

FILED
01-17-2024
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 23 AP 1367

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JOSEPH B. VENABLE,

Defendant–Appellant.

BRIEF OF DEFENDANT–APPELLANT

ON APPEAL FROM CONVICTION ENTERED ON JUNE 12, 2023, IN
THE CIRCUIT COURT FOR COLUMBIA COUNTY, BRANCH 1, THE
HON. TODD J. HEPLER, PRESIDING

Respectfully submitted,

JOSEPH B. VENABLE,
Defendant-Appellant

TRACEY WOOD & ASSOCIATES
Attorneys for the Defendant
6605 University Avenue, Suite 101
Middleton, Wisconsin 53562
(608) 661-6300

BY: ANDRIA T. SAVITCH
State Bar No. 1133673

TABLE OF CONTENTS

	<u>PAGE</u>
Table of Authorities	4
Statement of the Issues	5
Statement on Publication	6
Statement on Oral Argument	6
Statement of the Case and Facts	7
<u>Background</u>	7
<u>Argument</u>	
I. THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL TO PROVE MR. VENABLE WAS GUILTY OF OPERATING WHILE UNDER THE INFLUENCE	14
A. Standard of review and legal authority	14
B. The State did not establish a nexus between impairment and Mr. Venable's prescription medications.	15
i. The State's Analyst's testimony regarding drug interactions should not have been considered in the Court's finding.	20
C. The evidence remains insufficient to prove impairment was caused by Mr. Venable's medications.	25
Conclusion	29
Certifications	30
<u>Appendix</u>	
Judgment of Conviction	A-1

6/9/23 Exhibit #2 Laboratory Report

A-3

Transcript – 6/9-23 Court Trial

A-4

TABLE OF AUTHORITIES

Cases

<i>In re Commitment of Jones</i> , 2018 WI 44, 381 Wis. 2d 284, 911 N.W.2d 97	
.....	21, 22
<i>State v. Bailey</i> , 54 Wis. 2d 679, 196 N.W.2d 664 (1972).....	21
<i>State v. Beamon</i> , 2013 WI 47, 347 Wis. 2d 559, 830 N.W.2d 681	15
<i>State v. Booker</i> , 2006 WI 79, 292 Wis. 2d 43, 717 N.W.2d 676.....	14, 28
<i>State v. Dobbs</i> , 2020 WI 64, 392 Wis. 2d 505, 945 N.W.2d 609	21
<i>State v. Hubbard</i> , 2008 WI 92, 313 Wis. 2d 1, 752 N.W.2d 839.....	26
<i>State v. McAdory</i> , 2021 WI App 89, 400 Wis. 2d 215, 968 N.W.2d 770 .	16,
17, 18	
<i>State v. Poellinger</i> , 153 Wis. 2d 493, 451 N.W.2d 752 (1990).....	14, 28
<i>State v. Smith</i> , 2012 WI 91, 342 Wis. 2d 710, 817 N.W.2d 410.....	15
<i>State ex rel. Kanieski v. Gagnon</i> , 54 Wis. 2d 108, 194 N.W.2d 808 (1972)	
.....	15

Statutes

Wis. Stat. § 345.45	15
Wis. Stat. § 346.63(1)(a)	25
Wis. Stat. § 346.65(2)(am)	15
Wis. Stat. § 907.02	21, 22

STATEMENT OF THE ISSUES

- I. Did the State present sufficient evidence at trial such that it was clear, satisfactory, and convincing that Mr. Venable operated while under the influence of his prescribed medications?

The trial court held that it did.

STATEMENT ON PUBLICATION

Mr. Venable does not seek publication, as the issues presented may be resolved on the briefs by applying established law to the facts of the case.

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 issue on appeal.

STATEMENT OF THE CASE

On October 25, 2021, Columbia County filed a citation previously issued to Joseph Venable for Operating While Under the Influence (OWI).¹ Mr. Venable entered his written not guilty plea himself on July 5, 2022.² Shortly before the court trial set for March 15, 2023, Mr. Venable retained counsel.³ Newly retained counsel then filed a letter requesting a set over of the court trial to allow time to prepare and receive discovery.⁴ Prior to trial, the State turned over a lab report containing the results of Mr. Venable's blood test.⁵ The court trial was eventually held on June 9, 2023, and Mr. Venable was found guilty of the OWI of prescription medication.⁶

FACTS

On the evening of September 24, 2021, Joseph Venable was pulled over by Trooper Jennifer Van Oss of the Wisconsin State Patrol, in the town of Dekorra.⁷ At approximately 10:30 p.m., State Patrol dispatch received a driving complaint and relayed the information to Trooper Van Oss.⁸ Trooper Van Oss subsequently located the subject vehicle, began following, and observed the vehicle start veering into the middle lane, coming about five

¹ R. 27 at 1.

