STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
****
Case No. 2021AP405-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

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

MARTY S. MADEIROS,
Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVCITION RELIEF, ENTERED IN LA CROSSE COUNTY CIRCUIT COURT, THE HONORABLE MARTIN DE VRIES PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

BY:

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ARGUMENT

I. DEFENDANT SHOULD BE GRANTED A NEW TRIAL BECAUSE THE TRIAL COURT ERRED IN DENYING HIS MOTION FOR A MISTRIAL AFTER THE JURY ERRONEOUSLY HEARD DEFENDANT HAD FOUR PRIOR OWI OFFENSES.

A. Defense counsel requested a mistrial.

In it brief, the State suggests defense counsel may have made a strategic decision to request a curative instruction (State's brief at 14). This suggestion is inconsistent with the trial court's findings of fact. The trial court found there was an off-the-record discussion related to the erroneous admission of evidence of four prior OWI convictions (177:2)[1]. The trial court found defense counsel requested a mistrial and only agreed to a curative instruction in an attempt to make the best of the situation for defendant (177:3). This finding was consistent with trial counsel's testimony at the postconviction motion hearing (200:30)[2]. The trial court's finding of fact is entitled to deference unless it was clearly erroneous. *See e.g. State v. Thiel,* 2003 WI 111, ¶21, 264 Wis.2d 571, 665 N.W.2d 305. The trial court's finding is supported by the record and therefore is not erroneous.

[1] Counsel for defendant realizes an incorrect record cite was used in defendant's brief-in-chief for this document, the trial court's findings of fact related to the postconviction motion. It was cited as "218," the circuit court's designation. It should be "177." Counsel apologizes to opposing counsel and the court for any confusion caused by this error.

[2] Counsel for defendant realizes an incorrect record cite was used in defendant's brief-in-chief for this document, the transcript of the postconviction motion hearing held on 2/25/22. It was cited as "216," the circuit court's designation. It should be "200."

B. The jury heard the evidence of the prior OWI convictions.

The State repeatedly argues the jury may not have heard the evidence of defendant's four prior OWI convictions (State's brief at 14-15, 17-18)[3]. This argument is a nonstarter and does not improve with repetition. It is not supported by the record and is based on speculation. Trial counsel testified the jury heard the evidence (200:27). The trial court found the jury heard the evidence (177:2). The trial court's finding of fact is entitled to deference. The finding of fact is supported by the record and is not clearly erroneous.

C. Case law supports the premise that the damage caused by the erroneous admission of prior OWI convictions cannot be remedied by a curative instruction.

The State argues there is no support for the defense argument that that a cautionary instruction cannot cure the error of a jury learning someone has prior OWI convictions (State's brief at 15). In *State v. Alexander*, 214 Wis.2d 628, 571 N.W.2d 662 (1997), the court recognized:

> The Wisconsin Criminal Jury Instructions Committee (Committee) recognized the inherent danger of unfair prejudice to a defendant of admitting any evidence of the defendant's prior convictions, suspensions or revocations under Wis. Stat. §343.307(1) and submitting the element to the jury. See Wis. JI Criminal 2660-2665 Introductory Comment at 7. The Committee suggested that at the defendant's request the court give a cautionary instruction to the jury explaining that evidence of the prior offenses is relevant only as to the status of the defendant's driving record and should not be used for any other purpose. See Wis. JI Criminal 2660B. The Committee recognized, however, that "the potential prejudice to the defendant may be significant and may not be adequately cured by a limiting instruction." Wis. JI Criminal 2660-2665 Introductory Comment at 7. We agree with the Committee's concerns. Evidence of prior convictions may lead a jury to convict a defendant for

[3] This is really a weak argument. Couldn't that be said of any video evidence a litigant didn't like at trial?

> crimes other than the charged crime, convict because a bad person deserves punishment rather than based on the evidence presented, or convict thinking that an erroneous conviction is not so serious because the defendant already has a criminal record. (citations omitted). *Id*. at 643- 44, 571 N.W.2d at 668.

