State of Wisconsin
Supreme Court
Appeal No. 2022AP001583-CR

State of Wisconsin,

Plaintiff-Respondent-Respondent,

v.

James H. Siegert,

Defendant-Appellant-Petitioner.

Petition for Review of an Opinion of the Wisconsin Court of Appeals, District IV

Petitioner's Petition and Appendix

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Petition

Now comes the above-named petitioner, by his attorney, Jeffrey W. Jensen, and pursuant to § 809.62, Stats., hereby petitions the Wisconsin Supreme Court to review this appeal.

As grounds, the undersigned alleges and shows to the court that this case presents the perfect factual situation to allow the court to revisit the standard of appellate review for the sufficiency of circumstantial evidence to support a conviction[1].

Statement of the Issue

Siegert was charged with first degree reckless homicide by the delivery of a controlled substance. The evidence presented at trial was to the effect that Siegert, and three other individuals, including the deceased, Mae Matrick, drove to Rockford, Illinois, for the purpose of buying drugs. There, the group met with a supplier in the parking lot of a Wal-Mart. The people in the car all gave money to Siegert, who then went and purchased a quantity of white powder. When he got back to the car, the powder was "split up" among the people in the car. Matrick immediately consumed some of the white powder, and then the group began to drive back to Adams County. On the

[1] The undersigned is aware of another petition for review currently pending before the Wisconsin Supreme Court which presents an identical issue. The case is *State v. Lee Kennedy*, Appeal No. 2022AP1961. If the court decides to grant review, these two cases would be appropriate for consolidation for briefing.

way, Matrick was "having seizures." When they got back, they dropped Matrick off at her home. Many hours later, Matrick's mother found her slumped over a coffee table, apparently deceased. There was debris on the coffee table suggesting drug use.

At trial, the physician who conducted the autopsy on Matrick was not available, and the state chose not to present the testimony of a substitute expert concerning the autopsy. Rather, the state relied solely on the testimony of the Adams County Medical Examiner, Marilyn Rodgers, who offered the opinion that Matrick died accidentally as a result of an "acute drug fatality." Rodgers is not a physician, and she did not conduct an autopsy. The state also presented evidence that fentanyl was found in Matrick's blood.

Thus, the issue for this appeal is whether the circumstantial evidence was sufficient as a matter of law to prove that the substance obtained by Siegert in Rockford and then split up among the people in the car, was fentanyl, and that is was also the cause of Matrick's death many hours later.

Answered by the court of appeals: The evidence was sufficient to support the jury's guilty verdict.

Statement of the Case

I. Procedural History

On July 29, 2019, the petitioner, James Siegert (hereinafter "Siegert") was charged in a criminal complaint filed in Adams County with (1) first degree reckless homicide on December 1, 2018; (2) delivery of a controlled substance (fentanyl) on July 24, 2019; and possession of drug paraphernalia on July 24, 2019. [R:2] The reckless homicide charge arose out of the drug overdose death of McKenzie Mae Matrick (hereinafter "Matrick") on December 1, 2018. The remaining two charges arose out of a delivery of controlled substance, and then a warrant search of Siefert's home on July 24, 2019.

In a nutshell, the complaint alleged that on December 1, 2018, Siegert and several others, including Matrick, traveled from Adams County to Rockford, Illinois, where Siegert obtained a quantity of white powder that was split up among those in the car. *Id.* The complaint also alleged that on July 24, 2019, Siegert delivered a quantity of Fentanyl to Kristen Thor at Siegert's residence. The police obtained a warrant to search Siergert's residence and, there, they found a metal smoking pipe and a metal pick with burned residence. *Id.* According to the complaint, Siegert admitted to traveling to Rockford to

obtain heroin and Fentanyl, and he delivered it to persons "down the street" in Adams County. *Id.*

Siegert had a preliminary hearing, and, following the testimony, the court found probable cause bound Siegert over for trial. [42-13] The state filed an information alleging the same three counts, and Siegert entered pleas of not guilty to each of the counts. [42-16]

