raises this claim although the court did not enter a judgment on this count, because she believes the State could still seek a judgment of conviction on this count if she prevails in her appeal of her operating while intoxicated conviction.

ARGUMENT

I. THE TRIAL COURT SHOULD HAVE INSTRUCTED THE JURY USING A STANDARD FOR IMPAIRMENT EQUIVALENT TO THAT IN WIS. STAT. § 939.22(42)

A. The Trial Court Should Have Instructed the Jury that "Under the Influence" Means "Materially Impaired"

Mravik argues that, even though her charge of operating while intoxicated is a violation under the Traffic Code, because this is a criminal case the trial court erred by not instructing the jury in accordance with a definition of under the influence equivalent to that in Wis. Stat. § 939.22(42). The court should have amended JI-CRIM 2663 to define the element of "under the influence of an intoxicant" as "materially impaired" rather than "impaired."

The Supreme Court of Wisconsin has stated that the terms "under the influence" in sections 346.63(1)(a) and 939.22(42) of the Wisconsin code are equivalent terms. ***State v. Hubbard***, 2008 WI 92, ¶ 44, 313 Wis.2d 1, 752 N.W.2d 839; ***State v. Waalen***, 130 Wis.2d 18, 386 N.W.2d 47 (1986). If the terms are equivalent, the jury should be instructed as to a definition of "under the influence" that is equivalent to that set forth in Wis. Stat. § 939.22(42) – that it, one that includes the term "materially impaired."

The State misinterprets Mravik's argument when it argues her reliance on ***State v. Hubbard*** and ***State v. Waalen***, are misplaced. (State Br. at 3-5.) Mravik is not arguing that these cases mandate the use of the word "materially," but rather that the circuit court misinterpreted these cases when it found the cases and the Criminal Jury Instructions Committee comments prevented the court from changing the language. (*See* 34:4-7; App.104-107.)

The court's denial of Mravik's motion to amend the jury instruction was an erroneous abuse of discretion because it misinterpreted the case law. ***Hubbard*** simply addressed the narrow question of how to define "materially" in response to a juror question; it did not hold that "materially" should not be used to instruct the jury in the context of operating while intoxicated. ***Hubbard***, 2008 WI 92, ¶ 24. ***Waalen*** held that

the jury should not be instructed that material *and* substantial impairment is required to convict of operating while intoxicated. ***Waalen***, 130 Wis.2d at 27. Neither case precludes using the simple terminology "materially impaired" as the standard for intoxication, as requested by Mravik.

Additionally, the trial court's reliance on the Criminal Jury Instructions Committee comments to exclude the word "materially" was an erroneous exercise of discretion because that commentary is not precedent. ***State v. O'Neil,*** 141 Wis.2d 535, 541 n.1, 416 N.W.2d 77 (Ct.App. 1987). A court must exercise its discretion to fully and fairly inform the jury of the applicable rules of law. ***State v. Ziebart***, 2003 WI App 258, ¶ 16, 268 Wis. 2d 468, 673 N.W.2d 369. The court failed to do so in this case, to Mravik's detriment.

B. The State Failed to Show the Erroneous Instruction Was Harmless

It is the State's burden to establish, beyond a reasonable doubt, that an error it benefited from was harmless. ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222 (1985). Here, the State makes no argument that the error was harmless, therefore this court should find the issue conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.,*** 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

The trial court's failure to include the term "materially" in the instruction was not harmless, because it deprived Mravik of a jury deliberation based on the correct standard of law and there is a reasonable likelihood that it impacted the verdict by allowing the jury to convict with a lower standard of impairment. Therefore, this court should set the verdict aside. ***State v. Ziebart***, 2003 WI App 258, ¶ 26, 268 Wis. 2d 468, 673 N.W.2d 369. A conviction must be

reversed, unless the court is certain that the error did not influence the jury. ***Dyess***, 124 Wis.2d at 541-42.

II. THE EVIDENCE AT MRAVIK'S TRIAL WAS INSUFFICIENT TO SUSTAIN HER CONVICTION OF OPERATING WITH A PROHIBITED ALCOHOL CONCENTRATION

A. This Claim is Not Moot if Mravik Is Successful in Challenging Her Conviction of Operating While Intoxicated.

"An issue is moot when its resolution will have no practical effect on the underlying controversy." ***State ex rel. Olson v. Litscher***, 2000 WI App 61, ¶ 3, 233 Wis.2d 685, 608 N.W.2d 425. Mravik agrees that, if this court affirms her conviction of operating while intoxicated (2nd), her claim regarding the insufficiency of evidence supporting the jury verdict regarding operating with prohibited alcohol concentration (2nd) would have no practical effect on the underlying controversy because the court did not enter a judgment on that verdict.

However, if this court vacates her conviction of operating while intoxicated, Mravik is not aware of anything that would prevent the state from seeking a judgment on the jury's guilty verdict for operating with prohibited alcohol concentration (2nd) in lieu or retrying her on the first count. In that case, the issue of whether the jury's verdict was supported by the evidence is not moot.

B. The Evidence Did Not Establish Mravik's Alcohol Concentration Was .08 or Higher at the Time of Driving

The jury did not have sufficient evidence at trial to support its conviction of Mravik for operating with a

prohibited alcohol concentration. Expert testimony from both sides rebutted any probative value that the test result had as to Mravik's alcohol concentration at the time of driving. It was undisputed at trial that the blood test result of .09 did not show Mravik's blood alcohol concentration at the time of driving. Further, Mravik's expert testified that, to a reasonable degree of scientific and pharmacological certainty, Mravik's blood alcohol concentration was actually below .08 at the time of the traffic stop. (34:289, 294, 321-22.)

The State argues that Mravik's expert's testimony concerning standardized field sobriety tests provided evidence that Mravik operated her vehicle with a prohibited alcohol concentration. (State Br. at 10.) However, Dr. Oakes testified regarding the problems of relying on standard field sobriety tests to determine blood alcohol concentration in individuals with lower levels of concentration – like Mravik – describing studies that showed only a 30 to 60 percent accuracy in for blood alcohol concentrations ranging between .06 and .08. (34:310.) Oakes noted individuals who had consumed no alcohol still failed standard field sobriety tests at a rate of 26 percent; and this and other issues called into question the 90 percent accuracy rate when all three standard field sobriety tests are performed. (*Id.*) This evidence, particularly when compared with the undisputed testimony from both experts that Mravik's blood alcohol concentration during driving was not at the .09 level that the tests results showed, would not provide the jury a basis to find Mravik guilty.

Accordingly, the evidence of Mravik's blood alcohol concentration at the time of driving was not "so sufficiently strong and convincing to exclude every reasonable hypothesis consistent with the defendant's innocence." ***State v. Poellinger***, 153 Wis. 2d 493, 503, 451 N.W.2d 752 (1990).

The evidence was therefore insufficient as a matter of law to establish beyond a reasonable doubt that Mravik was guilty of operating with a prohibited blood alcohol concentration.

CONCLUSION

For the reasons stated above and in her initial brief, Mravik asks this Court to vacate the Judgment of Conviction and remand this case to the circuit court for a new trial on Count 1, operating while intoxicated. She further requests the Court to enter an order directing the trial court to enter a judgment of acquittal notwithstanding the verdict on Count 2, operating with prohibited alcohol concentration.

Dated this 15th day of April, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1375 words.

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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served by mail on all opposing parties.

Dated this 15th day of April, 2019.

Signed:

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