STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2022AP002122-CR

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

REPLY BRIEF OF DEFENDANT-APPELLANT

CARLOS BAILEY
Assistant State Public Defender
State Bar No. 1113630

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8259
baileyc@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

OTHER AUTHORITIES CITED

ARGUMENT

I. The State did not present sufficient evidence to prove that Rowe was in possession of intoxicating liquor.

Rowe was convicted of possessing with intent to sell intoxicating liquor, in violation of Wisconsin's liquor licensing laws. The single issue on appeal is a challenge to the sufficiency of the evidence that Rowe was in possession of "intoxicating liquor."

The only evidence of intoxicating liquor presented was testimony from the State's witness that he observed labeled "liquor bottles" on a shelf at the K&R Raceway Pub, which the officer identified based on personal and professional experience. (42:74, 77, 84; Appx. 11, 14, 21). After the State rested, the circuit court denied Rowe's motion for a directed verdict. (42:84; Appx. 21). Rowe then testified in her defense. During her testimony, Rowe acknowledged the "alcohol bottles" observed by the State's witness. (42:101; Appx 35). No further description of the bottles, their labels, or their contents was provided, and no direct evidence was presented since the bottles at issue were not seized as evidence during the investigation.

The question for this Court is whether a jury can infer that the "liquor bottles" contained the type of "ardent, spiritous, distilled or vinous liquors … containing 0.5 percent or more of alcohol by volume

[ABV]…but does not include 'fermented malt beverages," which fall within the definition of "intoxicating liquor." Wis. Stat. § 125.02(8).

Because the State did not present any evidence of ABV, or solicit any facts upon which a jury could infer that the type of alcohol in the bottles met the minimum threshold percentage, and could be excluded as a "fermented malt beverage," it failed to offer competent evidence of an essential element of the offense.

The State's Response does not identify any additional evidence in the record, but instead argues that the terms "liquor bottle" and "alcohol bottle" are well-established and commonly understood, such that when viewed within the context of the entire record, the jury can presume that the witnesses were referring to "intoxicating liquor." (Resp. Br., 12).

A. The State failed to present competent evidence of all elemental facts necessary for the jury to find, beyond a reasonable doubt, that the liquor bottles contained "intoxicating liquor."

The due process protections guaranteed by the Fifth Amendment, and applied in state criminal prosecutions via the Fourteenth Amendment, protect "the accused against conviction except upon proof beyond a reasonable doubt *of every fact necessary* to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970) (emphasis added). If the State fails to meet that high burden of proof as

to each and every element of the charged offense, due process is offended and the conviction cannot stand. *Id*. at 365.

When a defendant exercises their right to be tried in front of a jury, proof of all essential elements must be tendered to the jury. *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993); *see also State v. Peete*, 185 Wis. 2d 4, 19, 517 N.W.2d 149 (1994). Thus, no matter how overwhelming the evidence, a judge may not direct a verdict for the State. *Sullivan*, 508 U.S. at 277; *see also State v. McAllister*, 107 Wis. 2d 532, 533, 319 N.W.2d 865 (1982).

The State can meet its burden using direct and circumstantial evidence, through the use of various evidentiary and procedural tools: "'[i]t is often necessary for the trier of fact to determine the existence of an element of the crime—that is, an 'ultimate' or 'elemental' fact—from the existence of one or more 'evidentiary' or basic facts." *State v. Harvey*, 2002 WI 93, ¶32, 254 Wis. 2d 442, 647 N.W.2d 189 (quoting *Ulster County v. Allen*, 442 U.S. 140, 156 (1979); *see also*, Wis. Stat. § 903.03. Such presumptions against an accused are known as permissive inferences, and they may be statutorily derived or rooted in the common law, and are governed by the rules of evidence:

> When the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge may submit the question of guilt or of the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a

> whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt.

Wis. Stat. § 903.03(2).

This appears to be the position taken by the State in its response, which does not dispute the necessity of establishing the ultimate fact:

> 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. …
>
> 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. …
>
> 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…."

(Resp. Br., 8, 12); *see also Genova v. State*, 91 Wis. 2d 595, 607, 283 N.W. 2d 483 (1979) ("Presumptions and permissive inferences are procedural tools that enable a plaintiff to survive a motion to dismiss…*or, on review,* to establish the circumstantial sufficiency of the evidence to justify a predicate fact.") (emphasis added).

Inferences, however, are constitutionally impermissible in criminal cases if they do any of the following:

- shift the burden of persuasion to the defendant; or
- relieve the State of its burden to establish beyond a reasonable doubt every element of the crime, or negate every defense; or
- relieve the jury of its duty to find every element of the crime beyond a reasonable doubt from its own independent consideration of the evidence.

