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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 23 AP 1367

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JOSEPH B. VENABLE,

Defendant-Appellant.

REPLY 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

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TABLE OF CONTENTS

	<u>PAGE</u>
Table of Authorities	3
<u>Argument</u>	
A. The State failed to substantively respond to Defendant-Appellant’s brief and should be deemed to have conceded all arguments.	4
B. The evidence presented at trial did not clearly, convincingly, and satisfactorily prove Mr. Venable’s guilt.	7
Conclusion	12
Certifications	13
<u>Appendix</u>	
Transcript – 6/9-23 Court Trial	A-1

TABLE OF AUTHORITIES

Cases

Charolais Breeding Ranches, Ltd. V. FPC Sec. Corp., 90 Wis. 2d 97, 279 N.W.2d 493 (Ct. App. 1979).....6,7
Schlieper v. State Dep't of Nat. Res., 188 Wis. 2d 318, 525 N.W.2d 99 (Ct. App. 1994).....7
Serv. Emps. Int'l Union, Loc. 1 v. Vos, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35.....7
State v. Pettit, 171 Wis. 2d 627, 492 N.W.2d 633 (Ct. App. 1992) ...5

Jury Instructions

WI JI-Criminal 140A, *Burden of Proof: Forfeiture Actions*5

ARGUMENT

A. The State failed to substantively respond to Defendant-Appellant's brief and should be deemed to have conceded all arguments.

The State's brief does not substantively address any of the legal arguments Appellant set forth in his initial brief. Aside from reiteration that clear, satisfactory, and convincing is the appropriate standard here, and a single reference in the conclusion, the applicable evidence standard for conviction does not appear in the State's argument or elsewhere. The only reply the State offers to the entirety of Appellant's brief consists of conclusory statements, namely that the Analyst testimony as to the presence of substances in Mr. Venable's blood and Trooper Van Oss's observations of impairment were sufficient to convict. Although the State addresses competing evidence by way of claiming that alternative explanations need not be adopted, there is no evaluation as to the probative value of evidence. Instead, the State's brief includes only the conclusory statement that the evidence to convict was not "so lacking in probative value."¹ Similarly absent is any analysis in light of oppositional evidence, as required to determine whether the clear, satisfactory, and convincing

¹ State's Brief at 7.

standard was met.² In a similar vein, the State recognizes that it would have been improper for the Analyst to provide an expert opinion of why and how Mr. Venable was impaired, but neglects to address how the lack of personal or factual application diminishes relevance and probative value. These unspecific arguments are not supported by any references to legal authority or facts of record and must, therefore, be rejected by this Court as insufficiently developed.³

Neither the Trooper's specific observations of impairment nor the prominence, or lack thereof, of the suggested adverse reaction to the substances were discussed in the State's brief. The State did not substantively contest the lack of probative value of the only evidence offered that would connect the substances to impairment. Specifically, the multitude of facts that weigh against the substances being the cause and minimal applicability to specific facts of the case, as presented in Appellant's brief, went unrefuted. For instance, specific symptoms exhibited by someone impaired due to a poor interaction between substances, as testified to by Vosters, and indicia of

² WI JI-Criminal 140A, *Burden of Proof: Forfeiture Actions* (defines clear, satisfactory, and convincing evidence as "evidence which when weighed against that opposed to it clearly has more convincing power.").

³ *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) ("Pettit's arguments are not developed themes reflecting any legal reasoning. Instead, the arguments are supported by only general statements. We may decline to review issues inadequately briefed . . . Third, Pettit cites no legal authority in support of these claims. Arguments unsupported by references to legal authority will not be considered.").

impairment Van Oss personally observed from Mr. Venable were never discussed. Importantly, it was these facts that revealed drastic distinctions between Mr. Venable's behavior and that of an individual impaired by substance interaction became clear.

Furthermore, the State's brief does not put forth facts to establish the requisite nexus between impairment and Mr. Venable's medications. Notably, the lack of connection between impairment and substances present is precisely why the evidence to prove Mr. Venable's guilt was insufficient. This is yet another issue argued in Appellant's brief that the State's brief fails to address. The State's brief does not offer any case law or argument in opposition to Appellant's position that a nexus was not sufficiently established to connect Mr. Venable's impairment to his medications. Consequently, this Court should deem these arguments as conceded by the State.⁴

Factual support to applicability of serotonin syndrome, the only explanation as connecting impairment to the substances, was also noticeably absent. Instead of arguing why it would have been reasonable to conclude that the substance interaction leading to impairment was present here or presenting facts in support of a connection between substances and impairment, the State settled for

⁴ *Charolais Breeding Ranches, Ltd. V. FPC Sec. Corp.*, 90 Wis. 2d97, 108-09, 279 N.W.2d 493, 499 (CT. App. 1979).

concluding that impairment and presence of substances were enough. The State was required to prove that impairment was due to Mr. Venable's prescribed medications detected in his blood and that it was reasonable to make such a connection. However, facts and any basis otherwise to find any connection between impairment and the substances was noticeably absent from the State's brief. Rather, the brief was conclusory in its entirety and the State cannot expect this Court to abandon its neutral role to develop their arguments for it: "it is up to them to make their case."⁵ As the State has failed to substantively respond to Mr. Venable's initial brief, this Court should deem the arguments contained therein conceded by the State.⁶

B. The evidence presented at trial did not clearly, convincingly, and satisfactorily prove Mr. Venable's guilt.

State argues that the conclusion of the trial court "is not so lacking in probative value as to render a conviction unreasonable."⁷ Albeit conclusory, the statement nonetheless seems to simultaneously

⁵ *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶ 24, 393 Wis. 2d 38, 56, 946 N.W.2d 35, 44 ("We do not step out of our neutral role to develop or construct arguments for parties . . .").

