STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2019AP1176-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RYAN C. DIEHL,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR A NEW TRIAL, ENTERED IN THE CRAWFORD COUNTY CIRCUIT COURT, THE HONORABLE LYNN M. RIDER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

The defendant-appellant Ryan C. Diehl was convicted of operating a motor vehicle with a prohibited alcohol concentration (PAC) above 0.02 after a jury found him guilty of the charge.

Is Diehl entitled to a new trial on the ground that his trial counsel was ineffective for not objecting when the prosecutor presented evidence that Diehl's driver's license restricted him from driving with an alcohol concentration above 0.02, rather than the normal level of 0.08?

The circuit court answered no, concluding that evidence that Diehl was subject to the 0.02 restriction was relevant and admissible, and that evidence that the normal standard is 0.08 was not prejudicial to Diehl. Accordingly, Diehl's counsel did not perform deficiently by not objecting and Diehl suffered no prejudice.

This Court should answer "no" and affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication, as the arguments are fully developed in the parties' briefs, and the issue presented involves the application of well-established principles to the facts presented.

STATEMENT OF THE CASE AND FACTS

On January 9, 2018, at approximately 8:00 p.m., Crawford County Sheriff's Deputy Marcus Ploessl stopped a truck driven by Diehl because he observed that the truck's license plates were expired. (R. 69:17, 19–20.) The deputy did not observe bad driving, and when he made contact with Diehl he did not observe any signs of impairment. (R. 69:22, 24.) Deputy Ploessl ran Diehl's license through dispatch and

learned that Diehl was restricted from driving with an alcohol concentration above 0.02. (R. 69:25–26.) Because the deputy had observed a 30-pack of beer in Diehl's truck, he asked Diehl if he had been drinking that night. (R. 69:26.) Diehl admitted that he had consumed two or three beers. (R. 69:26.) Diehl agreed to take a preliminary breath test (PBT), and after the test, Deputy Ploessl arrested him for operating a motor vehicle with a prohibited alcohol concentration above 0.02. (R. 69:26–27.)

Deputy Ploessl took Diehl to a hospital in Prairie du Chien, read him the Informing the Accused form, and requested a blood sample. (R. 69:27.) Diehl agreed, and his blood was drawn at 9:53 p.m. (R. 69:27, 35.) A test of the blood revealed an alcohol concentration of 0.031. (R. 69:55.)

The State charged Diehl with operating a motor vehicle with a prohibited alcohol concentration (PAC) above 0.02. (R. 12.) The State alleged that Diehl had eight prior convictions for operating while intoxicated (OWI), so it charged him with a 7th, 8th, or 9th offense. (R. 12.)

At trial, the State presented the testimony of Deputy Ploessl and the forensic toxicologist who analyzed Diehl's blood sample. On questioning from the prosecutor, Deputy Ploessl testified that when he ran Diehl's license through dispatch, he learned that Diehl was subject to the 0.02 blood alcohol restriction rather than the normal 0.08 level. (R. 69:26.)

The defense presented testimony from Diehl, who testified that he was at a bar playing bingo from 6:00 p.m. until 8:00 p.m., and that he believed he drank two beers, the second one right before he left the bar. (R. 69:67–68, 71, 80–81.) Diehl said the beers were 12-ounce bottles of Budweiser. (R. 69:69, 81.)

On cross-examination, the prosecutor asked Diehl if he knew that he "had that .02 restriction" on his driver's license. (R. 69:77.) Diehl said that he did not believe he was subject to the .02 restriction "because I was not on probation anymore. I thought that was only for during probation." (R. 69:77.) The prosecutor asked Diehl whether he had been convicted of any crimes and Diehl answered, "Yeah. Twice." (R. 69:78.) The prosecutor asked again if Diehl believed he was under the .02 restriction, and Diehl answered, "No. I didn't realize that I was still under that restriction." (R. 69:78.)

The defense also presented the expert testimony of Stephen Oakes, who testified that he did not take issue with the blood test that showed Diehl's alcohol concentration at .031 when his blood was drawn. (R. 69:107.) But Oakes concluded that Diehl's alcohol concentration was likely below 0.02 when his truck was stopped. (R. 69:103.) Oakes based his conclusion on Diehl having drank three beers, one right before he left the bar, and on the beer being light beer that was 4.2 percent alcohol. (R. 69:114–17, 19.) However, Diehl testified he believed he drank only two beers, and they were Budweiser. (R. 69:69, 71, 81.) Oakes testified that Budweiser has an alcohol concentration of 5.0 percent. (R. 69:115.)

