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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2019AP001399-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TAMMY GENEVIEVE HARDENBURG,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an
Order Denying Postconviction Relief Entered in
Milwaukee County Circuit Court, the Honorable
Dennis R. Cimpl Presiding.

REPLY BRIEF OF
DEFENDANT-APPELLANT

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ARGUMENT

I. Admission of the scientific conclusions of Ms. Sasman and Ms. Greene was not harmless error.

The State's only argument on appeal is that the error(s) complained of by Ms. Hardenburg do not merit reversal because they were harmless. (State's Br. at 16). Having conceded all other issues in Ms. Hardenburg's favor, *see Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979), the State must now prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *State v. Mayo*, 2007 WI 78, ¶ 47, 301 Wis.2d 642, 734 N.W.2d 115. Importantly, the standard requires more than mere proof that other untainted evidence was sufficient for a conviction. *See State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222 (1985).

In an attempt to meet this imposing burden, the State makes essentially two arguments. First, they allege that the error was harmless due to "strong evidence of Hardenburg's guilt." (State's Br. at 17). Here, the State needed to prove that Ms. Hardenburg was impaired as a result of ingesting prescription drugs. (88:55). As the State points out, mere ingestion was insufficient to establish this element. (State's Br. at 18). What the State needed to prove, beyond a reasonable doubt, was that Ms.

Hardenburg consumed “a sufficient amount of prescription drugs” such that she was unable to safely operate her motor vehicle. (88:55).

As a starting point, exclusion of the test results at issue would appear to be the “best evidence” for proving this element. Notwithstanding this fact, the State now claims there was “strong evidence” on this point. To support their contention, they point to the non-expert testimony of Officer Kleinfeldt, who told the jury about Ms. Hardenburg’s physical presentation during the traffic stop. (State’s Br. at 18). He offered an opinion that Ms. Hardenburg was “impaired” and also told the jury that he found a prescription drug bottle in Ms. Hardenburg’s car. (State’s Br. at 18-19).

While suggestive, this is far from “strong evidence” of guilt, at least when divorced from the essential (and improperly admitted) test result. Officer Kleinfeldt could not tell the jury, for example, what was in the pill bottle or whether it had any “cautions” on the label. (87:33-34). Obviously, not all medications are impairing. Mere proof that Ms. Hardenburg was in possession of a prescription medication does not establish that she was unlawfully impaired.

Similarly, the officer’s testimony about Ms. Hardenburg’s presentation during the traffic stop also does not prove—beyond a reasonable doubt—that Ms. Hardenburg was impaired as a result of ingesting a prescription medication, especially

considering his other concerns that she might have been mentally ill. (87:60-61). These observations are inherently ambiguous, absent hard proof that Ms. Hardenburg had excessive levels of a drug that would directly cause such behavior—exactly what was provided by the amphetamine test result.

The State also cites to Officer Kaye's testimony. (State's Br. at 19). Once again, however, he offered only inherently ambiguous testimony about Ms. Hardenburg's behavior. (State's Br. at 19). That behavior, when uncoupled from the test result, does not prove the element at issue beyond a reasonable doubt. The State also points out that Ms. Hardenburg admitted to having ingested Adderall many hours before. (State's Br. at 19). Without a test result that would place that statement in proper context, however, the "admission" also does not prove, beyond a reasonable doubt, that Ms. Hardenburg was unlawfully impaired at the time she operated her motor vehicle. Moreover, Officer Kaye's non-expert opinion—which was in part wrong, because it left open the possibility of alcohol intoxication—does not prove up the State's case, either. (State's Br. at 19). Thus, Ms. Hardenburg certainly disagrees that the testimony of these two officers was "strong evidence" of the controverted element.

The State also discusses the testimony of Leah Macans, the analyst who did testify during this trial. (State's Br. at 19). They observe that Ms. Macans was able to opine that substances other than amphetamines were in Ms. Hardenburg's system.

