STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2022AP002122

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KIMBERLY D. ROWE,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in the Lincoln County Circuit Court,
the Honorable Robert R. Russell Presiding

BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

ISSUES PRESENTED

> Did the State present sufficient evidence at trial to prove beyond a reasonable doubt that Kimberly Rowe possessed with the intent to unlawfully sell "intoxicating liquor?"

The jury found Rowe guilty of possession with intent to sell intoxicating liquor without a valid liquor license.

This Court should reverse.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is requested as the briefing should adequately set forth the arguments, and the issue involves the application of settled law to the facts of this case.

STATEMENT OF THE CASE AND RELEVANT FACTS

On October 14, 2020, according to the Complaint, Deputy Lange of the Lincoln County Sheriff's Office responded to K&R Raceway Pub after receiving a report that the pub was serving minors. (2:1). According to the Complaint, Deputy Lange spoke with several people in the pub who claimed that the bartender had served them alcohol without verifying their ages. (2:1). The bartender, later identified as

Kimberly Rowe's significant other, "fled the bar on the arrival of law enforcement." (2:1; 42:75; App. 12). Deputy Lange identified the pub's proprietor, Kimberly Rowe, and directed her to provide him with the pub's liquor license, as well as her operator's (bartender's) license. (2:1; 42:77; App. 14). Rowe provided only an expired operator's license. (2:1; 42:78; App.15).

On November 4, 2020, the State charged Rowe with selling, or possessing with the intent to sell, intoxicating liquor without a license, a misdemeanor violation of Wis. Stat. § 125.66(1). (2:1). Proceedings in the case continued, and on January 19, 2022, the case was tried to a jury in the Lincoln County Circuit Court. (42; App. 6-77).

At trial, the State presented testimony from two witnesses, the town clerk, and Deputy Lange. (42:60; 70). The town clerk testified concerning the county's liquor licensing records, which she maintained as part of her regular duties. (42:60). The clerk testified that Rowe did not have the required license for the sale or service of alcohol during the month in question. (42:69).

Deputy Lange testified about his interaction with Rowe at K&R Raceway Pub, and his observations at the pub during his investigation in October 2020. (42:70-84; App. 7-28). Lange testified that when he arrived, the pub appeared to be open for business: cars were in the parking lot and the lights were on; people were inside "consuming intoxicants," and "consuming

beverages," that he later clarified he believed to be beer; there was a cash register behind the counter. (42:73, 75-77; 83-84; App. 10, 12-14, 20-21).

Lang testified that during his interaction with Rowe he saw liquor bottles on a shelf behind her. (42:74, 77; App. 11, 14). Lang testified that the labels on the bottles were facing the patrons and were visible to him from where he was standing, such that he could read the labels, but offered no testimony as to what the labels said. (42:77; App. 14). When asked on direct whether, in his experience, any of them were liquor bottles, he responded "yes." (42:77; App. 14).

The State rested after Lange's testimony, and the defense moved for a directed verdict outside the presence of the jury. (42:85; App. 22) The defense asserted a number of grounds as to why no reasonable jury could convict given the evidence that the State presented (or perhaps, more accurately, given the evidence the State *did not* present):

- no evidence of any sale of liquor, either by Rowe or anyone else;
- no evidence of the consumption of intoxicating liquor (only beer, which does not constitute "intoxicating liquor" by statute);
- no evidence that Rowe possessed intoxicating liquor with the intent to sell;

- no evidence that intoxicating liquor was present in the pub, as Deputy Lange provided no details as to the type, amount, or alcoholic content;

- no testimony from any of the witnesses at the pub which the State could have called to testify about the sale of liquor;

(42:86, 89; App. 23, 26).

The State responded that an intent to make a sale could be gleaned from the pub being open to the public, and the fact that people were drinking at a pub where Rowe was observed behind the counter (i.e. tending bar). (42:88; App. 25). The State argued that Lange identified liquor bottles as liquor bottles, and the presence of a cash register. (42:88; App. 25). Lastly, the posting of the expired license (which had been admitted as an exhibit upon the State's offer) indicated that the establishment was a bar. (42:79, 88; App. 16, 25).

The court denied the motion for a directed verdict, stating that testimony from Lange as to the appearance of the establishment, including: neon signage; liquor bottles observed inside the pub; a number of people present, some of which appeared to be drinking beer; the presence of a cash register; and the testimony concerning the expired license; all tended to support that a reasonable jury could find for the State. (42:91; App. 28).