² *Id.*; *see also* R. 2.

³ R. 6 (Notice of Retainer for trial counsel was filed on February 27, 2023); R. 27 at 1

⁴ R. 9.

⁵ R. 18.

⁶ R. 27 at 2; R. 21.

⁷ R. 23: 5-6, 9.

⁸ *Id.* at 6.

feet from a box truck, and then continue back into the right lane.⁹ Trooper Van Oss pulled over Mr. Venable after observing his vehicle travel between lanes.¹⁰

During the initial contact, Mr. Venable revealed that he had been tired and that he began driving that morning, around 10:00 or 11:00 am, traveling between Wisconsin and Illinois.¹¹ Trooper Van Oss then asked if Mr. Venable had taken any prescription medications, and Mr. Venable provided the names of medications he was prescribed.¹² Mr. Venable's prescribed medications include Paroxetine and Adderall, both of which he had been taking for five to six years before this incident.¹³ Mr. Venable indicated to Trooper Van Oss he took both medications as normal the morning of the incident, around 11:00 or 11:30 a.m.¹⁴ During her interaction with Mr. Venable, Trooper Van Oss observed slow movements, slurred speech, dilated pupils, and bloodshot eyes.¹⁵ Interestingly, Trooper also described Mr. Venable as "[v]ery animated."¹⁶ She believed Mr. Venable had some confusion regarding where he was geographically and where he had traveled that day as well.¹⁷

⁹ *Id.* at 8.

¹⁰ *Id.* at 8-9.

¹¹ *Id.* at 10-1.

¹² *Id.* at 11.

¹³ *Id.* at 26.

¹⁴ *Id.* at 26.

¹⁵ *Id.* at 12.

¹⁶ *Id.* at 11.

¹⁷ *Id.*

Despite Mr. Venable's disclosure of multiple medical conditions, including nystagmus, possibly from a head injury, and a blood clot in his leg, Trooper Van Oss proceeded with field sobriety tests (FSTs).¹⁸ One FST Trooper conducted the Modified Romberg test.¹⁹ This was an additional test conducted to determine if Mr. Venable could accurately indicate the passage of 30 seconds.²⁰ At the court trial, Trooper Van Oss affirmed that the Modified Romberg test is focused on how a controlled substance may interact with an individual and is utilized to gauge impairment.²¹ According to her testimony, an internal clock that is too fast would normally indicate a stimulant, while a slow internal clock may suggest a depressant or similar characteristics.²² Notably, the Modified Romberg test yielded no signs of impairment.²³ Trooper Van Oss did not notice any eyelid tremors or major swaying.²⁴ Further, the test revealed Mr. Venable's internal clock to be at 29.²⁵ This was well within the 5 second margin allowed for the test, so Trooper Van Oss did not note this as a sign of impairment or indicate any concerns.²⁶

¹⁸ *Id.* at 13-4.

¹⁹ *Id.* at 15.

²⁰ *Id.* at 23.

²¹ *Id.* at 24.

²² *Id.* at 23.

²³ *Id.* at 15-6, 23-4.

²⁴ *Id.* at 24.

²⁵ *Id.* at 23.

²⁶ *Id.* at 24.

Lindsey Vosters, a Forensic Scientist 1 in the Forensic Toxicology section of the Wisconsin State Laboratory of Hygiene, also testified at the court trial.²⁷ Analyst Vosters was listed as the laboratory analyst for Mr. Venable's blood test and testified that she was responsible for the initial drug screen and confirmatory amphetamine test.²⁸ After initial screen detected amphetamine and paroxetine in Mr. Venable's blood, both of which reflect medications he was prescribed, the blood sample proceeded to confirmatory testing.²⁹ According to Analyst Vosters, confirmatory testing varies depending on what type of drug is present.³⁰ For Mr. Venable's sample, Analyst Vosters testified that the instrument for confirmatory testing was tailored to the amphetamine.³¹ The results of the confirmatory test, admitted as Exhibit 2, revealed 260 ng/mL of amphetamine and an unquantified amount of paroxetine were present in Mr. Venable's blood.³² Notably, the analyst did not testify that that level would cause impairment.