The jury found Diehl guilty of operating with a PAC above 0.02. (R. 69:181–82.) Diehl moved for a new trial, asserting that his trial counsel was ineffective for not objecting when the prosecutor asked the arresting officer if Diehl had a 0.02 restriction on his driver's license and if the normal level above which a person cannot legally drive is 0.08. (R. 41:3–5.) Diehl also asserted his counsel was ineffective for not objecting when the prosecutor asked Diehl if he knew he had a 0.02 restriction, and then asking Diehl how many times he had been convicted of a crime. (R. 41:3–5.) Diehl argued that his counsel should have objected, moved to strike, and moved for mistrial. (R. 41:5–6.)

The circuit court denied Diehl's motion after a hearing. (R. 55; 71:28.) The court concluded that the prosecutor's reference to a "restriction" on Diehl's driver's license was not problematic because everyone's license is restricted. (R. 71:25.) The court concluded that reference to Diehl being subject to the 0.02 standard was relevant because it is an element of the offense that he was charged with violating. (R. 71:25.) The court said that when the prosecutor referred to the "normal" alcohol concentration above which a person cannot legally drive being 0.08, it could have given a cautionary instruction. (R. 71:26.) But the court concluded that "the average person knows that the average person's blood alcohol restriction is .08," and that the reference "was not so substantial that it would have resulted in a mistrial." (R. 71:26.) The court also concluded that the prosecutor appropriately asked Diehl whether knew he was subject to the 0.02 restriction and how many times he had been convicted of a crime, and that Diehl's statement about being on probation was initiated by Diehl, not the prosecutor. (R. 71:26–27.)

The court concluded that Diehl's trial counsel did not perform deficiently and that Diehl suffered no prejudice. (R. 71:27–28.) Accordingly, it denied Diehl's motion for a new trial. (R. 55; 71:28.) Diehl now appeals.

STANDARD OF REVIEW

Whether a defendant was denied the constitutional right to effective assistance of counsel presents a mixed question of law and fact. *State v. Mayo*, 2007 WI 78, ¶ 32, 301 Wis. 2d 642, 734 N.W.2d 115. A reviewing court upholds a circuit court's findings of fact "unless they are clearly erroneous." *Id.* "Whether counsel's performance was deficient and prejudicial to his or her client's defense is a question of law" reviewed de novo. *Id.*

ARGUMENT

The circuit court properly denied Diehl's ineffective assistance of counsel claim because Diehl has not proven deficient performance or prejudice.

A. To be entitled to a new trial due to ineffective assistance of counsel, a defendant must prove both deficient performance and prejudice.

To prevail on an ineffective assistance of counsel claim, "[a] defendant must prove both that his or her attorney's performance was deficient and that the deficient performance was prejudicial." *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To prove deficient performance, a defendant must prove that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* ¶ 26 (citations omitted). Reviewing courts are to be "highly deferential" in evaluating the actions of counsel and are to "avoid the 'distorting effects of hindsight.'" *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted). A reviewing court is "highly deferential to counsel's strategic decisions." *State v. Dalton*, 2018 WI 85, ¶ 35, 383 Wis. 2d 147, 914 N.W.2d 120.

To prove prejudice, a defendant must show "a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Allen*, 274 Wis. 2d 568, ¶ 26 (citing *State v. Guerard*, 2004 WI 85, ¶ 43, 273 Wis. 2d 250, 682 N.W.2d 12). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

If a court concludes that a defendant fails to meet his or her burden on either element, it need not address the other element. *Mayo*, 301 Wis. 2d 642, ¶ 61 (citing *State v. Tomlinson*, 2001 WI App 212, ¶ 40, 247 Wis. 2d 682, 635 N.W.2d 201).

B. Diehl's trial counsel did not perform deficiently by not objecting when the prosecutor presented evidence that Diehl was restricted from driving with an alcohol concentration above 0.02, rather than 0.08.

1. Evidence that Diehl was subject to the 0.02 BAC limit rather than the 0.08 limit was relevant and admissible.

The basis of Diehl's motion for postconviction relief, and this appeal, is his claim that his trial counsel performed deficiently by not objecting when the prosecutor asked questions of Deputy Ploessl and him about his being restricted from driving above a 0.02 blood alcohol concentration, rather than 0.08.