In *State v. Diehls*, 2020 WI App 16, ¶47, 391 Wis.2d 353, 941 N.W.2d 272, the court confirmed this concern:

> When it comes to the danger of unfair prejudice, the "nature of the drunk driving offense and the social stigma attached to it" makes repeat OWI prosecutions "unique." *State v. Warbelton*, 2009 WI 6, ¶¶45, 46, 315 Wis. 2d 253, 759 N.W.2d 557. In these cases, if the jury infers that a defendant has multiple prior OWI convictions, this presents an "extremely high" risk of unfair prejudice for three reasons: First, upon learning that the defendant has prior convictions, suspensions, or revocations, jurors are likely to infer that these prior offenses were also for drunk driving—precisely the same offense the defendant is charged with now. Second, upon learning that the defendant had multiple prior offenses, jurors are likely to infer that the current charge is part of a pattern of behavior—that is, that the defendant habitually drives while intoxicated. Third, given the defendant's probable habit of driving while intoxicated, jurors might conclude that even if the defendant is not guilty on the particular occasion charged, the defendant likely committed the same offense on many other occasions without being caught. As a result of the propensity inferences that the jury is likely to make, "the jury is likely [to] convict, even if there is not persuasive proof that the defendant is guilty of the instant charge." Id. at ¶47.

Prior to trial, the State agreed the four prior OWI convictions were inadmissible at trial (171:32). In making that concession, the State presumably was recognizing the probative value of this evidence was far outweighed by the danger of unfair prejudice. The State did not suggest the evidence could be admitted with an accompanying cautionary instruction. Proceeding in this fashion would have flown in the face of the law from *Alexander* and *Diehls.*

If the four prior OWI convictions were inadmissible with an accompanying cautionary instruction before trial, it could be no more admissible with an accompanying cautionary instruction *during* trial. The concerns raised in *Alexander* and *Diehls* are the same regardless of how the evidence is presented during trial, either deliberately or inadvertently.

The State is really arguing the admission of the four prior OWIs, with the subsequent cautionary instruction, made any error harmless. This is a separate analysis. Outside a harmless error analysis, case law consistently recognizes it is ordinarily inappropriate to allow the admission of prior OWI convictions during a jury trial, even with a curative instruction.

D. There erroneous admission of the prior OWI convictions was not harmless.

Defendant continues to argue that because of the nature of the erroneously introduced evidence, prior OWI convictions, this error is not subject to a harmless error analysis.

In the alternative, defendant asserts this error was not harmless. The State has the burden of demonstrating any error was harmless under *State v. Hale,* 2005 WI 7, ¶60, 277 Wis.2d 593, 691 N.W.2d 637. The State cannot meet that burden.

As previously argued, the issue for the jury was whether defendant was legally intoxicated when he last operated his motor vehicle. Defendant was not found behind the wheel of his vehicle. His first contact with police was over an hour after his abandoned vehicle was reported to police (170:106, 184). His defense was he had consumed a substantial amount of alcohol after he last drove. There was no direct evidence defendant had consumed alcohol prior to his car becoming disabled. No witness testified to seeing him consume alcohol prior to abandoning his car.

Defendant had the strong odor of intoxicants on his person when an officer first had contact with him, suggesting he had recently consumed alcohol (170:193-94).

The trial court denied defense counsel's motion for a mistrial. It found there was no reasonable likelihood the erroneous admission of the four prior OWI convictions contributed to defendant's conviction (177:3-4). In reaching its decision, the trial court found defendant's story "made no sense" (177:3). The court noted no bottles were found along the trail where defendant walked (177:3). The State suggests defendant's decision to leave his car rather than waiting for help was implausible (State's brief at 177:3).

The trial court's opinion should not serve as a reliable substitute for the judgment of 12 independent jurors. As to the trial court's observation that no bottles were found, no exhaustive search for bottles was made during the police investigation. The relevant investigation took place between roughly 1 a.m. and 2:30 a.m., with limited lighting along the trail. An officer testified there was blowing snow on the trail where defendant was found walking (170:183-84). A reasonable juror could have concluded this may have obscured the visibility of any empty bottles.