After Analyst Vosters testified to Mr. Venable's blood content, the State sought to elicit information about the interaction between the two substances present.³³ Analyst Vosters' testified that her education and

²⁷ *Id.* at 27.

²⁸ *Id.* at 28.

²⁹ *Id.* at 11.

³⁰ *Id.* at 30.

³¹ *Id.*

³² R. 18.

³³ R.23 at 32.

training was in toxicology, not pharmacology.³⁴ Accordingly, Defense objected to this expansion of testimony, citing a lack of foundation.³⁵ Instead of ruling on the objection, the trial court proposed asking Analyst Vosters about her education as it pertained to the specific line of inquiry.³⁶ Analyst Vosters indicated that her knowledge of drug interactions stemmed generally from training about the interaction of substances in the body and attendance at the Robert F. Borkenstein course in drugs.³⁷ She then explained that the course covered “...all the different types of classes of drugs, as well as current literature and published literature on the effects of those drugs, how they affect the body, as well as affect performance and behavior in individuals...” and that there is also continuing in-house training for a particular class of drugs.³⁸ She stated that amphetamine and paroxetine were included in her training and education.³⁹

Analyst Vosters ultimately testified that amphetamine and paroxetine may interact if taken together, “[a]lthough it is very uncommon...”⁴⁰ According to her testimony, serotonin syndrome is a consequence of the two drugs interacting, which is an excess of the serotonin chemical and may have

³⁴ *Id.* at 28, Analyst Vosters testified to having a Master’s of Science in forensic toxicology from the University of Florida, and a Bachelor’s of Science from Wisconsin-Platteville in chemistry and forensic investigation.

³⁵ *Id.*

³⁶ *Id.* at 32.

³⁷ *Id.* at 32-3.

³⁸ *Id.* at 33.

³⁹ *Id.*

⁴⁰ *Id.*

adverse complications.⁴¹ Mild complications include, sweating, shivering, “uncontrolling” body movements, and confusion, whereas severe tremors, seizures, unconsciousness, and death are severe indications of serotonin syndrome.⁴² Following her explanation, Analyst Vosters reiterated how uncommon the symptoms are for taking amphetamine and paroxetine together.⁴³ She also clarified that she neither knew Mr. Venable, nor if he suffered from serotonin syndrome.⁴⁴

During closing arguments, the State emphasized Mr. Venable’s poor driving and what was actually known about how Mr. Venable felt.⁴⁵ According to the State, trial testimony revealed that there was poor driving, indications of impairment, Mr. Venable was very tired, had 260 nanograms per milliliter of prescribed amphetamine in his system, and was prescribed other medications as well.⁴⁶ Accordingly, the prosecutor argued that it seemed that Mr. Venable “was impaired by something else in addition to, perhaps, being tired.”⁴⁷

Similarly, Defense recognized that Mr. Venable was having issues with his driving;⁴⁸ however, Defense argued that Mr. Venable’s poor driving

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 33.

⁴⁴ *Id.* at 34.

⁴⁵ *Id.* at 38.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

and performance on FSTs was not due to being impaired by any substance.⁴⁹ As Trooper Van Oss confirmed during her testimony, nystagmus is not caused by stimulants, which is the only substance with any sort of quantitative measurement here.⁵⁰ Despite the detection of amphetamine, there was “no testimony on whether or not that level of amphetamine would cause someone to be impaired,” as Defense argued.⁵¹ Thus, impairment and mere presence was not sufficient to reach the burden to prove Mr. Venable was impaired by an intoxicant.⁵²

At the conclusion of the court trial, the Court found Mr. Venable guilty of the OWI.⁵³ According to the court:⁵⁴

In this case, clearly he was not safely driving. The defense argues that, well, he was just tired, yet it is clear that he was under the influence of a controlled substance as indicated by the laboratory report.

...

The lab analyst has testified to the levels of amphetamine in his system. There was amphetamine and paroxetine both present there. There is no question that his driving was not safe given the observations in the video, the trooper's observations, and the calls from citizens reporting that.

