STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2022AP002122-CR
Court Case No.: 2020CM000190

STATE OF WISCONSIN

Plaintiff-Respondent,

vs.

KIMBERLY D. ROWE

Defendant-Appellant.

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

RESPONDENT'S BRIEF

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CERTIFICTAION OF ATTOERNY AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19 (9)(b), (bm), and (c) this a brief. The length of the brief is 14 pages and 2634 words.

Dated: July 14, 2023

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POSITION ON ORAL ARGUMENT

Oral argument is not necessary as the issue is limited and addressed in party briefs.

POSITION ON PUBLICATION

State of Wisconsin is not requesting this case be published.

STATEMENT OF THE CASE

In addition to the facts set forth in the Brief of Defendant-Appellant:

Three jurors of the 12 person jury panel selected for the January 19, 2022 trial had experience as bartenders. (R 42: 35-37, 46; R 45: 1). One juror stated they were born and raised in a bar, as their parents had owned a bar. (R 42: 39, 46; R 45: 2). These jurors were given an instruction on the definition of "intoxicating liquor." (R. 42: 124)

At the trial Deputy Logan Lange testified to these jurors that the K and R Raceway Pub was labeled with a sign indicating "K and R Raceway Pub." (R. 42: 72). Deputy Lange opined the pub was open, in part, due to neon lighting in the windows. (R. 42: 72). Deputy Lange saw Kimberly Rowe behind the establishment's countertop with a cash register. (R. 42: 74,77). Rowe referred to the establishment's countertop in her testimony as

"the bar." (R. 42: 101). Deputy Lange referred to bottles behind the bar as "liquor" and Rowe referred to the bottles as "alcohol." (R. 42: 77, 101).

Rowe testified that she was at the K and R Raceway Pub on October 14, 2020. Rowe said that her boyfriend [Ronald Reese] wanted to run a bar out of the K and R Raceway Pub building and she would do anything for him [Reese]. (R. 42: 108, 109). Rowe said that Reese put a Budweiser sign on the side of the building, Budweiser neon lights in the front windows, and placed the alcohol bottles behind the bar. (R 42: 99, 101).

ARGUMENT

1. The State presented sufficient evidence for the jury to find Rowe possessed "intoxicating liquor" for the purpose of sale

a. Standard of Review

Court may not reverse a conviction "unless the evidence, viewed most favorably to the state and 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 guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 451 N.W.2d 752, 755 (1990). If any possibility exists that the jury could have drawn the appropriate inferences from the trial evidence to find guilt, this court may not overturn the verdict. *Id*. at 507.

This Court "must accept and follow the inference drawn by the trier of fact unless the evidence on which the inference is based is incredible as a matter of law." *Id.* at 757.

b. Applicable Legal Standards

"The standard for reviewing the sufficiency of the evidence to support a conviction is the same in either a direct or circumstantial evidence case." *Id.* "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.". *Id* at 758. "Statutes cannot be construed in derogation of common sense." *American Indus. Leasing Co. v. Geiger*, 345 N.W.2d 527, at 530, 118 Wis.2d 140 (Wis. App. 1984). "When the general or primary meaning of a word is once established by such common usage and general acceptation, we do not require evidence of its meaning by the testimony of a witness…." *Briffitt v. State*, 58 Wis. 39, 16 N.W. 39, 40 (Wis. 1883).

c. Evidence provided at trial was sufficient as it created a possibility the jury could infer Rowe possessed intoxicating liquor

The jury received direct and circumstantial evidence that Rowe was behind the bar of K & R Raceway Pub and had bottles of liquor displayed (R 42: 72-101). The only question at issue is if the testimony regarding those

bottles, in the light most favorable to the State, was of sufficient probative value that the jury could possibly inferred the bottles contained "intoxicating liquor." (Appellant Br.: 11, 12).

While the definition of intoxicating liquor is specific, this is not a technically that requires special testimony because the ordinary terms reflect the separation between intoxicating liquor and beverages with nominal amount of trace alcohol. *See Briffitt*. No standard for testing or proof beyond the common sense of the fact finder is established by *Gebaj*, *Hoch*, or other citable precedent[1] nor invalidate *Briffitt*. It is reasonable for a jury to infer that when an adult refers to a group of labeled beverage bottles as "liquor" or "alcohol" it is presumed they intend to mean "intoxicating liquor" or "alcoholic beverage," which includes intoxicating liquors.[2]

i. Describing a bottle as "liquor" or "alcohol" creates a reasonable inference that the contents of the bottles were "intoxicating liquor"

"As long as laws for licensing the sale of intoxicating liquors have existed, brandy, whisky, gin, rum, and other alcoholic liquids have been held to be intoxicating liquors *per se*; and why? Simply because it is within the

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[1] *Gebaj v. State,* 184 Wis. 289, 199 N.W. 54 (1924); *Hoch v. State*, 199 Wis. 63, 225 N.W. 191 (1929)

[2] Wis. Stat. § 125.02(1)

common knowledge and ordinary understanding that they are intoxicating liquors. By this rule of common knowledge courts take judicial notice that certain things are *verities*, without proof." *Briffitt v. State*, 58 Wis. 39, 16 N.W. 39, 40 (Wis. 1883).