The matter proceeded to a jury trial beginning on July 21, 2021. After approximately two days of testimony, the jury returned verdicts finding Siegert guilty on all three counts. [R:144-66]

On count two the court sentenced Siegert to five years in prison, bifurcated as four years of initial confinement followed by one year of extended supervision. [R:141-39] On count three, the court sentenced Siegert to thirty days in jail concurrent to count two. *Id.* Finally, on count one (the homicide charge) the court imposed and stayed a consecutive sentence of ten years, bifurcated as six years of initial confinement and four years of extended supervision, and placed Siegert on eight years of probation. *Id.*

Siegert timely filed a notice of intent to pursue postconviction relief. There were no postconviction motions. Rather, Siegert filed a notice of appeal.

On appeal, Siegert argued that there was insufficient evidence to prove that the substance Siegert obtained in

Rockford and distributed to the others was fentanyl; further, that the evidence was insufficient to prove that the substance found on the table near the body was the substance Siegert delivered to her nine hours earlier; and, finally, that the evidence was insufficient to prove that the substance Siegert delivered to Matrick was what caused her death. On November 22, 2203, the court of appeals issued an opinion affirming Siegert's conviction.

According to the court of appeals, concerning the sufficiency of the evidence to establish the nature of the substance Siegert obtained in Rockford, the court reasoned, "The victim's brother and the other individual who accompanied Siegert and the victim to Rockford both identified the substance that Siegert provided as fentanyl." [Ct. App. p. 3] Thus, the evidence was sufficient to prove that the substance Sieget obtained in Rockford was, in fact, fentanyl.

Further, the court of appeals found that the evidence was sufficient to establish that the fentanyl Siergert obtained in Rockford was the same fentanyl that was found on the table near Matrick's body. The court reasoned, "The fourth individual . . . . [who went to Rockford with the group] testified that they did not stop to purchase drugs anywhere else during the trip. There wa also evidence indicating that, once the victim was dropped off at home, she did not use her phone to facilitate the purchase of additional fentanyl and no one else came to her

residence before she was found dead." [Ct. App. p. 3-4]

Finally, Siegert argued on appeal that the evidence was insufficient to show that the use of fentanyl was a substantial factor in causing death. This argument was based on the fact that there was no credible evidence as to the cause of death.

Once again, the court of appeal rejected Seigert's argument, writing:

> The county medical examiner testified that the cause of death was "acute drug fatality" and that "[t]here was no competing cause of death." Although the medical examiner did not explain the basis for her opinions, the opinions were consistent with the toxicologist's testimony and with evidence that the victim had overdosed on fentanyl. That evidence included testimony by a police officer describing drug paraphernalia found near the victim's body including a plastic wrapper with white residue, an aluminum foil "bindle,"5 a red straw with white powder, and a plate with a white substance on it. The officer also testified that there were brown and red substances found near the victim's body that he believed to be vomit and blood. That evidence included testimony that the white powdery substance near the victim's body tested positive for fentanyl.

[Ct. App. p. 4]

II. Factual Background

On November 30, 2018, Matrick and Toni Thor were leaving for a staff meeting at work; however, when they got outside thet found Shaun Russell in a car along with Siegert. [R:142-184] Thor realized that this was going to be a "drug run"

to Rockford. *Id.* Therefore, both Matrick and Thor got into the car.

When the group arrived in Rockford, they met the supplier in the parking lot of a Wal-Mart. [R:142-187] Matrick had some money, and she contributed it to the purchase of the drugs. *Id.* They all gave their money to Siegert. [R:142-218] Siegert and Russell got out of the car, and, according to Thor, Siegert bought the drugs and brought them back to the car. [R:142-189] Whatever Siegert brought back to the car was split between the people in the car. [R:142-224] There was no description of who split up the drugs, or how it was done. According to Thor, Matrick got approximately two grams of a white, powdery substance. [R:142-193] Matrick immediately consumed some of the drugs while in the car in Rockford. [R:142-191, 192; 224]

On the ride back to Adams County, Matrick was having “seizures" where she would briefly lose consciousness. [R:142-220 to 223] When they arrived back home, Siegert and Russell got Matrick into her home and left her with her mother, Irene. [R:142-222]

On December 1, 2018, shortly after midnight [R:142-171] Matrick’s father came home from work and found her slumped over a coffee table in the living room of their home. [R:142-154] Matrick was non-responsive, and she appeared to be dead. [R:142-164; 167]

Chief Medical Examiner for Adams County, Marilyn

Rogers[2] examined the scene, pronounced Matrick dead, and determined that she died of an "acute accidental drug fatality". According to Rogers, there was no competing cause of death. [R:143-20] Rogers did not conduct an autopsy on Matrick.