The Court ordered that Mr. Venable's license be revoked for six (6) months, that he pay a forfeiture and costs for the OWI citation, and that he complete an AODA assessment and follow through with any treatment recommendations.⁵⁵

⁴⁹ *Id.*

⁵⁰ *Id.* at 38-9.

⁵¹ *Id.* at 39.

⁵² *Id.*

⁵³ *Id.* at 40.

⁵⁴ *Id.*

⁵⁵ *Id.* at 40-41; R. 21

I. THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL TO PROVE MR. VENABLE WAS GUILTY OF OPERATING WHILE UNDER THE INFLUENCE

A. Standard of review and legal authority

The question of whether the evidence is sufficient to support a conviction is a question of law this Court reviews *de novo*.⁵⁶ A conviction may be reversed when 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.⁵⁷ When reviewing the sufficiency of the evidence to support a conviction this Court has stated:⁵⁸

[We] may not substitute [our] judgment for that of the trier of fact unless the evidence, viewed most favorably to the [S]tate and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it. . .

...

Additionally, [i]n reviewing the sufficiency of circumstantial evidence to support a conviction, [we] need not concern [ourselves] in any way with evidence which might support other theories of the crime. [We] need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence to sustain the verdict rendered.

⁵⁶ *State v. Booker*, 2006 WI 79, 12, 292 Wis. 2d 43, 717 N.W.2d 676 (citing *State v. Poellinger*, 153 Wis.2d at 501, 451 N.W.2d 752.).

⁵⁷ *Id.* at 22; becomes applicable to the case at hand by replacing the beyond a reasonable doubt standard with the clear, satisfactory and convincing burden of proof.

⁵⁸ *Id.* (citing *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)).

As stated, the standard applies to criminal cases; however, the present case involves a first-offense OWI, which is a civil offense.⁵⁹ Accordingly, clear, satisfactory and convincing evidence of guilt is required for a conviction.⁶⁰ Therefore, beyond a reasonable doubt must be replaced with the clear, satisfactory and convincing burden of proof for the aforementioned standard to reverse a conviction to apply to the case at hand.

The party challenging the sufficiency of the evidence carries the burden to show that the evidence could not have reasonably supported a guilty finding.⁶¹ Although a jury may draw reasonable inferences, it should do so from established facts and refrain from inferences entirely unsupported by any evidence.⁶² The same should hold true for the Judge in this case, as he was the fact finder in lieu of a jury.⁶³ Nonetheless, courts “uphold the conviction if there is any reasonable hypothesis that supports it.”⁶⁴

B. The State did not establish a nexus between impairment and Mr. Venable’s prescription medications.

The State did not sufficiently link the presence of prescribed medications to impairment. Presenting the lab report to the fact finder,

⁵⁹ Wis. Stat. § 346.65(2)(am) (imposing civil penalties for first offenses and imprisonment upon convictions subsequent to the first offense).

⁶⁰ Wis. Stat. § 345.45.

⁶¹ *State v. Beamon*, 2013 WI 47, ¶ 21, 347 Wis. 2d 559, 572, 830 N.W.2d 681, 688.

⁶² *State ex rel. Kanieski v. Gagnon*, 54 Wis. 2d 108, 117, 194 N.W.2d 808, 813 (1972).

⁶³ See R. 23; see also R. 27.

⁶⁴ *State v. Smith*, 2012 WI 91, ¶ 24, 342 Wis. 2d 710, 817 N.W.2d 410.

without further explanation from any source, will not provide a basis to evaluate the significance of the specific levels revealed in the report.⁶⁵

The evidence presented at trial, relating to controlled substances, established only that paroxetine and 260 ng/mL of amphetamine were present. Notably, the quantity of paroxetine was left unknown. Despite the lab report including a known quantity of amphetamine, no context or testimony was provided to give the result any probative value. The State did not call any expert witnesses to testify as to whether the amount found in Venable's system could have impaired him. Overall, there was no evidence to establish the quantitative value of amphetamine relative to a normal amount for someone appropriately ingesting their prescribed Adderall, an appropriate amount for Mr. Venable, a dangerous amount, an amount necessary to cause impairment, and so on. Perhaps less significant was the detection of paroxetine. Paroxetine was merely marked "present" and without testimony to establish even the minimum amount necessary for detection. Further, there was no explanation of how paroxetine impacts the body when present at any level.

