STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2023AP992
Jefferson County Circuit Court Case Nos. 2021CV84

CITY OF WATERTOWN,

Plaintiff-Respondent,

v.

ANDREW WIEST,

Defendant-Appellant.

AN APPEAL FROM THE JUDGEMENT OF CONVICTION FOLLOWING JURY TRIAL IN CIRCUIT COURT FOR JEFFERSON COUNTY, THE HONORABLE WILLIAM HUE, JUDGE, PRESIDING

THE BRIEF AND APPENDIX OF THE DEFENDANT-APPELLANT ANDREW WIEST

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STATEMENT OF THE ISSUES

Was the evidence sufficient to support a conviction for operating a motor vehicle while impaired and with a prohibited alcohol concentration?

Answer: The jury returned a verdict of guilty.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Because this is an appeal within Wis. Stats. Sec. 752.31(2), the resulting decision is not eligible for publication. Because the issues in this appeal may be resolved through the application of established law, the briefs in this matter should adequately address the arguments; oral argument will not be necessary.

STATEMENT OF THE CASE/FACTS

The defendant-appellant, Andrew Wiest (Mr. Wiest) was charged with operating a motor vehicle while under the influence of an intoxicant a violation of Wis. Stat. § 346.63 (1)(a) and operating a motor vehicle with a prohibited alcohol concentration stemming from an offense allegedly occurring on July 6, 2019. Mr. Wiest, by counsel, requested a jury trial and timely filed the written request for said trial. A jury trial was held on March 3, 2023 the Honorable William F. Hue, Judge, Jefferson County Circuit Court, presiding. The City of Watertown presented several witnesses. At the close of the City's case, counsel moved for a directed verdict arguing the City had not established the time of operation. (R:69:83/ App.50). The Court denied the motion. ***Id.*** Mr. Wiest timely filed a Notice of Appeal on June 5,2023. . The appeal herein stems from the circuit court denying the defendant's oral motion for directed verdict and challenging the sufficiency of the evidence for said verdict. The facts that are pertinent to this appeal were received through the testimony of the witnesses who testified at trial. Each witness and their testimony is provided below.

City of Watertown Police Officer Nora Achilli testified she is an eight-year veteran of the Watertown Police Department and

that she was on duty on July 6, 2019. (R:69:34/ App.2). On said date, she was assigned patrol duties. She testified she was patrolling the downtown area of the City of Watertown. She testified her patrol has her constantly moving through the streets of downtown Watertown. (R:69:35/ App.3). On July 6, 2019 around 3:01 a.m., she was on East Main Street, and could see high beams on a vehicle which drew her attention to it. (R:69:35-36// App.3-4). The vehicle was pulled over to the south and parked in the yellow area. ***Id.*** The high beams of the vehicle were on and the back tire was on the sidewalk. The vehicle was stopped in a no parking zone. As she drove past the vehicle, she observed the defendant sitting back with his head back and his mouth hanging open. (R:69:37/ App.5).

Achilli pulled up behind the vehicle in the roadway, activated her lights and exited her squad. (R:69:39/ App.6). When she walked up to the vehicle, she observed the window was closed. She knocked on the window and Mr. Wiest woke up immediately. (R:69:39// App.6). Officer Achilli motioned to Mr. Wiest to roll down the window, he tried to but according to Achilli had difficulty with the controls, and eventually simply opened the door. ***Id.*** The rear lights of the vehicle were on when Officer Achilles approached. (R:69:40/ App.7). When Mr. Wiest opened

the door, a strong odor of intoxicant was apparent from the cabin of the vehicle. Officer Achilli also observed an open intoxicant in the center console. (R:69:40// App.7). Achilli conceded the vehicle was not running when she approached the vehicle. However, when the door was open, she heard a chime from the interior of the vehicle, she testified this was because the keys were in the ignition. (R:69:41/App.8). Officer Achilli eventually asked Mr. Wiest to exit the vehicle, and at that time Mr. Wiest removed the keys from the ignition. (R:69:41/ App.8).

Achilli did not see Mr. Wiest turn the keys at all, but testified she only observed Mr. Wiest pull the keys from the ignition. (R:69: / App.8).