"Intoxicating liquor" means all ardent, spirituous, distilled or vinous liquors, liquids or compounds, whether medicated, proprietary, patented or not, and by whatever name called, containing 0.5 percent or more of alcohol by volume, which are beverages, but does not include "fermented malt beverages". Wis. Stat. § 125.02(8). Judge Russell instructed the jury of this definition before they deliberated. (R 42: 124).

It is within the realm of ordinary expertise that 0.5% alcohol by volume (ABV) is a very small amount of alcohol. Beverages such as soft drinks, fruit juices, and certain other flavored beverages which are traditionally perceived by consumers to be "non-alcoholic" could actually contain traces of alcohol (less than 0.5 percent alcohol by volume) derived from the use of flavoring extracts or from natural fermentation. FDA [Food and Drug Administration] considers beverages containing such trace amounts of alcohol to be "non-alcoholic." USFDA CPG § 510.400 (Updated

11/29/2005).[3] Additionally, beverages with less than 0.5% alcohol are marketed, labeled, and referred to in the common vernacular used by jurors as "NA" or "non-alcoholic." Examples include Anheuser-Busch's O'Doul's[4], Heineken's Buckler[5], Weihenstephaner's Non-Alcoholic[6], Joyus's Non-Alcoholic wines[7], Boisson's Surley wines[8], Seedlip Non-Alcoholic Spirits[9]; which contain trace amounts of alcohol but are accepted as non-alcoholic. When Rowe, whose previous experience as a bartender was already a matter of record, referred to the bottles in question as "alcohol" it was a clear assertion under common and technical language that they contained over 0.5% ABV and was an intoxicating liquor.

August 29, 1935, after the repeal of prohibition under the 21st Amendment of the United States Constitution, the Federal Alcohol Administration Act established labeling requirements for intoxicating liquors which include providing the consumer with the identity and alcohol content

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[3] https://www.fda.gov/regulatory-information/search-fda-guidance-documents/cpg-sec-510400-dealcoholized-wine-and-malt-beverages-labeling
[4] https://www.liquor.com/odouls-beer-review-5218710
[5] https://beveragedist.com/buckler-non-alcoholic-beer/
[6] https://www.weihenstephaner.com/our-beers/weihenstephaner-non-alcoholic
[7] https://drinkjoyus.com/products/joyus-non-alcoholic-cabernet-sauvignon; https://drinkjoyus.com/products/copy-of-joyus-non-alcoholic-quad-pack
[8] https://boisson.co/collections/surely
[9] "This product may contain trace elements of alcohol (<0.5%ABV). when consumed without mixing or diluting w/ other non-alcoholic liquids e.g. Ginger ale. When diluted w/ Ginger ale at the recommended serve levels, the alcohol level is comparable to the level of alcohol found in orange juice or apple juice." https://www.seedlipdrinks.com/en-us/faqs/

of the liquor [10] (with an exception for wines that's have 14% or less ABV). Wis. Stat. §§ 125.68(9)(b) and Tax 8.52, and 27 U.S.C. 205 (e)(2). The labeling provision requiring the alcohol content of a liquor has been part of the requirement since Federal Alcohol Administration Act was enacted on August 29, 1935. (74th Congress Sess. I CHS 814 page 982). The labeling provision of the Federal Alcohol Administration Act is currently part of 27 U.S.C. 205 (e)(2) and incorporated into Wisconsin law through Wis. Stat. §§ 125.68(9)(b). and Tax 8.52.

Intoxicating liquors are sold across Wisconsin numerous locations including bars, liquor stores, gift shops, grocers, and gas stations. Under the Federal Alcohol Administration Act intoxicating liquors are labeled, clearly stating greater than 0.5% ABV. Substantial portion of the adult community therefore reasonably know that those ardent, spirituous, distilled or vinous liquors, liquids or compounds, and liquor by any other name, have a higher than 0.5% ABV.

Direct testimony regarding the intoxicating liquor was given by Deputy Lange and Rowe. Deputy Lange testified that he saw labeled bottles facing the bar that Lange knew to be liquor bottles behind the bar with

[10] 27 U.S.C. Subchapter 1 - §§ 201-212

Rowe in the K and R Pub on the night at issue. (R 42: 77, 84). No objection was raised by Rowe as to Lange's ability to identify liquor bottles. Lange testified he had three years of experience at the Lincoln County Sheriff's Office. (R 42). Rowe also testified these were bottles of "alcohol" behind the bar. (R 42: 101). Rowe testified and provided paperwork that indicated she had experience in the alcohol service industry. With the background information and the physical appearance of Lange and Rowe, the jury could reasonably infer that when they used the terms "liquor bottle" and "alcohol bottle" and they were talking about an "intoxicating liquor" without additional information.

ii. *Gebaj* and *Hoch* do not preclude testimony alone as sufficient evidence of "intoxicating liquor"

Rowe's criticism is that a reasonable jury does not know what an intoxicating beverage is without testing and asserts that *Gebaj v. State*, 184 Wis. 289, 199 N.W. 54 (1924). and *Hoch v. State*, 199 Wis. 63, 225 N.W. 191 (1929) hold that State is required to sample, seize, or analyze the liquor to prove its alcohol content. Rowe's assertion is not true, neither case creates or contemplates such a standard.

