STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 4

Appeal No. 23 AP 241

COLUMBIA COUNTY,

Plaintiff-Respondent,

vs.

CARTER SMITS,

Defendant-Appellant

BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED ON JANUARY 27, 2023 IN THE CIRCUIT COURT FOR COLUMBIA COUNTY, BRANCH 3, THE HONORABLE TROY D. CROSS PRESIDING

Respectfully submitted,

CARTER SMITS, Defendant-Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE ISSUE

Was there sufficient credible evidence that Mr. Smits was driving with a prohibited alcohol concentration, in violation of Wis. Stats. §346.63 (1) (b), where the only evidence was a blood test with a result of .08 and where the State's own expert witness testified that the result was equally likely to mean Mr. Smit's BAC was below the limit as above it?

Circuit Court answered: Yes.

STATEMENT ON PUBLICATION

Defendant-Appellant Carter Smits does not recommend publication of the Court's decision.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT OF THE CASE AND FACTS

Just after midnight on August 16, 2020, Columbia County Deputy Sheriff Michael Rosecky pulled over Carter Smits on suspicion of speeding. R. 36 at 62, lines 9-12. Once stopped, Deputy Rosecky observed open intoxicants and suspected Mr. Smits of driving drunk. R. 36 at 64, lines 1-10. Mr. Smits agreed to a blood test. R. 36 at 77, lines 1-3. The result was .08. R. 25.

Mr. Smits pled not guilty to citations for speeding, driving with open intoxicants, driving while impaired, and driving with a prohibited alcohol concentration. R. 2. A jury trial took place on January 27, 2023. R. 36 at 1. The State, in its opening and closing statements, referred to the .08 test result as "right on the money." R. 36 at 50, lines 22-23; 163, lines 10-11. A peer reviewer for the State Laboratory of Hygiene, Kristen Dreweick, testified as an expert witness on behalf of the State. R. 36 at 106, lines 8-22. She testified about the testing procedure and to her confidence in the results. R. 36 at 109, line 9, to 113, line 23. Most importantly to this appeal, she testified as to the margin of error on blood tests:

> The official name for that is called "uncertainty of measurement." Any type of analytical test result has this uncertainly or variability to it. Now, we allow plus or minus 5 percent for our calibrators and our quality control materials that are at a level above 0.100; and if it's less than .100, then that allowed variability is plus or minus 0.005.

> All that means is that if we give a reported result, we have to acknowledge that there's actually a window around that value where the true result lies.

R. 36 at 114, lines 2-11. On cross-examination, Ms. Dreweick confirmed that this "uncertainty of measurement," when applied to Mr. Smit's .08 test result, meant that it was equally likely that his BAC was above or below the legal limit. R. 36 at 122, lines 1-22.

Based on this testimony, Mr. Smits' attorney moved for a directed verdict on the PAC charge before closing arguments. R. 36 at 131, 1-3. Attorney Snow argued that the testimony that the result was equally likely to reflect innocence as guilt meant that the blood test result "doesn't even meet a preponderance of the evidence standard." R. 36 at 131, lines 3-11. This meant the State hadn't met its burden of clear, convincing, and satisfactory evidence. *Id*.

The trial court denied the motion. Instead, the trial court stated a belief that there was sufficient evidence to meet the clear and convincing standard, and attributed the statement that there were equal possibilities that the test result was above or below the line to counsel.[1] R. 36 at 132, lines 1-12. Later in the proceedings, the judge admitted he had been reading a case on a different issue during the expert's testimony. R. 36 at 135, lines 17-18.

[1] R. 36 at 132, lines 1-2 ("…I'm going to leave it to the jury because you say there's an equal probability" (emphasis added)).

The jury found Mr. Smits guilty of operating with a prohibited alcohol concentration, with the blood test being the sole evidence before them to support the verdict. R. 30 at 1. Counsel for Mr. Smits then moved for judgment notwithstanding the verdict, based on the same lack of clear and convincing evidence. R. 36 at 188, lines 4-11. The circuit court denied the motion without elaborating further. R. 36 at 188, lines 17-19. The jury found Mr. Smits not guilty of operating while impaired (R. 36 at 186, lines 4-10) but found that he did have open intoxicants in the vehicle (R. 36 at 185, line 22, to 186, line 1). Mr. Smits appeals only his conviction of operating with a prohibited alcohol concentration in violation of Wis. Stats. § 346.63 (1) (b).

ARGUMENT

During opening and closing arguments, the State repeatedly stated that Carter Smit's BAC test result was "right on the money."[2] But as the jury heard, it was right on the line. Kristin Dreweick confirmed that the "uncertainty of measurement" in the result meant there was an "equal chance" that the real concentration was above or below .08. Because the result was right on the line, the test was not clear and convincing evidence that Mr. Smit's BAC was above the statutory prohibition. Since this test was the only evidence of Mr. Smit's BAC, nothing on the record supports the jury's verdict. The question should never have been submitted to the jury, and their answer to it cannot stand.