Meaningful explanation was similarly lacking in *McAdory*.⁶⁶ The jury was presented with the specific amount of each controlled substance, THC and cocaine, per liter but did not receive additional context from any source

⁶⁵ *State v. McAdory*, 2021 WI App 89, ¶ 27, 400 Wis. 2d 215, 968 N.W.2d 770.

⁶⁶ *McAdory*, 2021 WI App 89, 400 Wis. 2d 215, 968 N.W.2d 770.

regarding what the amounts might signify.⁶⁷ There was no explanation for how the substances at the specific levels could potentially effect the average person, much less how they could have impacted the defendant specifically and his ability to drive safely.⁶⁸ Ultimately, the Court of Appeals in found that “the jury lacked a basis to assess the significance of the specific levels reflected in the toxicologist’s report.”⁶⁹

Here, the lab report was published as an exhibit, allowing the fact finder to see which substances were detected and the amount of amphetamine present; however, no explanation was provided to put the level of amphetamine or presence of paroxetine into perspective. The evidence did not suggest what impact 260 ng/mL of amphetamine or paroxetine may have on the average person and did not get close to informing how Mr. Venable may be impacted.

Ultimately, the Court concluded that it was reasonable for the jury to infer McAdory’s impairment was due to the THC and cocaine.⁷⁰ One consideration that led to the Court’s finding was the jury’s knowledge of a negative ethanol test result, as alcohol was the other theoretical possibility for the defendant’s impairment.⁷¹ The other considerations included the congruency between signs of impairment and major signs of the effects of

⁶⁷ *Id.* at ¶ 27.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at ¶ 34.

⁷¹ *Id.* at ¶ 30.

cocaine and THC, and sufficient ingestion of cocaine and THC causing someone to be unable to safely control a vehicle falling within common knowledge of jurors.⁷² Ultimately, the inadequate testimony was overcome by the jury's collective common knowledge and common sense, making it reasonable to infer McAdory was impaired by the cocaine and THC.⁷³

The same justification cannot be relied upon here. First and foremost, this is not an ethanol or THC case like most prosecutions where it is well known that impairment can result. Rather this case involves prescribed medications as legal substances.⁷⁴ The other theoretical possibility was that Mr. Venable was too tired to drive safely. Exhaustion was never negated as the other potential cause of impairment. Additionally, most of the Trooper's observations of Mr. Venable resemble a low energy level, fatigue, and exhaustion, none of which are consistent with commonly known effects of amphetamine. They are also inconsistent with serotonin syndrome, as described below. If exhaustion was overwhelmingly established as the cause, through testimony, review of the video, and the evidence overall, as it was here, Mr. Venable should not have been found guilty.

It is within common knowledge that amphetamine is found in prescribed medications, and testimony established that amphetamine was specifically one medication prescribed to Mr. Venable; however, neither the

⁷² *Id.* at ¶ 31-2.

⁷³ *Id.* at ¶ 34-5.

⁷⁴ R. 23 at 36.

amount of amphetamine appropriate for a particular individual, especially measured in ng/mL, nor the level at which it impairs someone, is common knowledge. Without an expert, namely doctor or pharmacologist, to indicate what would impair a regular person, it is plainly unreasonable to infer an individual's prescribed medication caused impairment. Thus, it would be especially unreasonable to make that determination for a specific individual, like Mr. Venable, solely because a value was given.

In fact, only the opposite is supported by the facts. As prescribed medication and one which Mr. Venable indicated he took for years prior, it is expected to be present in Mr. Venable's blood, including in the absence of any impairment.⁷⁵ Further, it was reasonable to infer that amphetamine was safe for Mr. Venable and does not necessarily cause impairment that would prevent him from carrying out everyday tasks such as driving. While this may be contingent upon Mr. Venable taking the amount prescribed, there was no evidence at all to support the fact he exceeded his dosage or was outside of the therapeutic range for the medication. In fact, Mr. Venable's statement to Trooper Van Oss that he took his medications as normal that morning is the uncontroverted fact.⁷⁶ The quantity alone was insufficient to show impairment, as no testimony indicated how the quantity depicted in the lab report compared to normal levels or levels necessary for impairment.

