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**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II**

Appeal No. 2025AP134
Calumet County Circuit Court Case No. 23CT72

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT W. BERGHUIS,

Defendant-Appellant.

**AN APPEAL FROM THE JUDGEMENT OF
CONVICTION IN THE CIRCUIT COURT FOR
CALUMET COUNTY, THE HONORABLE CAREY J.
REED, JUDGE, PRESIDING**

**THE BRIEF OF THE DEFENDANT-APPELLANT
ROBERT W. BERGHUIS**

By: Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

Piel Law Office
11414 W Park Place Suite 202
Milwaukee, WI 53224
(414) 617-0088
(920) 390-2088 (FAX)

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STATEMENT OF THE ISSUES

Was the evidence adduced at trial sufficient to find that Mr. Berghuis operated a motor vehicle on a highway while impaired?
Jury verdict: guilty.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Because the issue 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. Furthermore, and for reasons listed in Wis. Stat. §809.23(1)(b)1 and 2, publication is not required.

STATEMENT OF THE CASE/FACTS

The defendant-appellant, Robert W. Berghuis (Mr. Berghuis) was charged in Calumet County Circuit Court with operating a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited alcohol concentration in violation of Wis. Stat. §346.63(1)(a) and (b). A jury trial was held on October 23, 2024, the jury found Mr. Berghuis guilty of operating a motor vehicle while under the influence of an intoxicant, but not guilty of operating a motor vehicle with a prohibited alcohol concentration.

Mr. Berghuis, by counsel timely filed a Notice of Intent to Pursue Post-Conviction Relief on December 17, 2024. The defendant by counsel timely filed a Notice of Appeal on January 20, 2025. Mr. Berghuis specifically appeals from the Judgment of Conviction and the verdict finding him guilty of operating a motor vehicle while under the influence of an intoxicant.

The pertinent facts are as follows and were provided at the jury trial through the testimony of the State's witnesses.

In opening statements, both attorneys advised the jury that the issue in the case is not whether Mr. Berghuis had a prohibited alcohol concentration. (R.54:5-6/App.3-4) In defense counsel's opening he conceded the fact that the case was not about whether

Mr. Berghuis was impaired or even over the legal limit. (R.54:5-8/App.3-6).

The first witness to testify was Madison Ann Rowe. Mr. Rowe testified she was working 3rd shift on May 4th of 2023. As she was driving home from work that evening, she saw a truck in a field. (R.54:10/App.7). Ms. Rowe testified she could not remember if the headlights were on, but she did remember the car itself was running. (R.54:10/App.7).

Rowe drove past the vehicle and then returned to it. After sitting in her car for a few seconds, she did walk up to the vehicle. (R.54:11/App.8). She observed Mr. Berghuis sleeping in the vehicle, and eventually she was able to wake him up. However, prior to that she had called 911. *Id.* The vehicle was in a farm field ditch, and Ms. Rowe testified she observed Mr. Berghuis attempting to back out of the ditch.

Rowe testified that within about ten minutes of her observing Mr. Berghuis' vehicle the police officers arrived on scene. (R.54:12/App.9). Ms. Rowe testified she would not be able to recognize the person who was in the vehicle, but he was male and a younger man (R.54:12/App.9).

On cross-examination, Ms. Rowe testified she worked less than one-half of her twelve-hour shift and left work around

midnight because she was feeling sick. She further testified that it took roughly ten to fifteen minutes to drive from her work to the location where Mr. Berghuis' vehicle was in the farm field ditch. (R.54:10/App.7).

Once she arrived on scene, Ms. Rowe explained that she had to walk into the farm field ditch to have contact with the driver. (R.54:15/App.10). She testified the ground was muddy, and she walked up to the vehicle before calling 911. (R.54:15/App.10).

Rowe further testified that the vehicle was in this farm field ditch and at no point did she ever observe the vehicle operate on the roadway. *Id.* It was her opinion that the driver of the vehicle simply drove from the roadway into the farm field ditch, and because it was muddy, the vehicle apparently became stuck. (R.54:16/App.11).

Rowe explained that the driver of the vehicle did roll down the window, and they had a discussion about whether he was ok, and the driver gave "pretty vague answers". (R.54:16/App.11).