Deputy Ploessl testified that after he stopped Diehl's vehicle, he ran Diehl's driver's license through dispatch. (R. 69:25.) The prosecutor asked Deputy Ploessl, "Did you learn of any other stipulations or restrictions on his license at that time." (R. 69:26.) Deputy Ploessl answered, "I learned that his blood alcohol level was restricted to a .02." (R. 69:26.) The prosecutor then asked Deputy Ploessl if "[t]he normal is .08," and the deputy answered, "Correct." (R. 69:26.)

Diehl argues that evidence that he was operating on a restricted driver's license, and that he was subject to the .02 standard rather than .08, was not relevant or admissible because it was not probative of the elements of his crime of driving with a prohibited alcohol concentration above 0.02. (Diehl's Br. 11–13.)

But the prosecutor's question to Deputy Ploessl about his learning from dispatch that Diehl was subject to a 0.02 BAC restriction was entirely appropriate. Whether Diehl was restricted from driving above 0.08 or above 0.02 was relevant to why Deputy Ploessl suspected Diehl might have driven with a prohibited alcohol concentration, why he requested a PBT, and why he arrested Diehl.

The deputy stopped Diehl's truck because of expired license plates (R. 69:17, 19–20). He observed no bad driving or other signs of impaired driving, such as slurred speech or glassy eyes. (R. 69:24.) Had the deputy not learned that Diehl was subject to the 0.02 BAC standard, he would have had no reason to suspect that Diehl had driven with a prohibited alcohol concentration.

The State charged Diehl with operating a motor vehicle with a prohibited alcohol concentration above 0.02. To find Diehl guilty, the jury had to find that Diehl operated a motor vehicle on a highway, and that he had a prohibited alcohol concentration. To find that Diehl drove with a prohibited alcohol concentration, the jury had to know the level above which Diehl was prohibited from driving. It had to know that he could not legally drive with an alcohol concentration above 0.02.

The prosecutor referred to Diehl being subject to the 0.02 "restriction" rather than the normal 0.08. As the circuit court recognized, the use of the word "restriction" was appropriate because everyone who operates a motor vehicle in Wisconsin is subject to a restriction. (R. 71:25.) Most drivers are subject to the restriction that they may not drive with an alcohol concentration above 0.08. Wis. Stat. § 340.01(46m)(a). Other drivers are subject to different restriction. For instances, drivers under 21 years of age are subject to a 0.00 restriction, Wis. Stat. § 346.63(2m). Commercial drivers are subject to a 0.00 restriction, Wis. Stat. § 346.63(7)(a), and 0.04 restriction, Wis. Stat. § 346.63(5)(a). And drivers with three

or more OWI convictions, or who are subject to an ignition interlock device (IID) order are subject to a 0.02 restriction. Wis. Stat. § 340.01(46m)(c). Drivers can be subject to an IID order for various reasons, including operating with a restricted controlled substance in his or her blood, or while under the influence of an intoxicant or other drug as a second or subsequent offense, Wis. Stat. § 343.301(1g)(a)(2), or for improperly refusing an officer's request for a sample of blood, breath, or urine under the implied consent law, Wis. Stat. § 343.301(1g)(a)(1). A person who refuses, or who has committed offenses involving drugs, can be subject to the 0.02 restriction without ever having been convicted of a drunk driving offense.

The prosecutor asked the deputy about the "normal" BAC limit being 0.08. As the circuit court noted, defense counsel could have objected. But as the court recognized, doing so "would have drawn more attention to it." (R. 71:26.) It is not deficient performance to refrain from objecting when doing so would draw unwanted jury attention to an issue. *State v. Cooks*, 2006 WI App 262, ¶ 44, 297 Wis. 2d 633, 726 N.W.2d 322.

And as the court also recognized, "the average person knows that the average person's blood alcohol restriction is 0.08." (R. 71:26.) Every juror who had a driver's license likely knew that he or she was subject to the 0.08 restriction, unless he or she was instead subject to the 0.00, 0.02, or 0.04 standards. Asking about the "normal" limit simply made no difference. Accordingly, Diehl's defense counsel did not perform deficiently by not objecting to the prosecutor's reference to the normal limit.

2. Evidence that Diehl was subject to the 0.02 BAC limit rather than the 0.08 limit was not other acts evidence.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." Wis. Stat. § 904.04(2)(a). Diehl argues that evidence that his operating privilege was restricted, and that he was subject to the 0.02 limit, was inadmissible other acts evidence. (Diehl's Br. 13–14.)

