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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2019AP001176 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

RYAN C. DIEHL,

Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE, AND ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE CRAWFORD COUNTY CIRCUIT COURT THE HONORABLE LYNN M. RIDER PRESIDING.

DEFENDANT-APPELLANT'S REPLY BRIEF

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Evidence that Diehl was subject to the 0.02 BAC limit rather than the 0.08 limit was irrelevant, and constituted impermissible other acts evidence.

The State argues that “[w]hether Diehl was restricted from driving above .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.” See State’s brief at page 7. The State similarly argues that evidence regarding the distinction between the 0.08 and 0.02 limits, and that Diehl was subject to the lower limit, was not other acts evidence because it was offered to provide “background for the deputy’s actions.” See State’s brief at page 10. The State specifically argues that “without that background, the jury would have no idea why the deputy suspected Diehl of driving with a prohibited alcohol concentration, why he requested a PBT, or why he arrested Diehl.” See State’s brief at page 10.

Contrary to the State’s arguments, evidence regarding the distinction between the 0.08 and 0.02 limits, and that Diehl’s license was restricted to the lower limit, was not necessary for

background or context. Other information easily painted the historical picture for the jury. Ploessl testified that he stopped Diehl's truck because he observed that the truck's license plates were expired. 69:17, 19-20. Ploessl testified that he observed a 30-pack of beer in Diehl's truck, and asked Diehl if he had been drinking that night. 69:25-26. Ploessl testified that Diehl admitted that he had been drinking that night, and that he had consumed two or three beers. 69:26. Ploessl testified that Diehl agreed to take a PBT, and in fact took one. 69:26-27.

Such information explained to the jury why Ploessl stopped Diehl; the vehicle had expired plates. Such information additionally explained why Ploessl suspected Diehl might have been driving with a prohibited alcohol concentration, and why Ploessl requested Diehl to take a PBT; Ploessl observed a 30 pack of beer in Diehl's truck, learned through Diehl's admissions that Diehl had been drinking earlier in the night, and learned that Diehl had consumed 2 or 3 beers. Such information additionally

explained why Ploessl arrested Diehl; the result of the PBT showed that Diehl was over the requisite limit.

Given the background and context provided by the above evidence, evidence regarding the distinction between the .08 and .02 limits, and that Diehl's license was restricted to the lower limit was unnecessary and irrelevant.

It is true that to find Diehl guilty of driving with a prohibited alcohol concentration, the jury had "to know that he could not legally drive with an alcohol concentration above 0.02." See State's brief at page 7. But such information was properly conveyed via the circuit court's instruction as to the elements of the offense. As discussed in Diehl's brief at page 12, the instruction from the court informed the jury that "[p]rohibited alcohol concentration means more than .02 grams of alcohol in 100 milliliters of the person's blood." 69:137. The jury did not need to know that the "normal" limit was .08, and that Diehl's license was restricted to a much lower limit. Such evidence was irrelevant.

The State cites *State v. Dukes*, 2007, WI App 175, ¶ 28, 303 Wis.2d 208, 736 N.W.2d 515, for the proposition that “[e]vidence is not ‘other acts ‘ evidence if it is part of the panorama of evidence needed to completely describe the crime that occurred and is inextricably intertwined with the crime.” See State’s brief at page 9. But evidence that the “normal” limit was .08 and that Diehl’s license was restricted to a much lower limit, was not needed to “completely describe the crime that occurred,” and was not “inextricably intertwined with the crime.” Such information served only to communicate that Diehl had engaged in some other crime, wrong or act.

At page 7 of the State’s brief, the State downplays the significance of informing the jury of Diehl’s restricted license status by arguing that drivers can be subject to restricted licenses for various innocuous reasons, for instance, because they are under 21 years of age, or because they are commercial drivers. But Diehl’s circumstance plainly did not fall into either of these categories. Diehl was well over 21 years of age, and he was not driving a

commercial vehicle. As such, Diehl fell into the other category of drivers who have their licenses restricted, those who have committed some other crime, wrong, or act including, as recognized by the State, refusing chemical tests, committing offenses involving drugs, or operating under the influence of an intoxicant. See State's brief at page 8.

Dr. Oakes did not rely on incorrect assumptions.

In arguing that Diehl has not show prejudice, the State argues that Dr. Oakes relied on incorrect assumptions regarding the number of beers Diehl drank and what type of beer it was. See State's brief at page 16. The State argues that Dr. Oakes's assumption that Diehl had consumed three "light" beers was inconsistent with Diehl's own testimony. See State's brief at page 16. The State ignores evidence that on the night of the incident, Diehl had admitted to Ploessl that he had consumed 2 *or* 3 beers. 69:71,74. In light of such evidence, trial counsel during closing argument explained that the actual number of beers was

uncertain. 69:168. As such, Dr. Oakes's testimony was consistent with evidence that Diehl actually had 3 rather than 2 beers. Next, the State criticizes Dr. Oakes's testimony for employing the "incorrect assumption" that Diehl had consumed light beer. In this regard, the State emphasizes Diehl's testimony that he drank "Budweiser," to signify that the beer he drank was regular beer as opposed to light beer. The State then makes its own assumption that the beer was regular to argue that Dr. Oakes's analysis was wrong. But Diehl did not specify whether the "Budweiser" was regular or light. And the State points to no other evidence in the record showing that the beer was in fact regular beer. The State's argument shows only that Dr. Oakes's testimony was inconsistent with the State's own assumption. Dr. Oakes's testimony was not inconsistent with the evidence or Diehl's defense.

Conclusion

For the above reasons and those stated in the defendant-appellant's brief-in-chief, this court should vacate the judgment of conviction and sentence and remand the case for a new trial.

Dated this _____ day of November 2019.

Respectfully submitted,

BY: _____/s/_____

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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Wis. Stat. Rule 809.19(8)(b) and (c) in that is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 1175 words.

Dated this ___ day of November 2019.

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CERTIFICATION OF COMPLIANCE WITH RULE
809.19(12)

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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 upon all opposing parties.

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