STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2020AP2001 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CARL LEE MCADORY,

Defendant-Appellant.

Appeal from a Judgment of Conviction
Entered in the Circuit Court for Rock County,
the Honorable John M. Wood Presiding
Circuit Court Case No: 2016CF26

REPLY BRIEF OF DEFENDANT-APPELLANT

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INTRODUCTION

Carl M. McAdory appeals his conviction of operating while under the influence of a controlled substance (8th), contrary to Wis. Stat. § 346.63(1)(a), on three grounds: *first*, that there was insufficient evidence at trial for the jury to find that he was impaired by a controlled substance, *second*, that the trial court's removal of language defining "under the influence" from the standard jury instruction misled the jury in violation of his due process rights, and *third*, that the real case or controversy – whether he was actually under the influence of a controlled substance at the time of driving – was not fully tried due to the erroneous instruction and arguments by the prosecutor.

For the reasons detailed in Mr. McAdory's opening brief and in reply to the State's response as detailed below, this court should reverse Mr. McAdory's conviction of operating while under the influence of a controlled substance.

ARGUMENT

I. THE EVIDENCE AT MR. MCADORY'S TRIAL WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT HE WAS UNDER THE INFLUENCE OF A CONTROLLED SUBSTANCE

The State did not provide sufficient evidence at trial to support the jury's conviction of Mr. McAdory for operating under the influence of a controlled substance, because it failed to prove he was under the influence *of a controlled substance* at the time of driving – that is, that his "ability to operate and safely control the vehicle was impaired." JI-CRIM 2664; *State v. Waalen*, 130 Wis. 2d 18, 22, 27-28, 386 N.W.2d 47 (1986).

The State's evidence at trial was primarily evidence suggesting that Mr. McAdory was *intoxicated* and test results showing detectable amounts of THC and cocaine. Aside from the mere presence of the controlled substances in his blood, there was no evidence that Mr. McAdory was under their influence at the time of driving. The evidence relating to Mr. McAdory's alleged impairment by a controlled substance at the time he was driving was so lacking in this case, that the evidence is insufficient as a matter of law. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

The State argues, without further explanation, that witness testimony, body cam video, and the exhibits introduced at trial provide sufficient evidence of impairment by a controlled substance. (Resp. Br. at 7.) Again, most evidence relied on by the State is evidence of purported intoxication by alcohol, (resp. br. at 8-9), and is not relevant to whether Mr. McAdory was under the influence of a controlled substance. A closer look at the State's evidence demonstrates the lack of evidence from which a jury could reasonably infer that Mr. McAdory was impaired by THC or cocaine at the time of driving:

Witness Testimony

- Officer Bier: testified to signs of *intoxication – not controlled substances*: odor of intoxicants, "slightly slurred" speech, Mr. McAdory's admission of consuming one beer about 30 minutes prior, and an open can of beer found in the vehicle. (129: 110-11, 115.)

- Kathryn Nolte (phlebotomist): testified about the general process and procedure followed when performing a legal blood draw, and that she would not be involved in any medical charting or treatment

for an individual during a blood draw. (129: 127-31, 134.) Nolte did not testify about impairment by controlled substances.

- Michael Larson (toxicologist): testified Mr. McAdory's blood tested positive for cannabinoids and cocaine metabolites and negative for alcohol. (129:140-44.) Larson did not testify about impairment by controlled substances.

Video Evidence

- Officer Bier's body camera footage depicted Mr. McAdory interacting with Officer Bier, leaving his vehicle, and fleeing the scene. It then depicts officers pursuing and appending Mr. McAdory. The video does not contain any reference to controlled substance or suspicion that Mr. McAdory was impaired by a controlled substance. (80.)

Exhibits

- Exhibit 3: Informing the Accused: states Mr. McAdory was arrested for a violation of "OWI," and was provided the notice required by Wisconsin's Implied Consent Law. (82.)

- Exhibit 4: Alcohol/Drug Influence Report: contains Officer Bier's opinion that Mr. McAdory was under the influence of intoxicants, and that "odor" was what first let the officer to suspect alcohol or drug influence.[1] (83.)

[1] Officer Bier testified that he observed the odor of intoxicants. He did not testify that he observed any odor of a controlled substance, such as marijuana, from Mr. McAdory's person or vehicle. (129:110-11.)

- Exhibit 5: Larson's Toxicology Report: reports positive values of cocaine: 130 ug/L and Delta-9-tetrahydrocannabinol (THC): 3.0 ug/L. (84.)

- Exhibit 6: Medical records from Mr. McAdory's admission to emergency room, including a diagnosis of "alcohol abuse with intoxication, uncomplicated." (85.)

- Exhibit 7: Toxicology Report showing ethanol not detected in Mr. McAdory's blood. (86.)