The second witness called by the State was Deputy George Beattie. Beattie testified he was employed with the Calumet County Sheriff's office in May of 2023. (R.54:18/App.12). Beattie testified regarding his law enforcement experience,

training, and specifically his training in detecting impaired drivers. (R.54:18-22/App.12-16).

Beattie testified on the night in question, he was assigned “north car” which was patrolling an area of County Highway PP north to Mancal Road and all the way east just past Brillion. (R.54:22/App.16). While patrolling, he testified he was dispatched to area of Highway 10 and D. (R.54:22/App.16).

According to Deputy Beattie, the call originated at approximately 1:51 a.m. (R.54:23/App.17). The dispatch was regarding a male that was “possibly unconscious” in a vehicle. As Deputy Beattie got closer to the location, he observed a vehicle with reverse lights activated. (R.54:25/App.18). At the location, Beattie observed a “white Ram pick-up truck in the ditch line, so the right of way within the boundary line and then front of the truck was either right at the edge of the field or in it.” (R.54:25/App.18). The State introduced a video of the position of the vehicle.

Deputy Beattie testified that when he first made contact with the vehicle, it was running, and he observed one person (subsequently identified as Mr. Berghuis) inside the vehicle. (R.54:28/App.19). In his initial conversation with Mr. Berghuis,

Mr. Berghuis acknowledged he was drinking, and said he was coming from Shawano.

Deputy Beattie believed Mr. Berghuis could potentially be impaired, so he conducted field sobriety tests. (R.54:32/App.20). Beattie performed the horizontal gaze nystagmus, walk and turn and one leg stand tests. Observing four clues on the horizontal gaze nystagmus test, four clues on the walk and turn test, and three clues on the one leg stand test. (R.54:32-37/App.20-25). Based on his observations of Mr. Berghuis' performance on the field sobriety tests, Deputy Beattie placed Mr. Berghuis under arrest. (R.54:37/App.25).

Subsequently, he read Mr. Berghuis the implied consent warning from the Informing the Accused form, and Mr. Berghuis voluntarily submitted a sample of his blood for testing.

On cross-examination, Deputy Beattie admitted he did not search Mr. Berghuis' vehicle. (R.54:40/App.26). However, Deputy Beattie observed many miscellaneous items in the front seat, which would have made it hard for any other person to be in the front seat. (R.54:40/App.26).

Beattie testified eventually he requested Mr. Berghuis' dad come and retrieve and move the vehicle. (R.54:41/App.27).

Beattie acknowledged Mr. Berghuis' house was "just down the road from where" the vehicle was located. (R.54:41/App.27).

Beattie also acknowledged Mr. Berghuis' father advised the field where the truck was located was a field for which Mr. Berghuis worked. He also testified the father had to drive the truck through the field to get out of the field (R.54:42/App.28).

During its case, the defense called Mr. Berghuis, who testified he drove into the field somewhere between 10:15 and 11:00 p.m. on May 4, 2023. (R.54:51/App.29). He testified he is a farmer and his job is performing custom combining and field work. He drove into the field because his father wanted him to check the field before he came home that night. (R.54:52/App.30).

Mr. Berghuis testified prior to driving into the field, he was at a softball game in Shawano, and testified it takes about an hour to drive from Shawano to the location of the field. (R.54:52/App.30). He testified the game ended around 8:00 p.m. and he consumed a couple beers after the game. *Id.* A couple meant two or three beers. *Id.*

He testified that he stayed in the field because he was having issues with his parents, and did not want to return home,

which he stated was about 300 yards from his location on the opposite side of the road. (R.54:53/App.31).

Mr. Berghuis also testified that he consumed alcohol from a bottle of Jack Daniel's as he sat in his vehicle. He described taking five pulls from the bottle. (R.54:54/App.32). He further testified he fell asleep in the truck and was awakened by Ms. Rowe "beating on his window." (R.54:54/App.32).

Mr. Berghuis conceded that when Deputy Beattie arrived he was "definitely drunk". (R.54:55/App.33). He also conceded when Ms. Rowe showed up he did "throw it [the vehicle] into gear or reverse" because he "had no clue what was going on at that time." (R.54:55/App.33). Berghuis explained Rowe startled him.