I. Standards of Review

Trial judges need not and should not submit factual questions to juries when the evidence clearly supports only one conclusion. *Correa v. Woodman's Food Mkt.*, 2020 WI 43, ¶ 9, 391 Wis. 2d 651, 658, 943 N.W.2d 535, 538. When considering a motion for directed verdict, the trial court views all the credible evidence and reasonable inferences from it in the light most favorable to the non-movant. *Emer's Camper Corral, LLC v. Alderman*, 2020 WI 46, ¶ 15, 391 Wis.

[2]R. 36 at 50, lines 22-23; 163, lines 10-11.

2d 674, 683, 943 N.W.2d 513, 518. However, if the answer choices before the jury are "yes" or "we don't know," evidence that would require them to speculate or guess is not enough to survive a motion for directed verdict. *Correa*, 2020 WI 43 at ¶ 16. Appellate courts, while generally deferential to trial courts on these decisions, can and should reverse a trial court decision if it is clearly wrong. *Id* at ¶ 8.

Whether to enter judgment notwithstanding the verdict is a question of law which this Court reviews *de novo*. *State v. Booker*, 2006 WI 79, ¶ 12, 292 Wis. 2d 43, 54, 717 N.W.2d 676, 681. Trial and appellate courts apply the same standard in answering that question: when no credible evidence or reasonable inferences support the verdict, the jury's decision should be set aside. *Foseid v. State Bank of Cross Plains*, 197 Wis. 2d 772, 784, 541 N.W.2d 203, 208 (Ct. App. 1995).

Both questions hinge on whether credible evidence or reasonable inferences from it could clearly and convincingly prove that Mr. Smits had a BAC of .08 or higher. Because the blood test results were undisputedly no more accurate at answering this question than flipping a coin, the trial court should never have let the question go to the jury and should have disregarded its answer.

II. Because The Blood Test Result Was Undisputedly Just As Consistent With Innocence As With Guilt, There Was No "Clear, Satisfactory, and Convincing" Evidence Supporting the Jury's Verdict.

Considering the elements, the State was required to prove and the burden of proof they had to meet to do so, it is readily apparent that no evidence in the record supports the jury's decision. Wis. Stats. § 346.63 (1) (b) has only two elements: (1) driving on a highway; (2) with a blood alcohol concentration of .08 grams per 100 milliliters or above. Wis. Stats. § 340.01 (46m). Wis. Stats. § 885.235 (1g) (c) provides a presumption of correctness to chemical tests when the samples were taken within three hours of a stop. However, when the result is close to the .08 benchmark, a defendant can rebut that presumption by presenting evidence that the result may not accurately reflect the actual BAC. *Langlade Cnty. v. Lettau*, 2020 WI App 6, ¶ 34, 390 Wis. 2d 426, 939 N.W.2d 432 (unpublished).

If this presumption is rebutted, it makes the State's high burden difficult to meet. Civil traffic violations, like Wis. Stats. § 346.63 (1) (b), must be proven by "clear, satisfactory, and convincing" evidence. Wis. Stats. § 345.45. "Clear and convincing" requires a greater degree of certainty than the "preponderance" standard in ordinary civil actions. *Kruse v. Horlamus Indus., Inc.*, 130 Wis. 2d 357, 363, 387 N.W.2d 64, 67 (1986). That certainty must come not just from a

greater quantity of evidence, but also from evidence of a higher quality. *Kuehn v. Kuehn*, 11 Wis. 2d 15, 29–30, 104 N.W.2d 138, 147 (1960).

Winnebago Cnty. v. Christenson, 2012 WI App 132, 345 Wis. 2d 63, 823 N.W.2d 841 (unpublished), cited by the trial court on another issue, is instructive on what level of proof can meet this burden. In *Christenson*, the deputy sheriff found the injured defendant and her vehicle in a ditch. *Id* at ¶ 2-3. While arranging for her care, the deputy smelled intoxicants and requested a blood sample, which the defendant provided. *Id* at ¶ 3-4. Three tests on the sample provided results of .084, .084, and .081 percent BAC, respectively. *Id* at ¶ 5. Both in the trial court and on appeal, the defendant relied on the .005 percent "uncertainty of measurement" as a defense, eliciting testimony that the numbers could have "just as easily" been .079 and .076. *Id*. The trial court, sitting as fact-finder, and the Court of Appeals on review, were unconvinced. *Id* at ¶ 24.