The evidence in total is not probative of impairment by a controlled substance; the jury could not reasonably infer that Mr. McAdory was impaired by THC or cocaine based upon this evidence. *Herbst v. Wuennenberg*, 83 Wis. 2d 768, 774, 266 N.W.2d 391 (1978) (jury verdicts must be based on evidence, not "conjecture and speculation").

The State argues it is not required to provide evidence linking impairment to a controlled substance, because "there is no set prohibited concentration for drugs because individuals react differently to them and exhibit signs of impairment at varying levels." (Resp. Br. at 10.) It is precisely *because* of this fact that the State must provide evidence not just of a positive test for controlled substances, but of impairment by those controlled substances.

While the State concedes that blood test results showing the presence of a controlled substance do not prove Mr. McAdory was under the influence of a controlled substance,[2] it maintains the law does not provide specific requirements as

[2] The State makes no argument to the contrary. *Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) ("propositions of appellants are taken as confessed which [respondents] do not undertake to refute").

to the type of evidence that must be offered. (Resp. Br. at 12.) Of course, this is not what Mr. McAdory argues.

While the law does not set forth specific evidentiary requirements, the State must offer *something* to prove impairment by a controlled substance, for the State has the burden of proof on every element. *In re Winship*, 397 U.S. 358, 363-64 (1970). The State's lack of evidence of impairent was detailed in-depth in Mr. McAdory's brief in chief, (*see* Br. at 16-19), which established there was no evidence at trial as to the impairing effects of cocaine or THC and that those effects were present in Mr. McAdory, nor was there any evidence that Mr. McAdory was physically or mentally impaired to a degree to impact his ability to drive in any way.

Finally, the State also relies on evidence that Mr. McAdory was nervous, gave Officer Bier the wrong first name, and fled from the traffic stop and argues that the jury could infer this was evidence of consciousness of guilt. (Resp. Br. at 11.) Yet without any evidence of actual impairment by a controlled substance, this inference would also be unreasonable. A jury may draw reasonable inferences from facts established by circumstantial evidence, but it may not indulge in inferences wholly unsupported by any evidence. *State ex rel. Kanieski v. Gagnon*, 54 Wis. 2d 108, 117, 194 N.W.2d 808 (1972).

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 guilty beyond a reasonable doubt." *Poellinger*, 153 Wis. 2d at 501. The trial evidence was insufficient as a matter of law to establish beyond a reasonable doubt that Mr. McAdory was guilty of operating while intoxicated by a controlled substance.

II. THE TRIAL COURT IMPROPERLY MODIFIED THE STANDARD JURY INSTRUCTION FOR OPERATING WHILE UNDER THE INFLUENCE OF A CONTROLLED SUBSTANCE

The trial court erroneously exercised its discretion by eliminating from Instruction 2664 key language defining the element of "under the influence of a controlled substance." The court applied an incorrect legal standard by treating the offense as a strict liability offense, and it failed to tailor the instructions to the facts of the controlled substances at issue in this case. The language removed from the standard instruction was necessary for an accurate statement of the law regarding impairment and to help the jury understand the difference between this count the strict liability offense of operating with a detectable amount of restricted controlled substance.

A proper jury instruction is one that "accurately describes the circumstances in which a jury can infer whether an operator's ability to operate a vehicle is 'materially impaired.'" *State v. Waalen*, 130 Wis. 2d 18, 28, 386 N.W.2d 47 (1986). The jury did not receive that here. The court's error resulted in an instruction that misled the jury regarding the State's burden of proof in violation of Mr. McAdory's due process rights. *State v. Ziebart*, 2003 WI App 258, ¶ 6, 268 Wis. 2d 468, 673 N.W.2d 369 (jury instructions unconstitutional where "jury understood the instructions to allow a conviction based on insufficient proof").

A. Removing language from Instruction 2664 was an erroneous exercise of discretion

The State argues it was within the trial court's discretion to amend the language of Instruction 2664. (Resp. Br. at 13.) This is true, but a proper exercise of discretion requires a trial court to "examine[] the relevant facts, appl[y] a proper

standard of law, use[] a demonstrated rational process, and reach[] a conclusion that a reasonable judge could reach." *State v. Echols*, 2013 WI App 58, ¶14, 348 Wis. 2d 81, 831 N.W.2d 768. Here, the trial court erroneously exercised its discretion for two reasons.

The court's decision to remove the middle paragraph explaining the "under the influence" was based on an incorrect legal standard: that this offense was a strict liability offense. (129:171-72; App.107-08 ("that language [regarding ability to control vehicle], I think, adds to confusion is because of point you just made. *It's a strict liability provision. Okay? It's in your blood, you're done*." (emphasis added).) The court's statements make it clear that it modified the language on the incorrect basis that the presence of a controlled substance in Mr. McAdory's blood was sufficient for a conviction. The State does not argue otherwise.