Genova, 91 Wis. 2d at 608; *see also* Wis. Stat. § 903.03. The above prohibitions are reflected within Rule 903.03's standard that applies when a presumptive fact is used to establish guilt or an element of the offense, requiring the court to find that a reasonable juror, upon considering the evidence as a whole (including the "basic facts" upon which the presumption is based), could either find the presumptive fact or make a determination of guilt beyond a reasonable doubt. Wis. Stat. § 903.03(2).[1]

[1] The rule also requires the judge to instruct the jury that they "may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so." Wis. Stat. § 903.03(3). Of course, since the State did not rely on this evidentiary path at trial but now seeks to "establish the circumstantial sufficiency of the evidence to justify a predicate fact" necessary to sustain its conviction as contemplated in

The State does not dispute that it must provide satisfactory evidence of the ABV threshold, as well as proof that the bottles at issue did not contain beer or malt liquor in order to establish its ultimate fact, that the bottles at issue contained intoxicating liquor. Again, the State instead takes the position that both of these findings may be inferred from the evidence, as a whole. (Resp. Br. 8, 12, 15).

Both the ABV threshold and the type of alcohol are elemental facts. They are both required by the statute; "proof of one without the other would be insufficient for conviction." Wis. Stat. § 125.02(8); *Harvey*, 254 Wis. 2d 442, ¶27 (determining that the statute at issue included two elemental facts, a proximity finding and a "protected place" finding, as both were necessary to convict the defendant of the enhanced offense at issue, and that both must be submitted to the jury and proven beyond a reasonable doubt); *see also Arty's LLC v. Wisconsin Dept. of Revenue*, 2018 WI App 64, ¶ 19, 384 Wis. 2d 320, 919 N.W.2d 590 (confirming that the beverages at issue were "intoxicating liquor," which is "partially define[d]" by the 0.5 percent ABV threshold, and exclusive of fermented malt beverages.).

The State's argument fails for two reasons. First, there is simply no nexus that would allow a jury to infer ABV or rule out a class of malt-based alcoholic beverages without more information. The result in this

---

Genova, 91 Wis. 2d at 607, the court made no findings, and provided no such instruction.

case is that the State is either relieved of its burden to prove the essential elements, or the jury is relieved of its duty to make the requisite findings, rendering the presumption impermissible as discussed above.

The State relies heavily on *Briffitt v. State*, 58 Wis. 39, 16 N.W. 39 (1883), where the court took judicial notice that the word "beer" is commonly accepted to mean an intoxicating, fermented malt beverage, such that "when the witnesses…testified that the defendant sold to them beer, the prosecution had sufficiently proved that he had sold to them a malt and intoxicating liquor." *Briffitt*, 58 Wis. 39, 40.

Briffitt is legally and factually distinguishable from this case. In that case, the statute at issue defined proof of the sale of "*any* malt liquor" as proof of the sale of intoxicating liquor, without any reference to ABV. *Id*., 40 (citing s. 9, ch. 332, Laws 1882). While the State is correct that under the current iteration of the statute that defines "fermented malt beverage" does include the same 0.5 ABV threshold that applies to intoxicating liquor, the State's assertion that the same statute was at issue in *Briffitt* is incorrect. (Resp. Br., 14).

As to the facts, *Briffitt* involved testimony that referred to the type of alcohol, which was all that was necessary under the statute. The testimony in this case was not that the officer observed whisky, or whisky bottles (or gin, or brandy, etc.). Rather, the officer's testimony is that he saw non-descript "liquor bottles standing on a shelving unit of some sort," and

an affirmative response when asked, "In your experience, were any of those liquor bottles?" (42:74, 77).

The officer's ability to identify the bottles by their labels affords no insight. The testimony suggests that the officer may not have even read the labels:

> Once I had entered inside the establishment, the countertop was to my right. Behind that countertop was Kimberly Rowe, who was later identified. Behind her were liquor bottles standing on a shelving unit of some sort…
>
> Q.: You said there were bottles behind her. How were those bottles arranged?
>
> They were positioned in a way that if I was behind the countertop, that you would be able to read the labels from your position.

(42:74, 77). While it is possible that the officer was referring to the area where a patron would order a drink, it seems more than likely that "behind the countertop" referred to the bartender's area because the officer had just used the same phrase to describe where Rowe was standing. The response is also conditioned on a premise, "*if* I was behind the countertop, you [sic] *would* be able to read the labels," a rather unusual way for someone to describe their current position. What remains clear is that the officer did not testify that he actually read the labels, nor is there any further description about the bottles, their labels, or their contents.