However, the evidence at issue was not other acts evidence. "When the State or the defense offers a 'different' act to show a similarity between that other act and the act complained of, then it is properly termed 'other acts evidence' and the court should proceed pursuant to WIS. STAT. § 904.04(2)." *State v. Bauer*, 2000 WI App 206, ¶ 7 n.2, 238 Wis. 2d 687, 617 N.W.2d 902. But when evidence is not offered to show "a similarity between that other act and the act complained of," it is not other acts evidence. *See id.* "Evidence is not 'other acts' evidence if it is part of the panorama of evidence needed to completely describe the crime that occurred and is thereby inextricably intertwined with the crime." *State v. Dukes*, 2007 WI App 175, ¶ 28, 303 Wis. 2d 208, 736 N.W.2d 515.

Here, evidence that Diehl was subject to the 0.02 limit was not offered to show that he acted in conformity with being subject to that limit. It was offered for the permissible purpose of providing background and context and to give a complete account of the situation. *See State v. Payano*, 2009 WI 86, ¶ 64, 320 Wis. 2d 348, 768 N.W.2d 832; *Dukes*, 303 Wis. 2d 208, ¶ 28.

As the supreme court noted in *Payano*, "The Wisconsin Jury Instructions define evidence relating to 'context or background' as 'provid[ing] a more complete presentation of

the evidence relating to the offense charged.'" 320 Wis. 2d 348, ¶ 64 n.13.

As explained above, evidence that Deputy Ploessl learned that Diehl was subject to the 0.02 standard was properly admitted to provide the background for the deputy's actions. Without that background the jury would have had no idea why the deputy suspected Diehl of driving with a prohibited alcohol concentration, why he requested a PBT, or why he arrested Diehl.

Diehl claims that evidence that he was subject to the 0.02 standard "communicated to the jury" that besides the conduct that Diehl was presently accused of, "Diehl had [previously] engaged in some [other] crime, wrong, or act." (Diehl's Br. 14.) He argues that the evidence impliedly communicated to the jury that Diehl had prior OWI convictions. (Diehl's Br. 14.) He points to the prosecutor asking him about his prior convictions as evidence of the State's purpose of showing his bad character. (Diehl's Br. 14.)

But the prosecutor's questioning of Diehl demonstrates that the prosecutor did not present evidence to show Diehl's bad character or that he acted in conformity with his prior acts.

The prosecutor asked Diehl, "you weren't under the influence or drunk or anything were you?" (R. 69:77.) If the prosecutor were trying to convince the jury that Diehl is a drunk driver so he drove drunk in this case, that question would have been counterproductive. That question gave Diehl an opportunity to say that he did not drive drunk. And Diehl took that opportunity, answering, "No." (R. 69:77.)

The prosecutor asked Diehl whether he knew he had the 0.02 restriction. (R. 69:77.) But whether Diehl did or did not know he was subject to the 0.02 standard does not show that he drove drunk because he is a drunk driver. This question again gave Diehl an opportunity to say either that

he was aware he was subject to the 0.02 standard, or he was not. But neither answer would imply to the jury that he had driven drunk before, so he probably drove drunk again in this case. There was not even an allegation that Diehl drove drunk in this case.

After Diehl volunteered that he had been on probation, but no longer was, the prosecutor asked Diehl whether he had been convicted of crimes in the past. (R. 69:78.) Diehl answered, "Yeah. Twice." (R. 69:78.) Diehl argues that "The juxtaposition of the questions implied to the jury that Diehl had prior OWI convictions which caused the limit of his blood alcohol concentration to be set at .02 rather than the 'normal' .08." (Diehl's Br. 17.) He asserts that because of this questioning, "There is a reasonable probability that the jurors, when provided this information, concluded that Diehl was more likely to be guilty in this case." (Diehl's Br. 18.)

However, even if the jury had actually heard evidence that Diehl had prior OWI convictions, and that he was subject to the 0.02 standard because of those convictions, there is no reason to think that the jury would be more likely to find Diehl guilty of driving a motor vehicle with an alcohol concentration above 0.02.

Significantly, there was no allegation that Diehl drove drunk in this case. And there was no dispute that he drove after drinking two or three beers. Diehl told Deputy Ploessl that he drove after two or three beers, and he testified that he believed he had two beers. (R. 69:26, 69, 71, 74.) Diehl thus freely admitted to drinking and then driving. The only issue in the case was whether he drove while his BAC was above or slightly below 0.02. Even if Diehl's admission to having two unidentified prior convictions somehow raised an inference that he has a propensity to drive drunk, he wasn't charged with drunk driving in this case. He was charged with operating a vehicle with a prohibited alcohol concentration

above 0.02. Whether he had prior OWI convictions had nothing to do with that question.