After the denial of the directed verdict and following a court colloquy, Rowe elected to testify as the defense's sole witness. (42:92-95; App. 29). Rowe denied selling any intoxicating liquor, and described the night in question as a "private get together," noting that she lived upstairs in the same building. (42:96; App. 30).

On cross-examination, Rowe acknowledged that beer was available in a cooler for her guests. (42:99; App. 33). Rowe also acknowledged that there "were a few alcohol bottles behind the bar" but denied ever having served anyone, explaining that her significant other had put the bottles there. (42:101; App. 35).

Over the defense's objection, the State introduced a second exhibit during Rowe's cross-examination: an application for a liquor license for K&R's Raceway pub, submitted by Rowe several days after the alleged offense. (42:103-106, 146-47; App. 71-72).

After the defense rested, the State sought leave to amend the complaint to conform to the evidence presented. (42:111; App. 38). Since no evidence of an actual sale was presented, the State asked "[t]hat the language of the charge be the defendant possessed with intent to sell intoxicating liquor rather than the language that was originally charged."[1] (42:111-12;

[1] The original language in the Complaint averred that Rowe "did sell, or possess with intent to sell, intoxicating liquor without holding the appropriate license or permit, contrary to sec. 125.66(1) Wis. Stats." (2).

App. 38-39). The State also asked for a correction of the name of the township where the pub was located (Bradley instead of Tomahawk). (42:112; App. 39). The defense did not object to either amendment, or to the circuit court's corresponding updates to the jury instructions. (42:112-14, 147-48; App. 39-41, 72-78).

After closing argument from the parties, the court gave final instructions to the jury for deliberation. (42:144; App. 69). The jury returned a guilty verdict, which the court accepted, and entered judgment of conviction in conformity therewith. (42:148-150; App. 73-75). The court then proceeded directly to sentencing. (42:152-53; App. 77).

The State recommended a straight sentence that included a $500 fine, exclusive of court costs. (42:153). The defense asked the court for a deferred entry of judgment (or, alternatively, that the court impose only costs) arguing that the offense was mitigated by the fact that no actual sale of the liquor had occurred. (42:153-54). Rowe gave an allocution expressing her remorse, and explaining the difficulties she encountered with the licensing requirements when she relocated to Lincoln County. (42:154).

The court denied the defense's request for a deferred judgment, noting that the court already entered judgment upon the verdict. (42:155). The court adopted the State's recommendation and imposed a $500 fine (plus costs, assessments, and surcharges) to be paid within 60 days unless a payment arrangement was made. (42:155). The court confirmed with the

parties that the conviction did not carry a mandatory court-imposed licensing restriction. (42:155). Lastly, the court advised Rowe to talk with counsel about her appellate rights (which Rowe promptly exercised by filing notice of her intent to pursue postconviction relief). (42:156; 31). This appeal follows.

ARGUMENT

I. The State failed to present sufficient evidence to prove that Rowe possessed "intoxicating liquor."

A. Legal standard and standard of review.

"In order to obtain a conviction, the state must prove every essential element of the crime charged beyond a reasonable doubt." *State v. Ivy*, 119 Wis. 2d 591, 606-607, 350 N.W.2d 622 (1984), A conviction obtained without sufficient evidence is a violation of the defendant's right to due process of law. U.S. Const. Amend. XIV; Wis. Const. Art. I, § 1; *In re Winship*, 397 U.S. 358, 365 (1970).

"The question of whether the evidence was sufficient to sustain a verdict of guilt in a criminal prosecution is a question of law," which this Court reviews de novo. *State v. Smith*, 2012 WI 91, ¶24, 342 Wis. 2d 710, 817 N.W.2d 410. In doing so, this Court will uphold the verdict unless the evidence "is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *Id.* (quoting *State v. Poellinger*,

153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)). Stated another way, this Court is to "decide whether 'any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial.'" *Id*., ¶44 (quoting *Poellinger*, 153 Wis. 2d at 506). Should this Court determine that the evidence produced at trial is insufficient, it must order a judgment of acquittal. *Ivy*, 119 Wis. 2d at 608-610.

B. The evidence at trial was insufficient to prove beyond a reasonable doubt that Rowe possessed with intent to unlawfully sell "intoxicating liquor."

