STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
****

CASE NO. 2021AP000405-CR

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

-vs- **Case No. 2018 CF 1**
(Dodge County)

MARTY S. MADEIROS,
DEFENDANT-APPELLANT.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND THE ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN DODGE COUNTY CIRCUIT COURT, THE HONORABLE MARTIN DE VRIES PRESIDING.

DEFENDANT-APPELLANT'S REPLY BRIEF

BY:

Philip J. Brehm
Atty For Defendant-Appellant
23 West Milwaukee St., #200
Janesville, WI 53548
608/756-4994
Bar No. 1001823

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ARGUMENT

I. THE TRIAL COURT'S FAILURE TO HOLD A *MACHNER* HEARING WAS AN ERRONEOUS EXERCISE OF DISCRETION.

A. Defendant's postconviction motion alleges sufficient facts to entitle him to a *Machner* hearing.

The State's position on this issue is perplexing. It argues the defense postconviction is conclusory and in its own conclusory and empty way, argues that defendant is not entitled to relief because the record conclusively shows defendant is not entitled to relief (State's brief at 21-23). That simply is not true.

Defendant has alleged three separate theories as to why he is entitled to relief due to ineffective assistance of counsel. He need only show one theory to trigger a *Machner* hearing. He easily does that.

1. Prior OWI convictions.

Defendant can prove the following:

-In a pretrial hearing, the State recognized that it would be improper to inform the jury that defendant had been convicted of OWI on four occasions.

-Notwithstanding its recognition that would be improper to introduce such evidence, the State inadvertently played video that informed the jury that defendant had been convicted of OWI on four prior occasions.

-There is no evidence in the record that trial counsel moved for a mistrial based on the erroneous admission of this evidence.

-The trial court instead gave a cautionary instruction about the prior convictions.

-In *State v. Alexander*, 214 Wis.2d 628, 571 N.W.2d 662 (1997) and *State v. Diehls*, 2020 WI App 16, 391 Wis.2d 353, 941 N.W.2d 272, appellate courts found evidence of prior OWI convictions is extremely prejudicial and may not be cured by a cautionary instruction.

> -Defendant's theory of defense was that he had consumed alcohol after he had last driven. He was found away from his vehicle a lengthy time after his vehicle was found disabled along the roadway.

These alleged facts are not a defense wish list. The defense can demonstrate each and every one of them. If these facts were to be demonstrated, a reviewing court, this court has the legal basis to grant defendant a new trial.

For this court to do a proper review and to reach a fair and just result, it needs to know more about what happened. For reasons not the fault of defendant, there are gaps in the record. The State pounces on these gaps and tries to suggest the gaps would all favor the State. For example, the State argues that maybe the jury did not hear about defendant's four prior OWI convictions (State's brief at 26). It tries to recreate what may have been played to the jury about the prior convictions even though appellate counsel for the State was not present at trial (State's brief at 26). Of course, that is not possible in reviewing the current record because the prosecutor did not precisely indicate what portion of the video inadvertently played contained the reference to the prior convictions and the specifics of that reference. Why should the defendant bear the consequences of an incomplete record in this regard? How is that fair? Why shouldn't he be allowed to have these facts developed? How does he obtain complete appellate review?

The State also argues that because defendant testified, the jury would have heard about his prior criminal convictions and they were aware he had a .02 blood alcohol concentration limit, meaning the jury "was likely already going to recognize at least one of these convictions was probably an OWI" (State's brief at 26).[1] This argument is cynical and speculative. The logical conclusion of the State's argument is that any time the defendant testifies at trial for an OWI 4th or greater charge, the jury is going to be aware of prior OWI convictions.

[1] In spite of its error in inadvertently playing video evidence defendant had four prior OWI convictions, that did not stop the State from asking defendant during cross-examination whether he had been convicted of a crime and if so, how many time (169:54).

There is also a gap in the record as to what took place after the error. There is no evidence trial counsel moved for a mistrial. Why not? Based on the law from *Alexander* and *Deihls,* it appears a motion for a mistrial by defense counsel would not only have been appropriate, but mandatory to protect defendant's interests. The suggestion by the State that trial counsel requesting a mistrial would somehow have been a novel theory makes little sense (State's brief at 27-28).

The State concedes the discussion about the development of the cautionary instruction in the face of the erroneous admission of the evidence was off the record. (State's brief at 28). Again, what took place during this hearing? What did defense counsel do to protect defendant's rights? Again, why should defendant bear the consequences of the incomplete record? How is it reasonable to demand that defendant, as a layperson, recount in an affidavit in support of his postconviction motions what took place during this off-the-record process? What there any discussion between defendant and trial counsel about what should be done in the face of the error?

As to whether defendant was prejudiced, *Alexander* indicates these types of errors cannot be cured through the use of cautionary instructions. For all of the reasons set forth in *Diehls,* in OWI cases, there is a heightened likelihood the prior convictions will be misused by the jury. Defendant presented a plausible defense. His defense relied heavily on his credibility. Evidence of the prior OWI convictions likely diminished his credibility in the eyes of the jury. That is the prejudice.

On this issue alone, defendant has presented a meritorious theory for relief. If his alleged facts can be proven, not only has defendant alleged a basis for relief, he is entitled to that relief.