As to defendant's decision to leave his vehicle, a reasonable juror could have found this was a pragmatic choice. There was no evidence defendant had a usable cell phone to call for help. Defendant's vehicle was disabled and partially in the roadway (170:126-27). Witness E.L. testified she had to cross the centerline of the road to avoid hitting the vehicle as she passed it (170:127). Under these circumstances, defendant decision to leave his disabled vehicle partially on the roadway may have been wise, allowing him to avoid being in the vehicle were it to be struck by a passing motorist. Defendant may have reasonably concluded there would have been little hope of someone stopping to help him, an adult male, that time in the morning.

As to defendant's decision to consume alcohol after leaving his vehicle, while one can debate the wisdom of him doing so, it would not be an incredible decision to make. There is a common misconception that alcohol can warm the body in cold conditions.

Defendant's four prior OWI convictions would have caused the jury to be skeptical of his credibility and his defense for the reasons cited in *Alexander* and *Diehl*. There is a reasonable likelihood the result of the trial would have been different but for this error. The error was not harmless.

II. THE TRIAL COURT ERRED IN ALLOWING EVIDENCE REGARDING DEFENDANT PRIOR HIT AND RUN CONVICTION.

A great deal of other acts evidence related to this case was admitted, including:

> a. Defendant fled the scene of an accident involving another occupied vehicle on 6/22/17.
>
> b. As a result of the accident, defendant's operating privileges were revoked.
>
> c. As a result of the accident, defendant was placed on probation.
>
> d. A condition of that probation was that defendant not drink alcohol (170:101-02).

The State makes a two-part argument. First, it argues the above evidence was contextual, and therefore not other acts evidence (State's brief at 22-24). Second, it argues it was evidence of modus operandi (State's brief at 22-24). Neither position justifies the admission of the evidence.

Assuming for the sake of argument the evidence was relevant to the context of defendant's statements, this does not make it automatically admissible. This was not inconsequential evidence. A pretrial motion hearing was held on its admissibility (171). Both parties recognized the danger of unfair prejudice created by its admission. Whether analyzed as potentially unfairly prejudicial evidence under Wis. Stat. §904.03 or as other acts evidence under other acts evidence under Wis. Stat. §904.04(2), the trial court had to conduct a final step in the analysis, that is whether its probative value was substantially outweighed by the danger of unfair prejudice to the defendant, probably the most important part of the analysis. The trial court did not address this step in the analysis! In failing to do so, the trial court erroneously exercised it discretion. The question then gets to be, under the law previously cited by the defendant from *State v. Pharr,* 115 Wis.2d 334, 343, 340 N.W.2d 498 (1998), whether this court, after a review of the record, can determine whether it provides a basis for the circuit court's exercise of discretion.

While one can simply pronounce that the probative value of any item of evidence is not far outweighed by the danger of unfair prejudice for virtually any challenged evidence, that is not an exercise of discretion. In its argument, The State carefully avoids an objective analysis as to how obviously damaging this evidence was to the defense. This was horrible, inadmissible evidence creating a huge risk of the defense being unfairly prejudiced by its admission. It told the jury the defendant had committed a hit and run crime several months earlier, that he was on probation at the time of the offense and that he was not to consume alcohol, suggesting to the jury the prior hit and run offense was *a drunk driving offense* and that he may have escaped full punishment on that occasion.

If this evidence merely provided context for the jury, its primary purpose was tangential to the issues for the jury, limiting is probative value. The State argues without this evidence, the State could not have effectively presented defendant's interaction with the arresting officers because the story would have appeared disconnected and it would have made little sense (State's brief at 24). Defendant obviously disagrees with that assessment. This often has to be done in trials when other acts evidence may be inadmissible. In fact, *in this case,* the parties recognized the prior OWI convictions were not admissible even though they were brought up during defendant's interaction with police. Although the attempt failed, the parties had a plan to allow the State to fully present its case without unfairly prejudicing the defendant. In criminal trials, the parties often have to find a way to allow the State to present its evidence without unfairly prejudicing the defendant. Admitting this type of evidence because it is too difficult not to do so is irresponsible and abdicates the court's duty to avoid the danger of unfair prejudice to a party.