⁶ *Schlieper v. State Dep't of Nat. Res.*, 188 Wis. 2d 318, 322–323, 525 N.W.2d 99, 101–02 (Ct. App. 1994) (holding that arguments unrefuted in a reply brief may be taken as admitted) ("Again, if there is a cogent argument why the exhaustion of administrative remedies issue is misplaced in this case, the estate has not brought it to our attention and we consider the issue to be confessed."); *Charolais Breeding Ranches, Ltd. V. FPC Sec. Corp.*, 90 Wis. 2d 97, 108–09, 279 N.W.2d 493, 499 (CT. App. 1979).

⁷ State's Brief at 5.

concede that the evidence was not strong. Notably, it is precisely the lack of evidence, seemingly alluded to by the State, that Appellant argues is insufficient for conviction. The only evidence to suggest that the substances detected caused impairment, as required for conviction, are the mere presence of two substances – one with an unknown value – and the existence of a “very uncommon” interaction between the substances.⁸ Vosters herself, who provided testimony of the phenomenon, made it abundantly clear how uncommon the adverse interaction between the substances was. Furthermore, there was nothing specific about Mr. Venable that any witness could point to that would suggest the substances had any such interaction in his body. The suggestion of a phenomenon based on presence alone, especially without knowing the extent of presence for one of the substances, is not clear evidence that would satisfy and convince any fact finder to reasonably conclude that it was the source of impairment and in turn convict. Moreover, virtually all other facts and observations are inconsistent, if not entirely contradictory, with the interaction between substances as the cause of impairment.

The State is correct in stating that evidence does support an alternative explanation for Mr. Venable’s impairment, namely

⁸ R. 23 at 33.

fatigue. However, the State's claims that an alternative explanation does not meet Appellant's burden and that the court was not required to arrive at the same conclusion misplaces the focus of the central issue. It is not about the existence of an alternative explanation to negate guilt necessarily, rather the implication it has on the State's ability to meet its burden for conviction. "Clear, satisfactory, and convincing evidence is evidence which, when weighed against that opposed to it, clearly has more convincing power."⁹ Here, the evidence of Mr. Venable's fatigue is in opposition with already minimal evidence of impairment by substances and further substantiates that oppositional evidence outweighs evidence of Mr. Venable's medications causing impairment. As previously discussed, the signs of impairment exhibited by Mr. Venable were almost entirely inconsistent with indicia of impairment exhibited when the substances have a poor interaction. To give greater weight and find that evidence, which merely alludes to a "very uncommon" phenomenon, has "clear and convincing power" is wholly unreasonable.¹⁰

The failure to connect Mr. Venable to any condition caused by his prescribed medications is precisely why the evidence was

⁹ WI JI-Criminal 140A.

¹⁰ R. 23 at 33.

insufficient to find him guilty. The State explains that the Analyst's failure to consider Mr. Venable's personal characteristics "would have been improper because the Analyst was not providing an expert opinion of definitively why Mr. Venable was impaired and how."¹¹ The State called the Analyst as a witness and elicited testimony regarding an unlikely, but generally possible, interaction between the two substances found in Mr. Venable's blood.¹² That interaction was presented as the avenue to connect Mr. Venable's medications to later indicia of impairment. Consequently, sufficient evidence must have been presented to satisfy the finder of fact and allow the trial court to reasonably conclude that Mr. Venable was in fact suffering from the described interaction.

The requisite nexus, between the interaction and impairment, was not established or supported here. Appellant agrees with the State that it would have been improper for the witness that testified to the interaction to establish relevance or a personal connection to Mr. Venable.¹³ However, that does not alleviate the State of its burden to do so. Accordingly, the relevance and value of the evidence offered to connect impairment to Mr. Venable's prescribed medications was

¹¹ State's Brief at 6.

¹² R. 23 at 33.

¹³ State's Brief at 6.

based solely on mere presence. The failure to connect Mr. Venable to a hypothetical condition that would have been caused by his prescribed medications is exactly why the evidence was insufficient to find him guilty.

According to the State, the totality of evidence, including testimony from Vosters regarding the substances present, and from Van Oss regarding his behavior, allowed the trial court to reasonably infer that Mr. Venable was impaired by his medications. Notably, as previously discussed, the testimony presented did not include evidence to ultimately establish a nexus between impairment and Mr. Venable's medications. Analyst's testimony did, however, include how "very uncommon" it is for the substances to have an adverse interaction.¹⁴ The lack of consistency between Mr. Venable's behavior and symptoms associated with impairment when attributable to the substances, the rarity of adverse interaction between the substances, a history of both medications being present without issue, and failure to make any personal connection to Mr. Venable collectively diminish the probative value of the evidence suggesting any relation between Mr. Venable's impairment and his prescribed medications existed at all. Consequently, attribution of Mr. Venable's

¹⁴ R. 23 at 33.

impairment to his medications would have been based solely on speculation, which is not sufficient for conviction.

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, March 15, 2024.

Respectfully submitted,

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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 1,842 words.

Dated at Middleton, Wisconsin, March 15, 2024.

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