Once outside the vehicle Officer Achilli discussed with Mr. Wiest how he arrived at the location. (R:69:42/ App.9). Mr. Wiest indicated he was coming from River Bend and had a couple of beers. His speech was slurred and at times he was difficult to understand. (R:69:43/ App.10). Mr. Wiest admitted consuming alcohol around nine or ten. ***Id.*** Officer Achilli testified her contact with Mr. Wiest occurred around 3:02 (R:69:43/ App.10).

Officer Achilli then had Mr. Wiest perform field sobriety testing. She testified as to her training regarding the performance of said tests. (R:69:45-48// App.12-15). Officer Achilli testified

she had Mr. Wiest perform the Horizontal Gaze Nystagmus test (HGN), the Walk and Turn test, and the One Leg Stand test. (R:69: 49-58// App.16-25). After completion of those tests, the officer felt Mr. Wiest was impaired. At that point she placed Mr. Wiest under arrest for OWI. (R:69:59/ App.26).

Subsequently, Officer Achilli read Mr. Wiest the Informing the Accused form and Mr. Wiest consented to submit to a chemical test of his blood. (R:69:60-91/ App.27-58). Officer Achilli transported Mr. Wiest to the Watertown Regional Medical Center where blood was drawn by a phlebotomist. ***Id.***

Officer Achilli then read Mr. Wiest his Miranda warnings and asked Mr. Wiest the questions contained in the Alcohol and Drug Influence report. (R:69:64/ App.31). Mr. Wiest agreed to answer questions. Mr. Wiest admitted that he was under the influence and did indicate he drove a motor vehicle. (R:69:65/ App.32).

On cross-examination, Officer Achilli agreed when she walked up to the vehicle, it was not running. (R:69:68/ App.35). Also, after the door to the vehicle was open, Mr. Wiest reached up and Officer Achilli warned Mr. Wiest not to turn the vehicle on. (R:69:68/ App.35). Officer Achilli conceded she did not

observe Mr. Wiest "turning or manipulating or trying to activate" the ignition. (R:69: 68/ App.35).

Officer Achilli testified the bars are open in the area until 2:30 a.m., and there are four or five bars in this area where the vehicle had been located.

The Court then questioned Officer Achilli about her patrol route that evening, and inquired as to whether she could remember the time she last passed by the location where the vehicle was found. Officer Achilli said it was "very hard to judge that time." (R:69:73/ App.40).

Thomas Neuser, a forensic scientist, from the State Laboratory of Hygiene also testified. Neuser testified he did not perform the analysis of the sample, but rather Laurie Edwards did. However, Mr. Neuser did the review and validated Ms. Edwards work. Neuser testified Mr. Wiest's blood ethanol concentration was .206 grams per 100 milliliters at 3:53 a.m. (R:69:81-82/ App.48-49).

At the close of the City's case, defense counsel moved for a directed verdict arguing the City has failed to establish the time of operation. (R:69:83/ App.50). The Court denied the motion. ***Id.***

During jury deliberations the jury submitted a question inquiring whether simply putting the keys into the ignition amounted to operation. Counsel and the Court had a discussion as to the definition of operation, and how to answer the juror question. (R:69:152-153/ App.64-65). The Court acknowledged there was a disagreement between counsel as to how the question should be answered. Defense counsel argued as the definition of operation should be that provided in ***Milwaukee County v. Proegler,*** 95 Wis.2d 614, 626, 291 N.W.2d 698 (Ct.App. 1980) prohibits "the activation of any of the controls of the motor vehicle necessary to put it in motion applies either to turning on the ignition or leaving the motor vehicle running while the motor vehicle is in park" (R:69:149/ App.61). The City cited to ***State v. Mertes,*** 2008 WI App 179, ¶10, 315 Wis.2d 756, 762 N.W.2d 813**,** arguing "even absent a running motor, jury is entitled to consider circumstantial evidence" (R:69:150/ App.62). The Court found the jury question showed the answer "means something" to the jury. (R:69:153/ App.65) However, in the end simply instructed the jury to review WI JI Criminal 2668.