Rather, out of the presence of the jury, the parties informed the court that an autopsy was later conducted on Matrick's body by a "Dr. Stier". During the course of the autopsy, Dr. Stier drew blood samples. The state had subpoenaed Stier for trial but he had "absconded." [R:143-27]

Thus, when the state attempted to call the blood analyst, Dr. Behonick, Siegert objected on the grounds that there was no chain-of-custody concerning the blood that Behonick tested because Dr. Stier had not testified concerning the drawing of the blood. [R:143-27] Ultimately, the parties reached an agreement that Behonick would testify that he received the blood samples from Rogers, and that the tubes had Matrick's name written on them, and that this would be sufficient proof of the chain-of-custody to permit Behonick to testify as to the result of his analysis of the blood. [R:143-32]

Thereafter, Behonick testified before the jury that his analysis of Matrick's blood revealed that it was positive for THC, THC-COOH, Fentanyl at 53.1 nanograms per milliliter, and acetyl fentanyl. [R:143-42] Behonick did not offer an opinion as to the cause of death, but he did say that this level of

[2] Although Rogers is the medical examiner, she is not a physician or a pathologist

Fentanyl "could be fatal." [R:143-46] Behonick stressed, though, that he could not offer an opinion as to the manner or the cause of death. [R:143-53]

Several months later, in July, 2019, Toni Thor and his wife, Kristen Thor, went to Siegert's house and traded him some Xanax pills for some heroin. [R:143-11] The next day, Kristen Thor reported this to the police.

Police arrested Siegert and then obtained a warrant to search his home. When police searched Siegert's home, they found a pipe that appeared to be used to smoke controlled substances.

Following his arrest, Siegert was questioned. Siegert told the police that he was "responsible" for Matrick's death, but he believed that she died from a seizure. [R:143-109]

Discussion

I. The Wisconsin Supreme Court should review this appeal for the purpose of clarifying and harmonizing the standard of appellate review of the sufficiency of circumstantial evidence to support a guilty verdict.

For many years, the standard of appellate review for the sufficiency of circumstantial evidence to support a criminal conviction required the appellate court to consider whether the circumstantial evidence was strong enough to rule out all reasonable inferences that are consistent with innocence. That all changed with *State v. Poellinger*. In *Poellinger* the supreme court held that the only question on appeal is whether there is a reasonable inference consistent with the defendant's guilt; and, if so, the reviewing court need not consider whether there were other inferences consistent with defendant's innocence. In other words, on appeal, the reviewing court must accept a reasonable inference that is consistent with guilt, even though there may be multiple other reasonable inferences that are consistent with innocence, and which are logically much stronger that the inference of guilt. Although the appellate court should not substitute its evaluation of the evidence for the jury's evaluation, the *Poellinger* standard has, in effect, made appellate review of the sufficiency of circumstantial evidence

meaningless. That is, all the appellate court needs to do is find an inference for which a reason may be given, regardless of its weight and value, that is consistent with the defendant's guilt, and then the review ends. For the reasons set forth in more detail below, the supreme court should review this matter for the purpose of addressing once again the standard of appellate review of the sufficiency of circumstantial evidence.