(State's Br. at 19). Yet, they also concede—as they must—that these amounts were either within or below the therapeutic range. (State's Br. at 19). Moreover, the symptoms of these depressant drugs, as described by Ms. Macans, do not track with the agitated, possibly delusional state observed by the two officers described above, notwithstanding some generic overlap of *possible* side effects with her behaviors (such as nystagmus). The State's theory at trial, it must be remembered, was that the large amount of amphetamine in her blood stream “caused a lot” of the behavior. (88:17). It therefore seems disingenuous to now argue that her intoxication—especially when it was so tightly tied to one specific drug—could have been proved via a totally different scientific hypothesis.

On that note, the State also argues that Ms. Hardenburg had a “cocktail” of drugs in her system that contributed to her state on the night in question. (State's Br. at 20). This “cocktail” theory, however, is at odds with the actual testimony. The State never presented any testimony about Ms. Hardenburg's condition being caused by a drug interaction; in fact, Ms. Macans was unable to offer a scientific opinion to that effect when asked. (88:33-34).

Overall, the State's argument for harmless error on this point is transparently weak. Here, the State told the jury in opening statements that the bulk of Ms. Hardenburg's concerning symptoms were directly linked to amphetamine usage. (87:16-17). They returned to that theme in closing arguments,

telling the jury that the improperly admitted amphetamine results, which showed very high levels of that drug in Ms. Hardenburg's system, independently supported a finding of guilty. (88:78). It therefore strains credulity to suggest on appeal that admission of this evidence—evidence which ostensibly explained all of Ms. Hardenburg's erratic behavior during the traffic stop—was harmless beyond a reasonable doubt. Here, the extremely high test result was essentially *per se* proof of impairment, as it was so far outside of any therapeutic range and, as Ms. Macans testified, would have caused the person ingesting that drug to display extreme mental health symptoms. (88:17-18).

As was pointed out at length in the brief-in-chief, admission of the amphetamine evidence was not harmless. (Brief-in-Chief at 31-36). While the State had the inherently ambiguous testimony of the two officers—rendered even more so in light of Officer Kleinfeldt's testimony about a possible Chapter 51 detention—the State's case is not complete, and not proven beyond a reasonable doubt, without this test result. Accordingly, the State is simply wrong to suggest that its case was “strong” absent this error.

In addition to this argument, the State also alleges that the test result was cumulative. (State's Br. at 21). In sum, the State relies on the presence of three other drugs in Ms. Hardenburg's system to argue that the amphetamine evidence was cumulative. (State's Br. at 22). However, none of those drugs matched, as precisely as the

amphetamines did, Ms. Hardenburg's agitated and deluded state. As the State argued in closing—over two paragraphs of transcribed text—the amphetamine result was closely tied to the observed behavior in this case. (88:69-70). They argued that the amphetamine “caused a lot of her behavior” and suggested that this was free-standing evidence of guilt. (88:77-78).

In contrast, the other drugs identified by Ms. Macans were all within or below the therapeutic range, as the State has conceded. (State's Br. at 19). Moreover, the analyst also testified that there were no “notable” interactions, thereby directly undercutting the State's “cocktail” theory. (88:33-34). And while the State is correct that some of the possible side effects—including nystagmus—could overlap with what was observed in this case, the bulk of the testified-to effects do not match. These drugs were almost all depressants, and had strong side effects like “drowsiness” as the State points out. (State's Br. at 20). Yet, that is not how Ms. Hardenburg presented during the the traffic stop. As the State argued, she was extremely agitated, talked constantly, and had delusions about bugs that were consistent with high levels of amphetamines, a stimulant. While she did later display more subdued characteristics, the State's argument at trial was that this was because she was “coming down” from those stimulants, not that she was therefore under the influence of depressants at the time she operated her motor vehicle. (87:53).

Faced with the strong emphasis placed on the amphetamines evidence at trial, the State resorts to what can only be classed as a denial of reality, informing this Court that Ms. Hardenburg has floated the “inaccurate premise” that it “focused extensively on the amphetamine evidence” at trial. (State’s Br. at 23). The State is correct that the other drug evidence was referenced. But it strains credulity to deny that the amphetamine evidence was central to its case. This directly contradicts the statements of the prosecutor in opening and closing statements as well as the lengthy testimony by Ms. Macans directly linking Ms. Hardenburg’s observed behavior with the high amphetamine result.