⁷⁵ *Id.* at 26

⁷⁶ *Id.*

Paroxetine was also found; however, the mere presence of this other prescribed medication, that Mr. Venable had been taking with amphetamine for around five years, does not prove that Mr. Venable's impairment had any relation to either of his medications or combination thereof. Additionally, as another prescribed medication, it would have been expected to be present in Mr. Venable's blood, including in the absence of impairment, and presumptively as it had been for years prior.

The facts, as established at trial, only establish the presence of amphetamine and paroxetine, both substances for which Mr. Venable had a valid prescription. There was no evidence that these medications caused Venable's impairment. The 260 ng/mL of amphetamine was never put in perspective or established to fall outside a therapeutic range or Mr. Venable's prescribed dosage. Paroxetine similarly was unaccompanied by any facts or testimony to suggest the mere presence would cause impairment. It was only the opposite inference, that the two substances in Mr. Venable's blood reflected his prescribed medications, and had been consumed without issue for years prior, that was supported by established facts.

i. The State's Analyst's testimony regarding drug interactions should not have been considered in the Court's finding.

The State's analyst exceeded the scope of her expertise by testifying beyond the results of the blood test. Analyst Vosters works in the forensic

toxicology department and has training, experience, and education related to drug screening and forensic toxicology.⁷⁷ While she may be qualified in her particular field, that does not establish her status as an expert for the State to introduce pharmacology evidence through her.⁷⁸ One consideration the circuit court must analyze before admitting expert testimony is whether the purported expert is qualified as such given their knowledge, skill, experience, training, or education.⁷⁹ The laboratory report and Analyst Vosters' testimony only established her expertise in forensic toxicology, not pharmacology or interactions between controlled substances. Due to the Analyst's lack of education and training regarding how controlled substances impact the body, Defense objected to allowing her to testify to the interaction between amphetamine and paroxetine.⁸⁰

Analyst Vosters did subsequently testify to her attendance of the Robert F. Borkenstein course in drugs and in-house training. To admit expert testimony in the form of an exposition on general principles, the court must consider:⁸¹

(1) whether the expert is qualified; (2) whether the testimony will address a subject matter on which the factfinder can be assisted by an expert; (3) whether the testimony is reliable; and (4) whether the testimony will "fit" the facts of the case.

⁷⁷ *Id.* at 27-8.

⁷⁸ *State v. Bailey*, 54 Wis. 2d 679, 685, 196 N.W.2d 664, 667 (1972).

⁷⁹ *In re Commitment of Jones*, 2018 WI 44, ¶ 29, 381 Wis. 2d 284, 304, 911 N.W.2d 97, 107 (referencing requirements of Wis. Stat. § 907.02(1)).

⁸⁰ R. 23 at 32.

⁸¹ *State v. Dobbs*, 2020 WI 64, ¶ 43, 392 Wis. 2d 505, 534-35, 945 N.W.2d 609, 624.

With the additional foundation, the Court allowed her testimony over objection;⁸² however, the testimony regarding a potential interaction between amphetamine and paroxetine should have been given little to no consideration by the trial court. The weight given to evidence is distinguishable from the issue of admissibility.⁸³ While the court is tasked with admitting evidence that meets the requisite standards, it then falls to the factfinder to weigh and ascertain truth of the evidence.⁸⁴ This would have been the responsibility of the Judge here, as it was a court trial, and the Judge was the factfinder.

The Analyst's testimony and ability to answer whether there was any interaction between amphetamine and paroxetine relied on one course, review of unspecified literature, and "in-house training on a monthly basis for a particular class of drugs."⁸⁵ She testified to only a general, and rare, possibility that simultaneous consumption of amphetamine and paroxetine could lead to "serotonin syndrome." Further, Analyst Vosters' opinion was based solely on the mere presence of both substances with no consideration for specific amounts, extraneous factors, or various circumstances surrounding the presence of the substances. Perhaps most important, the Analyst's expert opinion failed to consider any personal characteristics of

⁸² Wis. Stat. § 907.02.

⁸³ *In re Commitment of Jones*, 381 Wis. 2d at 305.

⁸⁴ *Id.*

⁸⁵ R. 23 at 33.

Mr. Venable. Without accountability for specific circumstances of this case or basis to reasonably infer serotonin was involved here, the Analyst's opinion has little, if any, applicability.