Id.

Mr. Berghuis testified when he told the officer he consumed five drinks he was referring to the five pulls of the Jack Daniel's bottle he had in the car. He also testified he told the officer he consumed beer, referring to the beer at the softball game in Shawano. (R.54:56/App.34)

On cross-examination, Mr. Berghuis confirmed the truck in the ditch was his, and that he was intoxicated when Ms. Rowe showed up. (R.54:56/App.34). Mr. Berghuis testified the field he was in belonged to one of their clients- Tom Leffler(sp). He also

stated he did not advise Deputy Beattie that he had consumed the Jack Daniels in the truck, but did mention the fact that he consumed beer. (R.54:56/App.34)

On re-direct, Mr. Berghuis told the jury that his company tends to many customer's fields, and that the field he was in was one of those fields. (R.54:58/App.35).

During closing, the Court instructed the jury that "Highway means all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for purposes of vehicular travel." (R.54:70/App.37). The only contested issue was whether the State established beyond a reasonable doubt that Mr. Berghuis vehicle was on the "boundary lines" as that statute required to meet the definition of operating on a highway. (R.54:78-79/App.38-39).

In its closing, the State argued when Mr. Berghuis put his vehicle in reverse as it sat in the ditch area, he operated a motor vehicle on a highway. (R.54:79-80/App.39-40).

Defense counsel argued the State put forth no evidence showing where the boundary line started or ended and specifically put forth no evidence as to measurements as to where the vehicle was in reference to this boundary line. (R.54:84/App.41). Defense

counsel argued the State failed to put forth sufficient evidence to establish that Mr. Berghuis operated his motor vehicle upon a highway. (R.54:89/App.42).

The jury returned a verdict of guilty to count 1 operating a motor vehicle while under the influence of an intoxicant but not guilty to count two operating a with a prohibited alcohol concentration. (R.54:98/App.43).

The Court accepted both verdicts. A sentencing hearing took place on December 9, 2024. Mr. Berghuis was sentenced to a period of jail among other penalties. On January 24, 2025, Mr. Berghuis filed a petition to stay penalties pending appeal. On February 3, 2025, the Court signed an order staying the penalties pending appeal. Mr. Berghuis by counsel timely filed a Notice of Appeal on January 20, 2025, appealing from the jury verdict finding him guilty of operating a motor vehicle while under the influence of an intoxicant.

STANDARD OF REVIEW

On appeal, a reviewing court “independently review[s] whether the evidence was sufficient to sustain a jury verdict, but in so doing, we view the evidence most favorable to sustaining the conviction.” *State v. Hanson*, 2012 WI 4, ¶15, 338 Wis.2d 343, 808 N.W.2d 390. A reviewing court must consider the

“totality of the evidence when conducting a sufficiency of the evidence inquiry.” *State v. Smith*, 2012 WI 91, ¶36, 342 Wis.2d 710, 817 N.W.2d 410.

A. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT MR. BERGHUIS OPERATED HIS MOTOR VEHICLE ON A HIGHWAY WHILE UNDER THE INFLUENCE OF AN INTOXICANT AS THE TERM HIGHWAY WAS DEFINED BY THE COURT DURING JURY INSTRUCTIONS AND UNDER WIS. STAT. SEC 340.01(22)

The defendant challenges the sufficiency of the evidence. “The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a nation.” *In re Winship*, 397 U.S. 358, 361, 90 sect. 1068, 25 L.Ed.2d 368. The requirement of proof beyond a reasonable doubt is “constitutionally required.” *Id.* at 362. “The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of conviction resting on factual error.” *Id.* The due process clause of the Fourteenth Amendment protects “the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *Id.* at 364. “If the evidence at a defendant’s trial was insufficient to support a conclusion that

every element of the crime was established beyond a reasonable doubt, the defendant should have been acquitted...if a defendant was convicted in state court, and the conviction is based on insufficient evidence, the conviction”...cannot constitutionally stand.” *State v. Ivy*, 119 Wis.2d 591, 608, 350 N.W.2d 622 (1984).