When the definition of "intoxicating liquor" specifies a certain percentage of alcoholic content, Wisconsin appellate courts have required the State to present competent evidence of alcoholic content in prosecutions of its unlawful possession and sale. *Gebaj v. State*, 184 Wis. 289, 199 N.W. 54 (1924); *Hoch v. State*, 199 Wis. 63, 225 N.W. 191 (1929)

In *Hoch v. State*, 199 Wis. 63, a conviction for the illegal possession and sale of intoxicating liquor was upheld on a sufficiency challenge. *Id*. at 63. Just as in Rowe's case, a sheriff's deputy testified that the alcoholic beverage at issue qualified as intoxicating liquor without providing any details or specificity concerning the alcoholic content. *Id*. The court determined that a basis for the conviction could not be sustained on this testimony alone, and found it necessary to consider additional evidence in the

record. *Id*. Unlike in this case, the record included testimony from a druggist that "the percentage of alcohol was about 45 by volume. This was abundant proof that the liquor seized was intoxicating." *Id*.

In G*ebaj v. State*, 184 Wis. 289, the Wisconsin Supreme Court considered the sufficiency of the evidence in a prosecution for the sale of intoxicating liquor. The alcohol was seized (unlike the liquor bottles in Rowe's case) and was subject to chemical analysis prior to trial. *Id*. at 289. When the State offered the bottles into evidence at trial, each of the bottles had been tested and labeled with the results of the analysis: "Health Department. Alcohol 5.40% by weight. E. Huebner Analysis, Chemical Laboratory Division." *Id*. The *Gebaj* court affirmed the verdict. *Id*.

Here, there was no evidence, lay or expert, of the alcoholic content of the liquor bottles Deputy Lange saw from across the bar. And unlike in *Hoch* (where the Wisconsin Supreme Court found that the deputy's testimony was not sufficient to establish that the liquor was intoxicating) and *Gebaj*, there was no testimony that the liquor in the bottles was ever sampled, seized, or subjected to any form of analysis to establish its contents.

Yet, during closing argument, the State nevertheless told the jury that it could rely inherently on the deputy's unsupported conclusion:

> [THE STATE] Kimberly Rowe had bottles of liquor behind her. From [Deputy Lange's] experience, he's seen a bottle of liquor before.

> When you go back in the jury room, you will also be relying on your own experience. He was able to recognize those were, in fact, bottles of liquor…".

(42:128; App. 55).

While jurors may apply matters of common knowledge or their own observation and experience in the affairs of life to circumstantial evidence, *De Keuster v. Green Bay & W.R. Co.*, 264 Wis. 476, 479, 59 N.W.2d 452 (1953), there are indeed matters that involve special knowledge, skill, or experience that is outside the realm of ordinary experience or knowledge of the jurors. *State v. Johnson*, 54 Wis. 2d 561, 196 N.W.2d 717 (1971).

Rowe contends that whether these bottles contained ardent, spiritous, distilled or vinous liquor with a minimum of 0.5 percent alcohol by volume, is not within the realm of ordinary experience. Even if it were, there is simply no testimony from Deputy Lange as to alcoholic content, and there are no facts in evidence upon which the jurors could infer such a finding. Thus any inference would be based on mere suspicion or conjecture, and insufficient to sustain a conviction. *See State ex rel. Kanieski v. Gagnon*, 54 Wis. 2d 108, 117, 194 N.W.2d 808 (1972).

Hoch and *Gebaj* illustrate the importance of seizing evidence, testing it, and ensuring a proper chain of custody for admission at trial, none of which appears to have been done in this prosecution. There is no reason why the State should not have had to obtain a chemical analysis to establish the alcoholic

content of the beverages at issue in order to prove that Rowe was in possession of "intoxicating liquor." Even if this Court determines that such analysis is not the only way to establish proof of alcoholic content, the fact remains that no other proof was offered in this case upon which the jury could make (or infer) such a finding. Without *some* evidence of alcoholic content, this conviction cannot stand.

CONCLUSION

The State failed to prove, beyond a reasonable doubt, that Rowe possessed intoxicating liquor with the intent to sell it unlawfully. Accordingly, Rowe respectfully requests that this Court reverse the judgment of conviction and remand to the circuit court with instructions to enter a judgment of acquittal.

Dated this 30th day of May, 2023.

Respectfully submitted,

Electronically signed by Carlos Bailey

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CERTIFICATION AS TO FORM/LENGTH

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 2,351 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 30th day of May, 2023.

Signed:
Electronically signed by
Carlos Bailey
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