When one conducts an appropriate balance between the probative value of this evidence and the danger of unfair prejudice, it is obvious the probative value of the evidence was fair outweighed by the danger of unfair prejudice to the defendant.

Defendant disagrees with the State's suggestion the prior hit and run incident was evidence of defendant's modus operandi. Defendant had a duty to stay at the hit and run scene in the prior incident. He did not when his car became disabled in this case. While he can be legally faulted for

leaving the scene of an accident, he cannot be for leaving the scene of a disabled vehicle along the roadway. Without that duty to stay with his car, the prior incident is not evidence of modus operandi, but "propensity to commit crimes" evidence, inadmissible under Wis. Stat. §904.04(2). Even if this were admissible modus operandi evidence, its probative value was far outweighed by the danger of unfair prejudice, making it inadmissible under the final step of *Sullivan.*

This error alone is sufficient to justify a new trial. Like the erroneous admission of the prior OWI convictions, this error denied defendant his right to a fair trial by demolishing defendant's credibility in the eyes of the jury. It was not harmless for the same reasons the erroneous admission of defendant's prior OWI convictions was, that is it unfairly destroyed defendant's credibility in the eyes of the jury. A new trial is warranted.

III. DEFENDANT SHOULD BE GRANTED A NEW TRIAL BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL.

The sole issue of ineffective assistance of counsel relates to the admission of expert testimony by witness E.L. While this error is far less serious than the errors related to the admission of defendant's prior OWI convictions and the prior hit and run conviction, it is still error. The State argues E.L. did not testify as an expert, but rather as a lay witness (State's brief at 30). But she did. While she was no longer a police officer, she testified as to her special knowledge gained as a police officer. Based on her law enforcement experiences, she testified defendant was intoxicated when defendant left his vehicle based on how his vehicle was left and the footprints he left in the snow (170:156-58).

As previously argued, there are no scientific studies the State can point to that would allow a trained law enforcement officer to determine whether someone is intoxicated by the footprints they make in the snow or how they park their vehicle, because there are no such studies. Such testimony was not the product or reliable principles and methods as required by *Daubert.*

The State argues under the law from *State v. Chitwood,* 2016 WI App 36, ¶48, 369 Wis.2d 132, 879 N.W.2d 786, police officers may testify about whether someone is driving intoxicated based on their training and experience without the need for peer reviewed studies (State's brief at 32). The exact quote from *Chitwood* reads:

> Even [the arresting officer]'s inability to conduct the range of divided attention psychophysical tests did not render his conclusion unreliable. He had multiple other indicators that Chitwood's ability to drive the vehicle safely was impaired by drugs, such as Chitwood's extremely relaxed state, delayed verbal responses, lethargic movement, and slurred speech. Police officers routinely opine regarding a defendant's ability to drive safely based on personal observations of the defendant's behavior, appearance and driving, along with their training and experience. As the circuit court noted, these observations of a defendant's ability to function where divided attention and coordinative abilities is required need not be tested or subject to peer review in order to be deemed reliable and admissible. *Id.*

Arguably, the law from *Chitwood* is limited to situations where an officer is allowed to opine as to a driver's intoxication based on his or her direct observations of a suspected drunk driver and not based on circumstantial evidence of intoxication gathered in other ways. While E.L. could testify as to her observations, it was up to the jury to determine what the evidence meant.

Trial counsel should have objected to this evidence as inappropriate expert testimony. As to prejudice, as previously conceded, while this error in itself would not warrant a new trial, this error coupled with the other more serious errors is.

CONCLUSION

For the reasons set forth above, defendant Madeiros should be granted a new trial.

Dated: July 23, 2022

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b), (bm) and (c) for a brief is 2,924 words produced with proportional serif font.

Dated: July 23, 2022

Attorney for Defendant
Electronically signed by Philip J. Brehm

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. §801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and serve for all participants who are registered users.

Dated: July 23, 2022

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