§ 809.62(1r)(c), Stats., which provides the criteria for granting review, provides, 'A decision by the supreme court will help develop, clarify or harmonize the law, and . . . 3**.** The question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court." Further, the supreme court has held that, "The question of whether the evidence was sufficient to sustain a verdict of guilt in a criminal prosecution is a question of law, subject to our de novo review." *State v. Smith*, 2012 WI 91, P24, 342 Wis. 2d 710, 726, 817 N.W.2d 410, 418, 2012 Wisc. LEXIS 384, *15-16, 2012 WL 2849277

For many years in Wisconsin, where-- as here-- a conviction is based almost entirely on circumstantial evidence, the law required the evidence to be sufficient to rule out any theory of innocence. *See, State v. Hall*, 271 Wis. 450, 452-453, 73 N.W.2d 585, 586, 1955 Wisc. LEXIS 278, [*Schwantes v. State* (1906), 127 Wis. 160, 176, 106 N.W. 237 . . . circumstantial evidence must be sufficiently strong to exclude

every reasonable theory of innocence. It is not enough that the evidence is consistent with the state's hypothesis of guilt; it must be inconsistent with any hypothesis of innocence)

That all changed in *State v. Poellinger*, 153 Wis. 2d 493, 507-508, 451 N.W.2d 752, 758, 1990 Wisc. LEXIS 94, *17-18

> We recognize that the confusion concerning the appropriate standard of review in circumstantial evidence cases has its origin in prior decisions of this court. To the extent that those decisions have suggested that the standard of review in circumstantial evidence cases is less deferential than that employed in a direct evidence case, we clarify today that it is not. We hold that once the jury has been properly instructed on the principles it must apply to find the defendant guilty beyond a reasonable doubt, a court must assume on appeal that the jury has abided by those instructions. In reviewing the sufficiency of circumstantial evidence to support a conviction, an appellate court need not concern itself in any way with evidence which might support other theories of the crime. An appellate court need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence to sustain the verdict rendered.

Later, the supreme court reaffirmed the *Poellinger* standard of appellate review of the sufficiency of circumstantial evidence. In, *State v. Smith*, 2012 WI 91, P33, 342 Wis. 2d 710, 730-731, 817 N.W.2d 410, 420, 2012 Wisc. LEXIS 384, *20-23, 2012 WL 2849277, the supreme court wrote:

> We also use this opportunity to reaffirm the soundness of the reasoning of *Poellinger*. The rule articulated in *Poellinger* was based on the principle that it is inappropriate for an appellate court to "replace[] the trier of fact's overall evaluation of the evidence with its own." [internal citations omitted] the relationship between

> appellate courts and juries). The position staked out in Hall that a jury verdict of guilt can be reversed on appeal if "[t]he inferences that may be drawn from the circumstantial evidence are as consistent with innocence as with guilt," *Hall*, 271 Wis. at 452, contradicts this deeply rooted tradition of judicial deference for jury verdicts. Indeed, there are few legal principles more indisputable than the idea that a jury is in a far better position to evaluate the evidence than is a reviewing court. [internal citation omitted] ("As this court has frequently stated, it is not our function to review questions as to weight of testimony and credibility of witnesses. These are matters to be determined by the trier of fact . . . . "). *Hall* and the other decisions overruled by *Poellinger* gave insufficient respect to the crucial role of the jury in our criminal justice system. For they allowed an appellate court to disturb a jury verdict even where it was based on a reasonable inference drawn from the evidence, simply because the appellate court preferred another reasonable inference. *Poellinger* was right to correct our case law when it strayed from these important principles, and we reaffirm its correction.

It is now for the supreme court to revisit this issue once again.

The *Poellinger/Smith* standard for challenges to the sufficiency of circumstantial evidence has proved to be meaningless in reviewing the sufficiency of circumstantial evidence. That is, whenever the appellate court can imagine any conceivable inference that would support the jury's verdict, the appellate court finds the evidence to be sufficient.

This process, though, had many flaws: (1) it assumes that all inferences for which a reason may be given are of equal

weight; (2) it ignores the burden of proof instruction in which the jury is told that, "If you can reconcile the evidence upon any reasonable hypothesis consistent with the defendant's innocence, you should do so and return a verdict of not guilty (Wis. JI-Criminal 140); and, (3) the reviewing court has no way of knowing the jury's actual process of reasoning, and, therefore, the reviewing court is free to make up its own "reasonable inference", and assume that this was the jury's reasoning.