The second reason the State's argument fails is that *Briffitt's* holding, while not explicitly overruled, is called into question by the Wisconsin supreme court's decision in *State v. Harvey*, 2002 WI 93, 254 Wis. 2d 442, 647 N.W.2d 189. There, in the wake of the watershed SCOTUS decision in *Apprendi v. New Jersey*,[2] the *Harvey* court held that it is error to give a jury instruction requiring the jury to accept a judicially-noticed elemental fact necessary to convict a defendant of an enhanced offense. *Id*, ¶33. The *Harvey* court's holding is focused on the error in instructing the jury, and did not determine that it was improper for the trial court to take judicial notice of a fact that was not, and could not be reasonably disputed, the Wisconsin Criminal Jury Instructions Committee included a salient comment, relevant to the issues in this case, in the judicial notice jury instructions:

> In light of *Harvey*, the continued viability of the holding in *State ex rel. Cholka v. Johnson*, 96 Wis. 2d 704, 713, 292 N.W.2d 841 (1980), is doubtful. The case holds that it was proper for the trial court to take judicial notice of the fact that Southern Comfort is in an intoxicating liquor and that excessive consumption of an intoxicating liquor can cause death.

WIS JI-CRIMINAL 165 (2003). At the time *Cholka* was decided, a substantially similar definition of

[2] *Apprendi v. New Jersey*, 530 U.S. 466, held that the elements of a penalty enhancer, other than those based on prior convictions, are elements of the offense, and thus, constitutionally required to be submitted to the jury and proven beyond a reasonable doubt.

intoxicating liquor was in effect under s. 176.01(2) Wis. Stats. (1975), the immediate precursor to the current statute, s. 125.02(8). What *Cholka* does imply, however, is that the type of alcohol at issue was crucial to establish the link between the basic facts, (testimony that the deceased consumed at least a half-quart of Southern Comfort within a short period of time, and slipped into an unconscious state and died shortly thereafter) and the ultimate fact necessary for conviction (that the alcoholic beverage met the definition of "intoxicating liquor"). Here, there was no testimony about either the type of alcohol, or its observed effects, upon which the jury could infer a necessary finding.

The State mischaracterizes Rowe's position concerning what evidence might be sufficient proof of ABV. Nowhere in her brief does Rowe argue that chemical testing is the only way to furnish proof,[3] nor are there any sweeping assertions that testimony alone will always be insufficient to provide that proof. (Resp. Br., 12). Chemical testing is simply one method of reliably establishing the percentage of alcohol.

Lastly, while the State notes that a minority of jurors could draw from their bartending experience as part of their observations and experiences in the affairs of life, which they could apply when considering

[3] "Even if this Court determines that [chemical] analysis is not the only way to establish proof of alcohol content, the fact remains that no other proof was offered in this case…" (App. Br., 15).

the evidence at hand, their experience undermines the State's position rather than offering any support. Experienced bartenders would know that among the bottles of alcoholic beverages behind the bar, an observer would be just as likely to see all the mixers and non-alcoholic beverages that are often used in both cocktails, and "mocktails." In fact, some are deceptively similar to the look and feel of many of the bottles used by distillers. Undersigned invites the reader to take note of the non-alcoholic spirits cited in the respondent's brief, particularly Seedlip Non-Alcoholic Spirits.[4] (Resp. Br., 8, n.9) The look of these artisanal "spirits" (and their price) would impress the most sophisticated of teetotalers, and more importantly, the bottles and their labels could fool even the most seasoned of drinkers when observed from across the bar.

CONCLUSION

For the reasons above, and in her brief-in-chief, Rowe asks that this court reverse the judgment of conviction in this case and remand the case to the circuit court with instructions to enter a judgment of acquittal, based on the State's failure to prove, beyond a reasonable doubt, that Rowe unlawfully possessed, with the intent to sell, intoxicating liquor.

---

[4] https://www.seedlipdrinks.com/en-us/ (last visited, August 7, 2023).

Dated this 8th day of August, 2023.

Respectfully submitted,

Electronically signed by
Carlos Bailey

CARLOS BAILEY
Assistant State Public Defender
State Bar No. 1113630

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8259
baileyc@opd.wi.gov

Attorney for Defendant-Appellant

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 2608 words.

Dated this 8th day of August, 2023.

Signed:
Electronically signed by
Carlos Bailey
CARLOS BAILEY
Assistant State Public Defender