As a matter of basic math, this makes sense. The testimony that .084 could "just as easily" have been .079 was, technically, true. However, it would be more accurate to say that a reading of .084 means there is only a 10% chance of the test subject's BAC being below .08. The fact that two more tests on the same sample came back with results only 10% (the second .084) and 40% (the .081 result)

likely to reflect a legal BAC increased both the quantity and quality of the evidence against Christenson. The fact-finder could infer that even if these results did not reflect Christenson's exact BAC, the sheer improbability of all three tests landing in the low end of the "uncertainty of measurement" range meant it was reasonably certain her BAC was at or over .08.[3]

By comparison, the evidence that Mr. Smit's BAC was at or above .08 or above lacked both the quality and the quantity to be considered "clear and convincing." While, as noted, the State described the .08 test result as "right on the money," it was actually "right on the line." On both direct and cross-examination, Ms. Dreweick testified that Mr. Smit's actual BAC could have been anywhere between from .075 to .085 and confirmed that there was an "equal chance" that the result was below or above the listed result. This means there was a 50% chance that Mr. Smit's BAC was within legal limits, as compared to the much smaller chances in *Christenson*.

The jury in Mr. Smit's case was also only presented with one result, meaning that the jury was left with an "equal chance" that Mr.

[3] While not explicitly relied upon, the trial court could have also bolstered this conclusion with the knowledge that Christenson had lost control of her vehicle and landed in a ditch, making it more likely that she was both operating while intoxicated and that her blood test results were low rather than high. By contrast, the jury in Mr. Smits' case explicitly found that he was not operating while intoxicated.

Smits was guilty or innocent, without any evidence they could use to tip the scale. While, as discussed, one of the results in *Christenson* had a 40% chance of being lower than .08, the two higher results could lead the jury to reasonably infer that wherever the actual number was, it was comfortably above .08. The only evidence that Mr. Smits was at or above .08 was a blood test result that was undisputedly no more capable of answering that question than flipping a coin. That "equal chance" of guilt or innocence wouldn't be enough to meet a preponderance of the evidence standard, let alone clear the "clear and convincing" that the State had to prove.

This is not to say that the "uncertainty of measurement" means that the effective prohibited BAC in Wisconsin is actually .085. While no test is without some margin of error, either a higher single result or a higher number of tests consistent with a result of .08 or higher could give juries the necessary certainty. Even one test at .085 would be clear and convincing, since the lowest the actual BAC could be was .08. Similarly, like in *Christenson*, additional tests, while all possibly below the .08 line, can reinforce each other to the point where a fact finder could be reasonably certain the defendant was above that line. Additionally, other evidence could reasonably support the test result by showing indications of impairment or alcohol intoxication, as in *Christenson*. Here, the jury found there was no impairment by alcohol.

Where the verdict must be to a reasonable certainty by clear and convincing evidence, if the State has a test result that is right on the line, it needs more evidence, be it additional tests or otherwise, that it's actually "right on the money." Here, they provided none[4].

This absence of credible evidence means that the trial court was clearly wrong in submitting the question to the jury and should have entered judgment notwithstanding their answer. The record shows why the trial court got it wrong. The trial court explicitly stated that during Ms. Dreweick's testimony, it was reading *Christenson* to determine the result of a different objection.[5] This lack of attention to the actual testimony is apparent in the trial court's ruling on the directed verdict motion. The trial court attributed the statement that there were equal possibilities that the test result was above or below the line to counsel[6] and stated a belief that there was sufficient evidence to meet the clear and convincing standard. But as discussed, the only evidence was a test that was undisputedly equally likely to mean that Mr. Smits' BAC was below the legal limit as above. While

[4] For example, in this case there was no testimony from the person who drew Mr. Smit's blood. There was no testimony that the person who drew the blood was an authorized person pursuant to Wis. Stat. § 343.305(5)(b). The lack of evidence is another unusual factor and shows the lack of both quantity and quality of evidence presented at trial to support the prohibited alcohol concentration charge.
[5] R. 36 at 135, lines 17-18 ("I read it while the last witness was testifying.").
[6] R. 36 at 132, lines 1-2 ("…I'm going to leave it to the jury because you say there's an equal probability" (emphasis added)).

the trial court was admirably attempting to respect the jury's role as fact-finder, this lack of attention to the actual evidence meant the jury was essentially asked to flip a coin to make its decision. A trial court judge has a great deal to do during a trial, and the oversight is understandable- but that doesn't make it any less "clearly wrong."

CONCLUSION

Because the blood test result was right on the line, rather than right on the money, the State presented no clear and convincing evidence that Mr. Smit's BAC was above the statutory prohibition. The question should never have been submitted to the jury, and their answer to it cannot stand. Accordingly, the Defendant respectfully asks this Court to reverse the trial court's denials of the motions for directed verdict and for judgment notwithstanding the verdict.

Dated at Madison, Wisconsin, July 13, 2023.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8) (b), (bm), and (c) for a brief. The length of the brief is 3275 words.

I further certified that filed with this brief is an appendix that complies with § 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 rulings 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 of 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 first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notion that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: July 13, 2023.

Signed,

BY: Electronically signed by Sarah M. Schmeiser
SARAH M. SCHMEISER