As discussed above, consequences of serotonin syndrome can include losing control over body movements, seizures, and tremors. In turn, impairment may result. If serotonin syndrome was present, it could link signs of impairment to a bad interaction between amphetamine and paroxetine. This theory would identify Mr. Venable's medications as the cause of his impairment, as required for conviction. Nevertheless, the possibility that Mr. Venable suffered from poor interaction between his meds, causing his impairment, was minute based on the evidence. That certainly does not satisfy the clear and convincing standard necessary for conviction.

Specifically, this theory was introduced solely based on the mere presence of amphetamine and paroxetine. It was not suggested because Mr. Venable's behavior was consistent with the symptoms, or because the amount of each substance in his blood reached levels that trigger serotonin syndrome, or because Mr. Venable deviated from his normal dose of each medication, or for any other reason that would make it reasonable to infer it had anything to do with Mr. Venable's impairment. Not only was serotonin syndrome largely inconsistent with the facts of this case, but Analyst Vosters also testified to the rarity of it – twice. Further, she did not know Mr. Venable or if serotonin syndrome was involved at all. In fact, all that could be

reasonably inferred was that Mr. Venable had taken both medications before and *not* suffered serotonin syndrome.

Albeit serotonin syndrome by name alone suggests Mr. Venable's behavior was consistent with the reaction, the specific indications of impairment do not line up with the specific symptoms Analyst Vosters testified to. According to Trooper Van Oss, among other things, Mr. Venable exhibited poor driving, slow movement, bloodshot eyes, and some slurring. None of which line up with the symptoms of serotonin syndrome as described above. She also testified that Mr. Venable was animated, which is perhaps most contradictory to the indications of an adverse reaction to his medications. Additionally, Mr. Venable only stated that he had felt extremely exhausted when explaining his driving.⁸⁶ Moreover, no testimony suggested that Mr. Venable appeared impulsive or lacking control over his body. One indication of the two drugs having a poor interaction is tremors, according to Analyst Vosters. Interestingly, this was something Trooper Van Oss specifically looked for and indicated was not present. Trooper Van Oss did not mention any shivering or sweating by Mr. Venable either.

On the other hand, Trooper did testify to Mr. Venable exhibiting some confusion when trying to geographically situate himself. Nonetheless, one common indicator out of many, which was also subject to multiple

⁸⁶ *Id.* at 9.

reasonable explanations, falls drastically short of making it reasonable to find Mr. Venable's impairment was caused by his prescribed medications. The mere presence of amphetamine and paroxetine and one common symptom is clearly insufficient to prove Mr. Venable was impaired by his prescription medications. Especially as it would suggest that Mr. Venable suddenly suffered a "very uncommon" adverse reaction to his prescribed medications, after taking both numerous times before without issue. Ultimately, the broad disconnect between serotonin syndrome and Mr. Venable challenges whether it would be reasonable at all to infer Mr. Venable suffered from serotonin syndrome.

C. The evidence remains insufficient to prove impairment was caused by Mr. Venable's medications.

The addition of Analyst Vosters testimony about serotonin syndrome does not prove Mr. Venable's medications caused him to operate while impaired. To convict Mr. Venable of the OWI, the State was required to prove, by clear satisfactory, and convincing evidence, that: (1) Mr. Venable drove on a highway; and (2) was under the influence of an intoxicant at the time of driving.⁸⁷ Under the influence of an intoxicant or controlled substance "to a degree which renders him or her incapable of safely driving" is an essential requirement for OWI prosecution.⁸⁸ That is, Mr. Venable must have

⁸⁷ WI JI-2663A; Wis. Stat. § 346.63(1)(a).

⁸⁸ Wis. Stat. § 346.63(1)(a).

consumed a sufficient amount of an intoxicating substance to cause him to be less able to practice clear judgement and the steady hand necessary to control his vehicle.⁸⁹

As previously discussed, the facts are undeniably insufficient to reasonably infer Mr. Venable's prescription medications caused impairment. Consequently, the evidence fails to satisfy the clear, satisfactory, and convincing standard required for conviction, regardless of whether the Analyst's expanded testimony was considered or not. "Clear, satisfactory, and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that the defendant is guilty because of its greater weight and clear convincing power."⁹⁰

The evidence necessary to reasonably infer Mr. Venable was impaired by amphetamine and paroxetine simply does not exist. Because unnamed literature and general conclusory lectures identify serotonin syndrome as a rare possibility under unknown conditions, does not make it reasonable to infer it had any involvement or applicability to Mr. Venable and facts in this case. Therefore, inferences of such are largely unsubstantiated, which certainly cannot outweigh opposing evidence and reasonable inferences when compared against each other.