C. Diehl has not proven that he suffered any prejudice.

Diehl argues that he was prejudiced by his trial counsel not objecting to the prosecutor's questions regarding him being subject to the 0.02 restriction rather than 0.08, because the resulting testimony communicated to the jury that he had prior OWI convictions. (Diehl's Br. 16.) He argues that the prosecutor asking him about the number of convictions he has shortly after asking him if he knew he was subject to the 0.02 implied to the jury that his prior convictions were for OWI. (Diehl's Br. 17.)

The prosecutor asked Diehl whether he knew he was subject to the 0.02 restriction, and Diehl said he was not aware of that fact, explaining that he did not believe he was subject to the 0.02 restriction because he was no longer on probation. (R. 69:77–78.) As the circuit court concluded, the prosecutor's question was appropriate. (R. 77:26.) And as the circuit court recognized, it was not the prosecutor's fault that Diehl decided to tell the jury that he had been on probation. (R. 77:26.)

The prosecutor then asked Diehl whether he had been convicted of any crimes, and Diehl answered, "Yeah. Twice." (R. 69:78.) But the prosecutor did not ask Diehl if he had been convicted of any OWI-related offenses, and Diehl did not indicate that he had been convicted of any OWI-related offenses.

As the circuit court concluded, the prosecutor's questions did not imply that Diehl's two convictions were for OWI. (R. 77:26–27.) And as the court noted, it gave Diehl "a break" because it allowed him to answer "[t]wo" when asked how many prior convictions he had, even though he had many more than two convictions. (R. 77:27.) The court excluded

Diehl's eight prior OWI convictions from his total of prior convictions, allowing him to answer "two" rather than "ten."

It was appropriate to ask Diehl if he was aware that he was subject to the 0.02 standard, and it was appropriate to ask him how many prior convictions he had. Diehl's BAC limit of 0.02 was an element of the charge that the State had to prove. And Diehl's prior convictions were relevant to his credibility. "The fact of prior convictions and the number thereof is relevant evidence because the law in Wisconsin presumes that one who has been convicted of a crime is less likely to be a truthful witness than one who has not been convicted." *Nicholas v. State*, 49 Wis. 2d 683, 688, 183 N.W.2d 11 (1971). "In addition, the number of prior convictions is also held to be relevant evidence on the issue of credibility because the more often one has been convicted, the less truthful he is presumed to be." *Id.* Diehl was not prejudiced when his trial counsel did not object when the prosecutor asked one of those questions shortly after asking the other question.

Diehl also argues that he suffered prejudice because he "presented compelling expert testimony in support of a defense that his BAC level at the time of operation was actually lower than . . . what it was at the time he gave the sample." (Diehl's Br. 19.)

However, the expert testimony that Diehl presented was not "compelling," because it was based on assumptions that were inconsistent with Diehl's testimony.

The defense expert, Stephen Oakes, testified that, based on his assumptions, it was likely that Diehl's alcohol concentration when he was stopped was below .02. (R. 69:103.) Oakes assumed that Diehl consumed two beers over two hours, and that both were light beers that were 4.2 percent alcohol. (R. 69:97–98.) He assumed that Diehl had a third beer just before he left the bar. (R. 69:98.) Oakes concluded that Diehl's alcohol concentration after he drank

two beers, and just before he drank the third beer, would have been .013. (R. 69:99–101.) And then, after quickly drinking the third beer, he was stopped five minutes later. (R. 69:102.) Oakes concluded that when he was stopped, Diehl's alcohol concentration would have been below .02. (R. 69:102.)

At least two of the assumptions that informed this expert testimony were inconsistent with Diehl's testimony. Oakes assumed that Diehl drank a light beer that is 4.2 percent alcohol. (R. 69:114–17, 119.) But Diehl testified that he drank Budweiser. (R. 69:69, 81.) As Oakes acknowledged, Budweiser is 5 percent alcohol rather than 4.2 percent. (R. 69:115.)