2. Other acts evidence.

The defendant argues this issue in the alternative. Defendant asserts he is entitled to a new trial because the trial court erroneously exercised it discretion in admitting the evidence by failing to perform an appropriate *Sullivan* analysis. In the alternative, defendant asserts trial counsel was ineffective in failing to require the trial court to rule on whether the probative value of the evidence was far outweighed by the danger of unfair prejudice.

The State argues evidence about the prior hit and run conviction was not really other acts evidence, and if it was, the trial court appropriate conducted a *Sullivan* hearing. In its analysis, the State meticulously goes through each of the *Sullivan* components and declares the trial court performed the proper analysis (State's brief at 18-20). The State ignores the obvious problem. The trial court never weighed whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. It was not done. That is the epitome of the erroneous exercise of discretion. The circuit court did not apply the proper standard of law in contravention of law. *See Loy v. Bunderson*, 107 Wis.2d 400, 414-15, 320 N.W.2d 175 (1982).

Evidence of the prior conviction was of marginal relevance. The State argues it was relevant to show he lied to police. The State presented a laundry list of alleged lies by defendant in support of it argument supporting its admission (175:31, App. at 105). While defendant's prior conviction was mentioned during his discussion with police after his arrest, he was truthful about that conviction, greatly diminishing its relevance. The State utterly ignores how detrimental the prior hit and run would have been to the defense. It argues it was a property offense and because he was caught after its commission, there was no evidence he was driving while intoxicated on that occasion (State's brief at 19-20).

Defendant obviously disagrees and asserts there is sufficient prejudice to warrant a new trial, especially in tandem with the erroneous admission of defendant's prior OWI convictions. Other acts alleged against a defendant are usually bad of obvious reasons. There is a danger the jury will use this type of evidence as justification to punish a defendant even if he or she is innocent. A jury could easily infer from

this recent hit and run evidence that defendant fled from the earlier accident to avoid an arrest for OWI, meaning in the jury's eyes, he unjustly escaped an OWI conviction. While the hit and run came out during defendant's discussion with police, it was tangential to the State's argument on whether defendant obstructed an officer. The tangential relevance of the hit and run arguably would be far outweighed by the danger of unfair prejudice to the defense occasioned by a prior criminal act.

The State argues that evidence was not even other acts evidence. Let's assume it was not. The State still knew enough to file a pretrial motion seeking its admission because of its inflammatory nature. Whether it is other acts evidence under Wis. Stat. §904.04(2) or whether it was presented pursuant to Wis. Stat. §904.03, the trial court still has to weigh the probative value of the evidence against the danger of unfair prejudice. Either way, prejudice was not weighed in this case. A perfunctory assertion by the State that the evidence was not unduly prejudicial does not remedy this error.

Defendant recognizes trial counsel objected to the admission of the evidence. The assertion of ineffective assistance of counsel was in anticipation of an argument by the State the issue was waived by the defense because trial counsel did not ask the trial court to make the ruling on prejudice.

3. Expert testimony by witness Laufer.

On this issue, the State argues it is black-letter law that police officers can testify about matters related to their training and experience (State's brief at 34-35). In *State v. Chitwood,* 2016 WI App 36, ¶48, 369 Wis.2d 132, 879 N.W.2d 786, the court recognized police officers routinely testify about whether a person is able to safely drive based on their perception of various factors, coupled with their training and experience. The alleged error in this case is qualitatively different than the type of testimony discussed in *Chitwood.*

In this case, the retired officer testified as an expert in footprint patterns and parking techniques of intoxicated persons. This was allegedly specialized knowledge that would assist the jury to understand the evidence or to determine a fact at issue, defined in Wis. Stat. §907.02. Because this was

allegedly specialized knowledge gained through her experiences as a police officer, it was not lay witness testimony. Calling her a lay witness does not make it lay witness testimony. This was not a comment on slurred speech or field sobriety tests. She claimed to be able to tell if someone was intoxicated based on observations not related to the observation of the person, including footprints and the way they parked their car. There is no such science. While she could testify about what she observed, under the circumstances, it was inappropriate for her to draw conclusions as an expert witness in the presence of the jury, whether designated as such or not.

This error coupled with the other errors is sufficient to warrant a new trial.

II. DEFENDANT IS ENTITLED TO A NEW TRIAL BASED ON ERRORS COMMITTED AT TRIAL.

For the reason previously argued, defendant Madeiros should be granted a new trial regardless of whether a *Machner* hearing is held.

CONCLUSION

For the reasons set forth above, defendant should be granted a new trial based on ineffective assistance of counsel and based on the trial court's erroneous admission of other acts evidence. In the alternative, the matter should be remanded with instructions for the trial court to hold a *Machner* hearing and to decide the motion within time limits set by this court.

Dated: August 29, 2021

Attorney for Defendant
Electronically signed by Philip J. Brehm
Bar No. 1001823
Email: philbreh@yahoo.com

CERTIFICATION AS TO FORM AND LENGTH/APPENDIX CERTIFICATION

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 this brief is 1860 words.

Dated: August 29, 2021

Attorney for Defendant
Electronically signed by Philip J. Brehm

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Rule 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 and that 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: August 29, 2021

Attorney for Defendant
Electronically signed by Philip J. Brehm