⁸⁹ *State v. Hubbard*, 2008 WI 92, ¶ 11, 313 Wis. 2d 1, 10, 752 N.W.2d 839, 843.

⁹⁰ WI JI-140A.

Instead, the established facts prove only that Mr. Venable was tired, took his prescribed medications, showed signs of exhaustion, and that amphetamine and paroxetine were detected in his blood. The mere presence of amphetamine and paroxetine during impairment is not clear, satisfactory, and convincing evidence that the substances caused impairment. In fact, both amphetamine and paroxetine were in Mr. Venable's blood the day he was pulled over, from when he took his medications around 11:00 or 11:30 a.m., until after 10:30 p.m. when dispatch received the complaint, and while his blood was taken. Without facts to establish Mr. Venable deviated from his medication schedule, which there are none here, Mr. Venable would have had a similar blood composition for approximately eleven (11) hours before his medications suddenly caused impairment.

The probability of the substances and impairment simply existing at a similar time, independent of each other, is not diminished by the Analyst's testimony. Her proposal of a phenomenon linking adverse reactions to the drugs lacks probative value, as there was no evidence establishing that such a link was present at all or that Mr. Venable suffered from a bad reaction to the drugs. To the contrary, the facts support a history of both drugs being present in Mr. Venable's blood previously *without* impairment.

Finally, indications of impairment exhibited by Mr. Venable were entirely consistent with being too tired to drive. This Court does not need to

entertain evidentiary support for other theories of the offense.⁹¹ However, this Court does need to decide whether the theory of guilt leading to the conviction is supported by sufficient evidence to sustain the verdict rendered.⁹² Here, the trial court's theory of guilt rested on the amphetamine and paroxetine detected in Mr. Venable's blood causing impairment.⁹³ As explained above, to be sufficient, the evidence to sustain the conviction must have satisfied and convinced the fact finder of Mr. Venable's guilt because of its greater weight and clear convincing power.⁹⁴ So, any evidence that Mr. Venable *did* suffer from serotonin syndrome must hold greater weight and be more convincing than the overwhelming opposing evidence. It clearly does not. Every indication of impairment and observation of Trooper Van Oss could most reasonably be connected to someone too tired to drive. Only the presence of amphetamine and paroxetine, and alleged glimpses of confusion are consistent with serotonin syndrome. Significantly, Mr. Venable's performance on the Modified Romberg test unequivocally supports exclusion of controlled substances as the source of the behavior observed here. Trooper Van Oss testified that the test focuses on drugs as the cause of impairment. She further stated that Mr. Venable performed well on

⁹¹ *Booker*, 262 Wis. 2d 43 (citing *State v. Poellinger*, 153 Wis. 2d at 501, 451 N.W.2d 752.).

⁹² *Id.*

⁹³ R. 23 at 40.

⁹⁴ WI JI-140A.

the test and that she did not see any indications of impairment that would otherwise be present when substance use is the cause.⁹⁵

CONCLUSION

For the reasons stated in this Brief, the judgment of the trial court should be reversed, and this action be remanded to that court, with directions that the court enter a directed not guilty verdict based on the sufficiency of the evidence. Alternatively, Mr. Venable respectfully requests a new trial based on plain error and in the interests of justice.

Dated at Middleton, Wisconsin, January 17, 2024.

Respectfully submitted,

JOSEPH B. VENABLE, Defendant

TRACEY WOOD & ASSOCIATES
Attorneys for the Defendant
6605 University Avenue, Suite 101
Middleton, Wisconsin 53562
(608) 661-6300

BY:



ANDRIA SAVITCH
State Bar No. 1133673
Andria@traceywood.com

⁹⁵ R. 23 at 23-4.

CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm) and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 200 dots per inch, 13-point body text, 11-point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 5,245 words.

Dated: January 17, 2024.

Signed,

BY:



ANDRIA SAVITCH
State Bar No. 1133673
Andria@traceywood.com

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 § 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: January 17, 2024.

Signed,

BY:



ANDRIA SAVITCH
State Bar No. 1133673
Andria@traceywood.com