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CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 4

Appeal No. 23 AP 241

COLUMBIA COUNTY,

Plaintiff-Respondent,

vs.

CARTER SMITS,

Defendant-Appellant

BRIEF OF PLAINTIFF-RESPONDENT

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,

STATE OF WISCONSIN, Plaintiff-Respondent

BY: Margaret A. Sorrentino
State Bar No.: 1129270

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Jury Instructions

Wis. JI—Criminal 2660A OPERATING A MOTOR VEHICLE
WITH A PROHIBITED ALCOHOL CONCENTRATION —
CIVIL FORFEITURE § 346.63(1)(b) 7

STATEMENT OF THE ISSUE

Was there sufficient evidence that Mr. Smits was driving with a prohibited alcohol concentration, in violation of Wisc. Statutes 346.63(1)(b), where evidence was presented that Mr. Smits's blood was tested at .08g /100 mL, and the State's witness stated that the result was equally likely to be at .075 as it was .085?

Circuit Court answered: Yes.

STATEMENT ON PUBLICATION

Respondent does not request publication of the Court's decision.

STATEMENT ON ORAL ARGUMENT

Respondent does not request oral argument unless the Court deems necessary.

STATEMENT OF THE CASE AND FACTS

In August of 2020, Sheriff Michael Rosecky pulled over Carter Smits on suspicion of speeding, and once stopped, observed Mr. Smits had open intoxicants in his car, and gave other indications of impaired driving. Mr. Smits consented to a blood draw to be tested for alcohol concentration.

The expert witness testified to the result of .080 g / 100mL, with an uncertainty of measurement of that blood test was testified to be 5%, for a variability of plus or minus 0.005 g /100 mL. Mr. Smits's attorney moved for a directed verdict, arguing that it was as likely to reflect guilt as innocence. The trial court denied this motion, and the jury found Mr. Smits guilty of operating with a prohibited alcohol concentration.

ARGUMENT

I. Standard of Review

The Respondent agrees with the standard of review as recited in the Appellant's Brief.

II. The Blood Result is Not "Just as Consistent with Innocence as with Guilt", and Did Present Clear Satisfactory Evidence on which the Jury Could Find the Defendant Guilty.

The expert witness testified that the variability or, colloquially, "margin of error" of the reported result was 5%, which is plus or minus 0.005 g /100 mL. Mr. Smits's reported range of alcohol concentration was between .075 and .085—yielding a total of eleven results possible in this case: 0.075, 0.076, 0.077, 0.078, 0.079, 0.080, 0.081, 0.082, 0.083, 0.084, and 0.085. There are a greater number of results which would be illegal (0.080 through 0.085) because the median result between .075 and .085 is also an illegal alcohol concentration. I.e.: six of those numbers are illegal results compared to five. Thus, a 54.55% likelihood of containing an illegal level of alcohol merely means that it was 54.55% likely that Mr. Smits's blood contained an illegal level of alcohol. This renders the Appellant's characterization of the blood result as "just as consistent with innocent as with guilt" inaccurate.

Therefore, it is justified that the jury might have thought that while the defendant wasn't too impaired to drive, but he did demonstrate that he might have an illegal BAC. Such a determination is the jury's determination to make based off of their reasoning and perception of the evidence as the finders of fact.

All of the Appellant's statements regarding prosecution's statements: "right on the money" are thus immaterial, as they reflect a misunderstanding of the principles of math involved. It is not, in

fact, “equally likely” that the defendant had a legal amount of alcohol in their blood as they did not, as the median number is in fact an illegal concentration.

The jury instructions for the offense themselves, state: “Where the test results showing 0.08 Grams or more have been admitted... as evidence.” This is inclusive of a value of exactly 0.08 grams. The comments to the jury instruction reinforce this notion. Section 885.235 provides the statutory authority for according evidentiary significance to alcohol test results. The subsection generally applicable to operating while intoxicated offenses is § 885.235(1g)(c), which reads as follows:

“The fact that the analysis shows that the person had an alcohol concentration *of 0.08 or more* is prima facie evidence that he or she was under the influence of an intoxicant and is prima facie evidence that he or she had an alcohol concentration *of 0.08 or more*.” (emphasis added).

CONCLUSION

Because the circuit court was not erroneous in denying the motion for directed verdict, the Respondent respectfully requests that this Court affirm the circuit court.

Dated: October 31, 2023.

Signed,

BY: Electronically signed by Margaret A. Sorrentino
Margaret A. Sorrentino

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 858 words.

Dated: October 31, 2023.

Signed,

BY: Electronically signed by Margaret A. Sorrentino
Margaret A. Sorrentino

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: October 31, 2023.

Signed,

BY: Electronically signed by Margaret A. Sorrentino
Margaret A. Sorrentino