The jury returned a verdict of guilty to both charges. The defendant timely filed a Notice of Appeal on June 5, 2023.

STANDARD OF REVIEW

In circumstantial evidence cases, an appellate court may not substitute its judgement for that of the jury unless the evidence, "viewed most favorably to the state and conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found the requisite guilt..." ***State v. Poellinger,*** 153 Wis.2d 493, 507, 451 N.W.2d 752 (1990)

ARGUMENT

THE EVIDENCE ADDUCED AT TRIAL WAS INSUFFICIENT TO SUPPORT CONVICTION WHERE THE EVIDENCE ADDUCED ESTABLISHED ONLY THAT MR. WIEST WAS SLEEPING IN A MOTOR VEHICLE WITH THE KEYS IN THE IGNITION BUT WHERE THE VEHICLE WAS NOT RUNNING

The issue on appeal is whether the evidence adduced by the City was sufficient to support the conviction. In determining whether the evidence was sufficient to support the conviction, the Court considers "whether that evidence, viewed in the light most favorable to the State, is so insufficient in probative value and force that as a matter of law no reasonable jury could have found guilt…" ***State v. Poellinger,*** 153 Wis.2d 493, 500, 451 N.W.2d. 752 (1990). "If there is any possibility that the jury could have drawn the appropriate inferences from the evidence to support its verdict, we may not overturn that verdict even if we believe the

jury should not have found guilt based on the evidence." ***State v. Graham,*** 2000 WI App 138, ¶6, 237 Wis.2d 620, 614 N.W.2d 504. "If more than one reasonable inference can be drawn from the evidence, we must adopt the inference that supports the verdict." ***State v. Mertes,*** 2008 WI App 179, ¶10, 315 Wis.2d 756, 762 N.W.2d 813.

Wis JI-Criminal 2668 requires the City to establish two elements at trial to a reasonable certainty by evidence which is clear, satisfactory and convincing. To find Mr. Wiest guilty of OWI and PAC, the City must establish (1) the Mr. Wiest operated a motor vehicle on a roadway, and (2) that either Mr. Wiest was under the influence of an intoxicant at that moment or had a prohibited alcohol concentration at that moment. "Operate" is "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Wis. Stat. §346.63(3)(b). "The prohibition against the 'activation of any of the controls of a motor vehicle necessary to put it in motion' applies either to turning on the ignition or leaving the motor vehicle running while the vehicle is in 'park.'" ***County of Milwaukee v. Proegler,*** 95 Wis.2d 614, 626, 291 N.W.2d 608 (Ct. App. 1980). Here, the evidence adduced at trial was insufficient to establish Mr. Wiest was operating a motor vehicle when

Officer Achilli arrived on the scene, and if/when Mr. Wiest had previously operated the vehicle.

During trial the jury questioned whether simply putting the keys into the ignition amounted to operation. The City arguing ***State v. Mert*****es,** 2008 WI App 179, 315 Wis.2d 756, 762 N.W.2d 813, compared Mr. Wiest's fact to those in ***Mertes*** and argued the ***Mertes*** Court made the "exact distinction." The City argued turning the vehicle on was not necessary and indicated the jury could use circumstantial evidence to establish operation. (R:69:149-150/ App.61-62). Here, Mr. Wiest was found sleeping in a vehicle that was not running. While the keys were in the ignition, they were not manipulated by Mr. Wiest. There was no testimony from anyone who observed Mr. Wiest drive to the location, and no testimony as to when Mr. Wiest might have arrived at said location.

However, the evidence adduced in ***Mertes*** was significantly stronger than that herein. In ***Mertes,*** officers responded to a call of a vehicle parked in front of gas pumps with two individuals passed out in the vehicle. ***Mertes*** at ¶2. Upon arrival officers observed Mr. Mertes to be passed out in the driver's seat of the vehicle. Officers woke Mr. Mertes after opening the car door of the vehicle. The keys to the vehicle were

in the ignition and had been manipulated to the auxiliary position. ***Id*** at ¶3. Mr. Mertes seemed "pretty incoherent" "disoriented and confused". ***Id.*** Mr. Mertes admitted coming from Milwaukee and acknowledged he had been parked at the location for about ten minutes.