Gebaj does not really concern the sufficiency of evidence. The contention before Supreme Court concerns chain of custody, whether bottles

of beer that were seized remained sealed between seizure and the time analysis. Court finds that the contention without a shadow of merit and affirms judgment with no discussion what-so-ever as to what constitutes sufficient evidence.

In *Hoch* the Court does not determine what evidence constitutes sufficiency. The question at issue in the relevant part of *Hoch* is if the liquor possessed without a permit was "privately manufactured distilled liquor," also known as moonshine. A Deputy testified that he knew the taste of "moon" and that what he drank was "intoxicating liquor." The question before that court was whether the Deputy's testimony regarding the taste of the liquor could establish both that it was an intoxicating liquor and the manner of its manufacture. That Court did not find that the deputies testimony was not sufficient. Rather the court found "if it were necessary to sustain the conviction upon this testimony, there would be some difficulty in construing it as a sufficient basis for finding that the liquor constituted privately manufactured distilled liquor." Id. The *Hoch* Court does not conclude the testimony alone was insufficient and while the Court may indicate the evidence is weak for proving a manufactured distilled liquor, "some difficulty" or even weak does not make the evidence insufficient under the "any possibility" standard. *Poellinger* at 507.

While additional evidence was presented in these cases, their Courts in these did not make a determination that anything greater than witness testimony as to the nature intoxicating liquor is necessary. Standards proposed by Rowe are not practical or necessary because the ABV in the definition of "intoxicating liquor" is consistent with the common understanding of the phrase. This is supported by older *Briffitt v. State*, 58 Wis. 39, 16 N.W. 39, that held "beer" obviously meant a malt and intoxicating beverage. *Briffitt* is illustrative as the definition of "fermented malt beverage" by statute has the same 0.5% ABV by statute as intoxicating liquor[11]; and "fermented malt beverages" and "intoxicating liquor" together constitute "alcoholic beverages."[12]

It's worth noting that *Gebaj* (1924) and *Hoch* (1929) are prohibition era cases, with incident and finding dates occurring while the 18th Amendment to the United States Constitution was in effect, prior to its repeal by the 21st Amendment to the United States Constitution, (1919-1933), [13]before the Federal Alcohol Administration Act made alcohol content labeling mandatory.

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[11] Wis. Stat. § 125.02(6)
[12] Wis. Stat. § 125.02(1)
[13] U.S. Const. amend. XVIII (*repealed* by U.S. Const. amend. XXI. (1933)

iii. Circumstantial evidence supports the reasonable inference that the "liquor" or "alcohol" were an "intoxicating liquor"

Circumstantial evidence increases the reasonableness that the "liquor" or "alcohol" bottles contained an "intoxicating liquor." The bottles of liquor were on a shelf; behind Rowe, who was standing in the customary place of a bartender behind the bar; with invalid server's license displayed in a manner of bar; in a building that had a Budweiser sign and lights displayed and was labeled a "Pub;" and with Rowe's testimony that her boyfriend intended the pub to be a bar. (R 42: 72, 74, 99, 101-102, 108).

One-third of the jury panel indicated a history of involvement in the bartending industry. The jurors were instructed that they were not expected to lay aside their own observation and experiences in the affairs of life and to apply them to the evidence at hand, consistent with *De Keuster v. Green Bay & Co.,* 264 Wis. 476, 479, 59 N.W.2d 452 (1953). To remove the question from the jury as a matter of law and now allow them to apply their experience to infer what liquor/alcohol mean is contrary to *De Keuster*.

Further, the jurors can infer that the liquor/alcohol being referred to was an intoxicating liquor, not a malt liquor, because Deputy Lange and Rowe both made distinctions in their testimony between the bottles of

liquor/alcohol behind the bar and the beer that was in the beer cooler and being consumed by the other occupants of the Pub. (R 42: 84, 97).

CONCLUSION

Lange and Rowe's uncontroverted testimony that Rowe had bottles of "liquor" and "alcohol" at her K and R Raceway Pub was of sufficient probative value that the reasonable jury inferred Rowe possessed intoxicating liquor which is given greater probative value and force by the circumstantial evidence that the bottles were placed in customary way of bottles of intoxicating liquor held for sale at premises licensed for the sale and service of intoxicating beverages. Since the possibility exists that the jury could have drawn the appropriate inference that the bottles contained greater than 0.5% alcohol. Therefore, evidence provided at trial was sufficient as a matter of law and the judgment must be affirmed.

Dated: 7/14/2023

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