Instead, the State argues that on Footnote 9 of the committee comments to Instruction 2664 supports the court's modification of the standard instruction. (Resp. Br. at 16.) First, the State is also wrong when it claims Mr. McAdory's opening brief selectively quotes Footnote 9 by leaving out the sentence regarding substances with "extreme effects," (*id.*); Mr. McAdory quotes the footnote in its entirety at page 22 of his brief.

The committee noted that the language in the form instruction is appropriate for cases involving the consumption of substances "roughly similar in their effect on a person as alcohol," while other controlled substances have "such extreme effects" that the sentence in brackets should not be used. JI-CRIM 2664, n.9. But the State cites to no evidence in the record that THC and cocaine were not similar to alcohol in their effects, nor that either substance has "such extreme

effects" on the user that the language was inappropriate for the facts of this case. It cannot do so, because no such findings were made by the trial court.

The State argues it was Mr. McAdory's burden to show that someone could use cocaine and THC in limited amounts and not be "under the influence." (Resp. Br. at 16.)[3] This is exactly the type of burden-shifting that made the jury instruction at issue improper and an inaccurate statement of the law.

B. The jury did not receive an accurate instruction regarding the definition of "under the influence"

The jury instruction was inaccurate because it failed to explain to the jury what impairment by a controlled substance *was*, only what it *was not*. The jury was told, "it is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving." (129:78.) But it was not instructed that the level of impairment required to satisfy this element is met only "when a person is incapable of driving safely, or is without proper control of all those faculties necessary to avoid danger to others," *Waalen*, 130 Wis. 2d at 27, or is "to some degree at least[,] less able either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle as powerful and dangerous a mechanism as a modern motor vehicle with safety to himself and the public." *City of Fond du Lac v. Hernandez*, 42 Wis. 2d 473, 475-76, 167 N.W.2d 408 (1969).

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[3] The State claims Mr. McAdory "does not argue these things because he cannot; there is no evidence to support such claims." (Resp. at 16.) This is contracted by the State's own argument regarding the sufficiency of the evidence: "there is no set prohibited concentration for drugs because individuals react differently to them and *exhibit signs of impairment at varying levels*." (Resp. at 10 (emphasis added).)

This standard would have been accurately relayed to the jury had the court not removed the explanatory language from Instruction 2664.[4] The removal of these key sentences from the definition of "under the influence" prevented the jury from being "fully and fairly inform[ed]" of the law. *Ziebart*, 2003 WI App 258, ¶ 16.

C. The revised instruction unconstitutionally misled the jury

Based the totality of the proceedings, the instruction was reasonably likely to mislead the jury as to the standard for finding Mr. McAdory under the influence of a controlled substance, and to convict him on insufficient proof in violation of his due process rights. *See State v. Austin*, 2013 WI App 96, ¶ 16, 349 Wis. 2d 744, 836 N.W.2d 833 (jury instruction that allows conviction based on insufficient proof violates the defendant's constitutional rights).

The State argues that misunderstandings and misstatements of the law by the prosecutors and the trial court do not impact the issue of whether the jury understood the instructions. (Resp. at 22.) But the reviewing court must "examine the challenged jury instructions in light of the proceedings as a whole." *State v. Lohmeier*, 205 Wis. 2d 183, 194, 556 N.W.2d 90 (1996). Thus, the improper arguments made by the State in opening and closing conflating this count with the strict liability count, as well as the court's own

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[4] The removed language mirrored the standards from *Waalen* and *Hernandez*:

> Not every person who has consumed (name controlled substance) is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of (name controlled substance) to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

JI-CRIM 2664.

mistaken application of the strict liability standard to this count in determining how to instruct the jury, cannot be ignored when in determining whether Mr. McAdory's constitutional rights were violated by the instruction. It does not make practical sense that the jury could discern the appropriate legal standard to apply when both the prosecutor and the court incorrectly believed the offense was a strict liability offense.

The jury's confusion was demonstrated by its questions during deliberation as to whether the definition of operating while intoxicated was the same as operating under the influence of a controlled substance. (129:206; 87.) The State explains this away by raising the issue of an incorrect title of the offense on the verdict sheet. (Resp. Br. at 20-21.) Rather than dispelling any question of juror confusion, the State raises an important point that demonstrates *additional* confusion by the jury – confusion between whether Mr. McAdory was under the influence of an intoxicant versus controlled substance. As further evidence of this confusion, the jury also asked about "the metabolization slash oxidation rate for alcohol," (129:208; 87), evidencing a likelihood that the jury relied on evidence of *intoxication* instead of impairment by a controlled substance. The jury's question makes sense when viewed in full context of the evidence at trial, and the fact that where there was any evidence of impairment, it was related to impairment by an intoxicant and *not* a controlled substance. The jury's questions demonstrated that the modified instruction was insufficient to explain the standard for "under the influence" of a controlled substance, and that it is reasonably likely that the jury was misled by the court's removal of defining language from Instruction 2664, in violation of Mr. McAdory's constitutional rights.