The ***Mertes*** Court found the following circumstantial evidence sufficient to support the conviction: "(1) Mertes sitting behind the wheel of a vehicle parked at a gas pump with the keys in ignition in the auxiliary position, (2) his statement that he had been there for approximately ten minutes, (3) his statement that he had come from Milwaukee and was headed to Milwaukee, and (4) the lack of any evidence evidence that the passenger (or any other specifically identified individual) had operated the vehicle". ***Id*** at ¶14.

Similar to the facts in ***Mertes***, here, Mr. Wiest was found sleeping in his truck behind the wheel with the keys in the ignition. However the similarities end there. Unlike ***Mertes***, the keys were not in the auxiliary position. Clearly, had the keys been in the auxiliary position there would be reasonable inference that the person sitting behind the wheel had manipulated them to the auxiliary position. However, here, there was no evidence that Mr. Wiest manipulated the keys. In fact, the jury question regarding

putting the keys into the ignition was illustrative. They wanted to know if simply putting the keys into the ignition was sufficient to constitute operation.

Furthermore, Officer Achilli conceded she did not observe Mr. Wiest manipulate the keys in the ignition. She warned Mr. Wiest not to turn the vehicle on, which established the vehicle was obviously not running, but further she conceded she did not observe Mr. Wiest turn or manipulate the keys in the ignition. When she asked Mr. Wiest to remove the keys from the ignition, he simply pulled the keys from the ignition, and did not turn or manipulate the keys. Thus, unlike ***Mertes,*** where the evidence established the keys were turned to the auxiliary position, here, there was no evidence proving Mr. Wiest ever manipulated keys while they were in the ignition and while he was impaired. This distinction is significant inasmuchas in ***Mertes*** as a fact finder could have concluded operation occurred simply from the manipulation of the keys to the auxiliary position.

Equally important, in ***Mertes***, Mr. Mertes admitted he had been at the location for about ten minutes and had driven from Milwaukee. ***Id.*** A reasonable jury could conclude if he was impaired ten minutes after arriving to the location, he was impaired at the moment he drove into the gas station. Further, his

admission that he drove from Milwaukee, arrived ten minutes prior to the officer's arrival, and was sitting behind the wheel with the keys in the auxiliary position sufficiently supported the conviction.

Conversely here, Officer Achilli had no information as to how long the vehicle had been at the location. Officer Achilli apparently did nothing to determine when the vehicle was driven or operated. She did not testify that she touched the hood to determine if it was warm or recently driven or tried to determine if there were witnesses to operation of the vehicle. While she established through questioning Mr. Wiest that he had consumed alcohol between 9:00 and 10:00 p.m. on the prior evening, she specifically did not ask Mr. Wiest to estimate how long he had been at the location. Furthermore, Officer Achilli could not accurately judge what time she had previously drove past the location on patrol, and thus could not otherwise establish a timeline for how long the vehicle was at the location.

Once again, the distinction is significant. In ***Mertes***, a reasonable fact finder could conclude because the vehicle had pulled up to the gas pumps only ten minutes prior to the officers arriving, and because Mr. Mertes was behind the wheel when the officers arrived, he must have just driven the vehicle to the

location. Conversely, in Mr. Wiest's case, there is no evidence establishing the moment of operation. Based on the evidence adduced, a jury could not conclude Mr. Wiest had recently driven the vehicle to the location or had even driven to the location within the previous three hours.

Based on the evidence adduced at trial, no reasonable jury could have found Mr. Wiest operated his motor vehicle while impaired and with a prohibited alcohol concentration.

CONCLUSION

Because the evidence was insufficient to support a conviction, inasmuch as no reasonable jury could have found Mr. Wiest to have operated his motor while impaired or with a prohibited alcohol concentration, the Judgment of Conviction should be vacated and reversed.

Dated this 20th day of November, 2023.

Respectfully Submitted

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FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 23 pages. The word count is 4038.

Dated this 20th day of November, 2023.

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CERTIFICATION OF COMPLIANCE WITH RULE 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 s. 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 this 20th day of November, 2023.

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or a 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 notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 20th day of November, 2023.

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APPENDIX