When the prosecutor asked Oakes what effect the beer Diehl drank being 5 percent alcohol rather than 4.2 percent would have, the expert said that using 5 percent would alter the ultimate figure, but somehow, "it wouldn't bring the value up." (R. 69:116.) Oakes said he "didn't do the calculation" for 5 percent, "but as I look at it right now, running through it, it would not put the individual up above .02 percent." (R. 69:116.) On redirect examination, the expert was again asked whether the beer Diehl drank being 5 percent alcohol rather than 4.2 percent would affect his conclusion that Diehl's alcohol concentration was below 0.02. (R. 69:132.) Oakes answered, "No, it wouldn't." (R. 69:132.)

However, in his report (R. 24), which was received into evidence (R. 69:135), Oakes showed the math behind his calculations. Using Oakes' calculations, but changing the

alcohol concentration from 4.2 percent to 5.0 percent, would seemingly result in Diehl having an alcohol concentration of .0211, even before he drank a third beer.[1]

Oakes also assumed that Diehl had two beers, bringing his BAC to .113, and then quickly had a third beer right before he left the bar. (R. 69:98.) But while Diehl testified that he had a beer right before he left the bar (R. 69:71, 80–81), he said he believed he had only two beers at the bar, not three. (R. 69:69, 71, 74.)

Oakes testified that each beer should have added .0214 to Diehl's blood alcohol concentration. (R. 69:98.) And he testified that Diehl's elimination rate should have been .03 over two hours. (R. 69:98.) Under Oakes' calculations, if Diehl had only one beer from 6:00 p.m. until just before 8:00 p.m., his alcohol concentration right before he drank the second beer should have been 0.00. But then, after drinking one beer

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[1] Oakes' report indicates that in reaching his conclusion, he considered Diehl's weight, the volume of distribution for the male defendant for each 12-ounce beer, the alcohol volume in beer, and the alcohol density. (R. 24:2.)

Oakes multiplied the percentage of alcohol, .042, by the volume of alcohol, 354.9 for a total of 14.9. He then divided the density of alcohol, .8, by 14.9, for a total alcohol weight of 11.9. He then divided 11.9 by the product of 81.65 times .68, for a total of .0214 g/100mL, for one beer. Oakes doubled that total for the second beer, for a total of .0428, and subtracted .030 of elimination over two hours for a total BAC of .013. (R. 24:2–3.)

The only value that seemingly would change because the beer Diehl drank was 5 percent alcohol rather than 4.2 percent, is the alcohol volume in beer. Changing the alcohol volume from .042 to .05, but keeping all other values the same, would mean multiplying .05 by 354.9 for a total of 17.745. Multiplying that total by .8 results in a total alcohol weight of 14.196. Dividing that total by the product of 81.65 times .68, gives an alcohol concentration of .02557 for each beer. Doubling that total for a second beer means a total of .0511. Subtracting .030 of elimination over two hours results in a total BAC of .021.

right before he left the bar, Diehl's alcohol concentration two hours later was .031. In other words, starting with an alcohol concentration of 0.00, a single beer which should add .0214, resulted in an alcohol concentration of .031 two hours later, even though Diehl's body should have eliminated .03 during those two hours.

For the expert's calculations to be even close to correct, Diehl's alcohol concentration had to be well above 0.00 when he consumed a beer shortly before he left the bar. The expert's testimony therefore discredited Diehl's testimony that he believed he had only two beers rather than three.

And since Diehl drank beer that was 5 percent alcohol rather than 4.2 percent, the expert's calculations would mean that Diehl's alcohol concentration right before he left the bar was above the 0.2 limit. And that was right before he drank his third beer.

The jury seemingly understood the evidence and the inconsistency between Diehl's testimony and the expert's assumptions. It left the courtroom to begin its deliberations at 2:59 p.m., and it returned with a guilty verdict at 3:25 p.m. (R. 69:181.)

In summary, there is no reason to believe that even if the jury had known that Diehl had prior OWI convictions, this knowledge would have made any difference. The evidence showed that Diehl's alcohol concentration was .031 a little less than two hours after he drove. His defense, that he was slightly below .02 when he drove, was based on his expert's incorrect assumptions. And his defense was inconsistent with his own testimony about how many beers he drank and what type of beer it was. Diehl has not shown that any deficient performance caused him prejudice.

CONCLUSION

This Court should affirm the judgment of conviction and the circuit court's order denying Diehl's motion for a new trial.

Dated this 8th day of November 2019.

Respectfully submitted,

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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 4682 words.

_____
MICHAEL C. SANDERS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 8th day of November 2019.

_____
MICHAEL C. SANDERS
Assistant Attorney General