D. The erroneous instruction was not harmless

For an error to be harmless, the State, as the party benefiting from the error, must prove that it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *State v. Harvey*, 2002 WI 93, ¶¶ 40, 46, 254 Wis. 2d 44, 647 N.W.2d 189. The State fails to do so here.

In this case, the State argues that "[a]ny lay person knows generally what 'under the influence' means" and the amended instruction "combined with the jurors' common sense would have led any reasonable jury to find McAdory guilty" based on the evidence at trial. (State Resp. at 23.) The State goes on to refer to its arguments regarding the sufficiency of the evidence – most of which was evidence of suspected *intoxication* not impairment by a controlled substance. (*See* State Br. at 7-8.)

Further, whether an error is harmless is a distinct inquiry from the sufficiency of the evidence. "Time and again, the Supreme Court has emphasized that a harmless-error inquiry is not the same as a review for whether there was sufficient evidence at trial to support a verdict." *Jensen v. Clements*, 800 F.3d 892, 902 (7th Cir. 2015). Instead, the question must be whether the error affected the jury's verdict:

> And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had on the jury's decision ... The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence.

Id. (quoting *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946)).

The incorrect jury instruction was not harmless here, particularly when viewed in the context of the misunderstandings and misstatements of the law by the prosecutors and the trial court. The State cannot prove beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *Harvey*, 254 Wis. 2d 44, ¶¶ 40, 46.

III. MR. MCADORY'S CONVICTION OF OPERATING UNDER THE INFLUENCE OF A CONTROLLED SUBSTANCE SHOULD BE REVERSED BECAUSE THE REAL CASE OR CONTROVERSY WAS NOT FULLY TRIED

As detailed above and in Mr. McAdory's opening brief, the prosecution arguments during opening and closing misstating the law on the operating while under the influence of a controlled substance, coupled with the court's removal of language defining "under the influence" *and* (as raised in the State's response) the incorrectly titled count on the verdict sheet, confused the jury and prevented the real case or controversy from being fully tried. For these reasons, this court should exercise its discretionary power to reverse the conviction on this count.

The jury was provided incorrect and inaccurate information throughout the entirety of the trial regarding the elements the State was required to prove in order to secure a conviction:

- The State argued *twice* in its opening statement that the offense of "operating while intoxicated" had two elements: the defendant was driving, and a

detectable amount of controlled substances in his system. (129:98-100.)

- The only witness to testify regarding signs of impairment of Mr. McAdory opined that Mr. McAdory was intoxicated, based on an odor of intoxicants, "slightly slurred" speech, his admission of consuming one beer, and an open can of beer found in the vehicle. (129: 110-11, 115.)

- The jury received an inaccurate and/or misleading jury instruction on the count of operating while under the influence of a controlled substance.

- The State's only argument regarding impairment during its closing was related to intoxication: (129:188 (Officer Bier "believes that he is impaired. Intoxicated in some way. That's through his behavior and the fact that he smelled an odor of intoxicants. That odor makes sense… later he found a beer in the car.")

- During deliberations the jury requested clarification on the difference between operating while intoxicated and operating while under the influence of a controlled substance, as well as asked for additional information regarding asked questions regarding metabolization of alcohol. Additionally, the verdict sheets provided to the jury incorrectly titled the count in question "operating while intoxicated" instead of "operating under the influence of a controlled substance."

Throughout the trial, both the prosecutors and the court conflated the two OWI charges Mr. McAdory faced, at times treating both as strict liability offenses and at others confusing

the charge of operating under the influence of a controlled substance with operating while intoxicated. This is not surprising when the state's case was made up of an officer who believed that Mr. McAdory was under the influence of an intoxicant, coupled with evidence that a detectible level of cocaine and THC was found in Mr. McAdory's blood.

Where, as here, a court's failure to provide the jury a proper framework for analyzing the key issue at trial prevented that issue from being fully tried, reversal is appropriate. *Austin*, 2013 WI App 96, ¶ 23. For these reasons, his conviction should be reversed pursuant to this court's discretion under Wis. Stat. § 752.35.

CONCLUSION

For the foregoing reasons, Mr. McAdory respectfully requests the Court to enter an order vacating the Judgment of Conviction and directing the trial court to enter a judgment of acquittal notwithstanding the verdict on Count 1. Alternatively, Mr. McAdory asks this Court to vacate the Judgment of Conviction and remand this case to the circuit court for a new trial on Count 1.

Dated this 4th day of June, 2021.

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 3,678 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 4th day of June, 2021.

Electronically signed by Jennifer A. Lohr

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