The State therefore continues to suggest that depressants—not the amphetamines—were a *possible* culprit. (State’s Br. at 23). They make inherently speculative arguments that these drugs “could” explain her behavior. (State’s Br. at 24). They point out, for example, that Ms. Hardenburg could have been impaired due to symptoms like “tingling or numbness in extremities.” (State’s Br. at 24). Yet, the State ignores the ample testimony of Ms. Macans, who told the jury that the amphetamines—and not the other depressants—would have caused the hallucinations, overstimulation, talkativeness, and aggression. (88:18). The State simply cannot have it both ways—both relying on evidence of “overstimulation” to prove impairment and then, when that evidence is questioned, alleging a mutually incompatible theory that Ms. Hardenburg was impaired as a result of minimal levels of depressant

drugs. The weakness of their position is especially reflected by their clutching at proof that “only” topiramate could have caused the observed nystagmus in this case. (State’s Br. at 24). Yet, nystagmus is an inherently ambiguous piece of evidence, as it could have numerous causes, including sleep deprivation or disease.¹

The State’s cumulative argument is simply not persuasive in light of the trial testimony, which shows the special emphasis placed on the amphetamine result and the specific symptoms displayed by Ms. Hardenburg which were allegedly consistent with that result.

Accordingly, this Court should find that the State has not proved that the error is harmless beyond a reasonable doubt.

II. Ms. Hardenburg was entitled to a hearing on her ineffectiveness claim.

Ms. Hardenburg’s motion adequately pleaded both deficient performance and prejudice, as set forth in the brief-in-chief. Accordingly, as a matter of law, she was therefore entitled to a hearing. *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis.2d 568, 682 N.W.2d 433.

The circuit court disagreed, explicitly concluding that exclusion of the challenged evidence would not have created a reasonable probability of a

¹ <https://en.wikipedia.org/wiki/Nystagmus>.

different result. (71:3). The court therefore concluded that Ms. Hardenburg failed to demonstrate prejudice. (71:3). This is a legal finding and, accordingly, that is what Ms. Hardenburg focused on in her appeal. At no point in the court's written decision did it indicate that it was denying a hearing for discretionary reasons.

The State's response is somewhat opaque. They assert, "[r]egardless whether trial counsel was ineffective for not objecting to the admission of the amphetamines evidence, Hardenburg cannot show prejudice for the reasons discussed in Section I. C. above." (State's Br. at 27). However, if trial counsel was ineffective, then that means his performance would have been prejudicial; that finding is subsumed within that legal holding. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The State's assertion, in other words, does not make much sense.

The State then falls back, for the most part, on briefly incorporating, by reference, their harmless error arguments above. (State's Br. at 26-27). As those have already been fully replied to above, counsel will not further address them here. The State then takes an even stranger rhetorical detour, faulting Ms. Hardenburg for not explaining why, as a matter of discretion on the part of the circuit court, she was entitled to a hearing. (State's Br. at 27). But that is not the basis for the court's denial—a finding that Ms. Hardenburg had not demonstrated prejudice in her motion undergirded that decision. (71:3). In their haste to assert a waiver argument, the State

appears to have trampled over the record and what the court actually said. Moreover, it is unclear to Ms. Hardenburg why, if she if met the legal requirements for a hearing, she would not also be entitled to hearing as a matter of discretion.

Accordingly, Ms. Hardenburg asks this Court to remand for a hearing on the ineffectiveness claim.

CONCLUSION

Ms. Hardenburg therefore respectfully requests that this Court grant her a new trial under the plain error doctrine, or in the alternative, remand for an evidentiary hearing on her ineffectiveness claim.

Dated this 19th day of December, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,175 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 on all opposing parties.

Dated this 19th day of December, 2019.

Signed:

Christopher P. August
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