When challenging the sufficiency of the evidence, an appellate court “may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the State 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.” *State v. Poellinger*, 153 Wis.2d 493, at 507, 451 N.W.2d 752 (1990). Probative value “reflects the evidence’s degree of relevance. Evidence that is highly relevant has great probative value, whereas evidence that is only slightly relevant has low probative value.” *State v. Payano*, 2009 WI 86, ¶81, 320 Wis.2d 348, 768 N.W.2d 832.

Here, the State had the burden of proof to establish beyond a reasonable doubt that Mr. Berghuis operated his motor vehicle on a highway, and additionally at the moment of operation he was impaired by alcohol. The Court instructed the jury that highway included “all public ways and thoroughfares and bridges on the

same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for purpose of vehicular travel.” (R.54:69/App.36). This is consistent with definition of “highway” under Wis. Stat. §340.01(22).

The testimony the State relied upon in arguing that they met their burden was provided by Deputy Beattie. On direct-examination, he testified “the truck was in the ditch line, so the right of way within the boundary line the front edge of the truck was either right at the edge of the field or in it.” (R.54:24/App.18). Mr. Berghuis testified he was in Tom Leffler’s (sp) field, as did Ms. Rowe.

The State failed to put forth any evidence as to how far the vehicle was off the road, or width of the road, width of the ditch, or width of any boundary lines of the roadway. No witness testified as to the distance Mr. Berghuis’ vehicle was from the paved portion of the road. No witness testified as to width of the right of way at this location, or the distance from the center of the road to the edge of the boundary line. More importantly, when Ms. Rowe arrived on the scene, she observed the vehicle in the field. She testified that she walked out to the vehicle that was in the farm field. This supports Mr. Berghuis’ testimony that he had pulled into the farm field. No testimony was provided as to how

far the vehicle was from the gravel shoulder or how many feet the vehicle had driven off of the road.

Moreover, the area in which Mr. Berghuis' vehicle was found was not "open to the use of the public as a matter of right for purposes of vehicular travel" as the area was private property owned by a client for which Mr. Berghuis tended his fields.

Here, the vehicle was not located on a public way, thoroughfare, or bridge. The State put forth no evidence establishing any boundary lines of the roadway that was traveled, and the location of the vehicle was not in an area open to the public for vehicular travel. Because of this, the evidence was not sufficient for a reasonable jury to have found beyond a reasonable doubt that Mr. Berghuis operated his vehicle on a "highway" as that term is defined in the jury instructions or by statute.

Stated another way, because the evidence adduced at trial was so lacking in probative value and force, no trier of fact, acting reasonably could have found Mr. Berghuis was operating his motor vehicle on a highway beyond a reasonable doubt.

CONCLUSION

Because the evidence adduced at trial was insufficient to sustain a verdict of guilty to the charge of operating a motor vehicle while impaired, this Court should reverse the conviction and dismiss the charge.

Dated this 25th day of April, 2025.

Respectfully Submitted

Piel Law Office

Electronically Signed by Walter A. Piel, Jr.

Walter A Piel, Jr.

Attorney for the Defendant-Appellant

State Bar No. 01023997

Mailing Address:

11414 W Park Place Suite 202

Milwaukee, WI 53224

(414) 617-0088

(920) 390-2088 (FAX)

FORM AND LENGTH CERTIFICATION

The undersigned hereby certifies 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 22 pages. The word count is 4030.

Dated this 25th day of April 2025.

Respectfully Submitted

Piel Law Office

Electronically Signed by Walter A. Piel, Jr.

Walter A Piel, Jr.

Attorney for the Defendant-Appellant

State Bar No. 01023997

Mailing Address:

11414 W Park Place Suite 202

Milwaukee, WI 53224

(414) 617-0088

(920) 390-2088 (FAX)

**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.

Dated this 25th day of April 2025.

Respectfully submitted,

Piel Law Office

Electronically Signed by Walter A. Piel, Jr.

Walter A. Piel, Jr.

Attorney for the Defendant-Appellant

State Bar No. 01023997

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 25th day of April, 2025.

Respectfully submitted,

Electronically Signed by Walter A. Piel, Jr.
Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

APPENDIX

Judgment of Conviction. A. App.1-2
Excerpts from Jury Trial 10/23/2024 A.App.3
Verdict Form—Count 1 A. App.4