Under the *Poellinger* standard, the only question is whether the reviewing court can make up an inference for which a reason may be given; and, if so, the reviewing court may ignore multiple other stronger inferences that are consistent with the defendant's innocence. This standard incorrectly assumes that all reasonable inferences are of equal weight and value. This is simply not true. If one looks out the window in the morning and the driveway is wet, one may reasonably infer that it had rained at some point during the night. This is an inference for which a reason may be given. But it is also a reasonable inference that the lawn sprinkler had been turned on overnight, and it was then turned off. Under the facts in the example, the "rain" inference is a much stronger inference. In the example, there was no evidence that anyone else was home who might have turned on the sprinkler. Nevertheless, under the *Poellinger* standard, a jury's finding that someone

turned on the sprinkler would be sustained even though it is much more likely that it had rained. Permitting the reviewing court to assess the strength and the weight of inferences does not substitute the court's evaluation of the weight of the evidence for the judgment of the jury. Rather, the reviewing court must assume that all testimony is true; and then answer this question: Is the inference supporting guilt *stronger* than any inferences supporting innocence.

Preventing the reviewing court from assessing the strength and weight of the various inferences also leaves open the possibility that the jury ignored the court's admonition to find the defendant not guilty whenever the evidence may be reconciled under any hypothesis consistent with the defendant's innocence. The jury could completely ignore numerous strong inferences that are consistent with innocence, but the appellate court is powerless to correct this clear violation of the instructions.

Here, the use of the *Poellinger* standard of review makes appellate review of the sufficiency of the evidence to be, in effect, meaningless.

First off, Siegert argued before the court of appeals that the evidence was insufficient to support the jury's implicit finding that the substance Siegert obtained in Rockford was fentanyl. For obvious reasons, Matrick did not testify that the substance she used was the substance she obtained from Siegert in

Rockford. There was no testimony that any quantity of the substance was obtained by the police under circumstances where the substance could be traced through chain of custody to the Rockford transaction. Nevertheless, based on the testimony of persons who have utterly no expertise in drug identification, the court of appeals found the evidence to be sufficient.

Similarly, the court of appeals found the evidence sufficient to establish that the substance obtained in Rockford was the same substance that was found on the table next to Matrick. The substance on the table was presumably what she consumed and which resulted in her death. This, according to the court, was because Matrick's phone did not reveal evidence that she contacted anyone during the day for an additional delivery of drugs, and no one came to her home. Admittedly, one reasonable inference from that circumstantial evidence might be that Matrick did not obtain additional controlled substances in the nine hours she was home. That is, she saved the drugs she obtained in Rockford, and did not use them for some nine hours laters. Nevertheless, a much more compelling inference is that she probably did use up all the drugs right away, and then obtained more. She was so anxious to use the controlled substances obtained in Rockford that she used them in the car on the way home. It seems highly unlikely, then, that once she got home she saved the

Rockford drugs until many hours later. However, under the current *Poellinger* standard, the reviewing court is not permitted to consider other stronger inferences that are consistent with Siegert's innocence.

Finally, the court of appeals found that the evidence was sufficient to support the jury's implicit finding that fentanyl was a substantial factor in causing Matrick's death. Recall, the only evidence presented concerning the cause of death was the testimony of a forensic pathologist concerning the quantity of fentanyl in Matrick's blood; and the conclusory testimony of a "medical examiner" who is not a physician that Matrick died from a drug overdose. The court of appeals concluded that the evidence was sufficient because there was agreement between the pathologist's testimony about finding fentanyl in Matrick's blood, and the medical examiner's "opinion" that this was the cause of death. Perhaps suspecting that this does not establish the cause of death, the court of appeals also mentioned the litany of drug paraphernalia found near Matrick's body.

On this record, the true cause of Matrick's death is a mystery.

Conclusion

For these reasons, it is respectfully requested that the Wisconsin Supreme Court review this appeal.

Dated at Milwaukee, Wisconsin, this 20th day of December, 2023.

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Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 4093 words.

Dated at Milwaukee, Wisconsin, this 20th day of December, 2023.

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