Appeal No. 03-0991-CR **Cir. Ct. No. 00-CT-000112**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN P. MCWILLIAMS,

DEFENDANT-APPELLANT.

FILED

Sept. 10, 2003

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Clerk of Court of Appeals

ERRATA SHEET

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PLEASE TAKE NOTICE that corrections were made to paragraph ¶15 in the above-captioned opinion which was released on Sepember 9, 2003. A corrected electronic version in its entirety is available on the court's website at www.wicourts.gov.

COURT OF APPEALS
DECISION
DATED AND FILED

September 9, 2003

Cornelia G. Clark
Clerk of Court of Appeals

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APPEAL from a judgment and an order of the circuit court for Oconto County: RICHARD DELFORGE, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] John McWilliams appeals an order denying his motion for a new trial and his conviction for operating while intoxicated and operating with a prohibited blood alcohol concentration. He argues that he was

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

denied his right to present a defense when the court excluded testimony that McWilliams had asked his first trial attorney to have his blood sample retested. We assume without deciding that McWilliams' request to his attorney was admissible as evidence of "consciousness of innocence." However, we conclude that its exclusion was harmless. Accordingly, we affirm the judgment and order.

Background

¶2 McWilliams attended a party on August 27, 2000, from about 3:30 to 9 p.m. McWilliams testified that he had two beers in that time frame, finishing the last one around 8:30 p.m. Three witnesses who were also at the party testified they did not see McWilliams consume much alcohol, and all three said they were unconcerned about McWilliams' sobriety.

¶3 In 1998, McWilliams had been treated for a "stroke-like illness" and a heart attack. As a result, he was on a variety of medications. Also, he sometimes experienced grand mal seizures that would cause him to lose consciousness. Alcohol consumption is not recommended for patients on McWilliams' medications because alcohol makes the patient more prone to a seizure.

¶4 At 8:30 or 9 p.m., McWilliams left the party to go to Martin Ragen's home. Ragen had invited McWilliams to spend the evening because the Ragen home was much closer to the party, and McWilliams had stayed with Ragen on previous occasions.

¶5 McWilliams testified that he was "doing fine" as he was driving on a back road to Ragen's home. Then his arm began to feel strange, which normally

indicated to him that a seizure was imminent. The next thing McWilliams remembered was waking up in the hospital.

¶6 At 4:30 a.m. on August 28, Jerome Trepanier responded to a sound of a horn and discovered McWilliams' truck in a ditch near Trepanier's home. McWilliams was still in the truck and told Trepanier he thought he was having a heart attack. Trepanier called for help.

¶7 Deputy sheriffs Clark Longsine and Roy Olson responded. Longsine thought the engine was still running, and both claimed to notice an alcoholic odor, although Trepanier did not recall any odor. Olson testified that McWilliams' alertness was reduced, but apparently knew this could also be the result of a seizure. McWilliams was eventually transported to the hospital and, although he had interacted with Trepanier and the deputies, he remembered nothing of the events between the time he left the party and the time he awoke in the hospital.

¶8 McWilliams agreed at the hospital to submit to a blood sample for a test of his blood-alcohol concentration. The State Laboratory of Hygiene returned a result of .199%. McWilliams believed the test was inaccurate. He asked his first attorney to have the sample retested. The first attorney did not pursue retesting, and McWilliams obtained a new attorney. By the time the second attorney came on the case, however, the lab had destroyed the sample because six months had passed and it was not asked to preserve the sample. McWilliams wanted to testify that he had asked his first attorney to have the blood retested, but the trial court refused. A jury convicted McWilliams of OWI and PAC. His postconviction motion for a new trial was denied. McWilliams appeals.

Discussion

¶9 "A trial court's decision to admit or exclude evidence is a discretionary determination and will not be upset on appeal if it has 'a reasonable basis' and was made 'in accordance with accepted legal standards and in accordance with the facts of record.'" ***State v. Santana-Lopez***, 2000 WI App 122, ¶3, 237 Wis. 2d 332, 613 N.W.2d 918 (citation omitted).

¶10 McWilliams argues that the court should have allowed his testimony that he wanted his blood retested to show his "consciousness of innocence." The court concluded that such evidence was irrelevant. However, as with evidence bearing directly on consciousness of guilt, evidence bearing directly on consciousness of innocence is also relevant. ***Id.***, ¶5.

¶11 For purposes of this discussion, we will assume but not decide that McWilliams' request for retesting is evidence of his consciousness of innocence.[2]

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[2] In ***State v. Santana-Lopez***, 2000 WI App 122, 237 Wis. 2d 332, 613 N.W.2d 918, the defendant was charged with sexual assault and offered to give a DNA sample. The sample was not taken, and the defendant asked to have evidence of his offer admitted. ***State v. Bolstad***, 124 Wis. 2d 576, 370 N.W.2d 257 (1985), involved a refusal hearing where the defendant wanted to offer evidence as to the health problems prompting him to refuse breath and blood tests. The supreme court reversed the trial court's exclusion of the evidence, writing:

> That refusal evidence is relevant, because it makes more probable the crucial fact of intoxication…. the inference to be drawn is closely akin to an admission against interest ….
>
> The corollary of that rule is that any evidence that tends to rebut or diminish the force of that permissible inference is also relevant …. Thus, evidence that would tend to show that the refusal was for reasons unrelated to a consciousness of guilt or the fear that the test would reveal the intoxication, tends to abrogate, or at least diminish, the reasonableness of the inference to be drawn from an unexplained refusal to take the alcohol test.

(continued)

On that assumption, it was error for the trial court to exclude the evidence as irrelevant. However, we conclude that the error was harmless. *See* ***id.***, ¶7.

¶12 The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction. ***State v. Fischer***, 2003 WI App 5, ¶38, 259 Wis. 2d 799, 656 N.W.2d 503. A reasonable possibility is a possibility sufficient to undermine our confidence in the conviction. ***Id.***

¶13 McWilliams' essential theory of defense was that his accident was caused by his medical condition, not alcohol, and that the .199% PAC was an error. To prove this, he testified that he had only had two beers. Other individuals testified that they did not see him drink much, nor were they at all concerned about his ability to drive himself home. He had a physician testify regarding his medical condition and treatments. On cross-examination, McWilliams elicited testimony from the State Laboratory technician that if the test result were correct, and if McWilliams had not consumed any alcohol between 8:30 p.m. and 5:30 a.m., his blood alcohol level at 8:30 p.m. would have been above .30%.

¶14 Ultimately, it was up to the jury to weigh the testimony of McWilliams and his witnesses against the results of the blood test. *See* WIS.

Id. at 585-86. McWilliams relies on ***Bolstad***. This is not, however, a case where McWilliams refused to give evidence for a reason other than a guilty mind. In ***Bolstad***, there was a medical reason for the refusal such that the normal inference of guilt was improper and Bolstad should have been allowed to explain his refusal.

Also, in contrast to ***Santana-Lopez***, where a test could theoretically establish innocence, McWilliams had already had a result tending to show his guilt at least on the PAC charge. He was not attempting to offer new or additional evidence but, rather, he took issue with existing evidence. This, however, creates an additional concern. By allowing a defendant to testify that he or she believed an original result to be in error, we run the risk that the jury construes such testimony as "expert" testimony regarding the accuracy of the State's testing method.

STAT. § 805.17(2). The jury evidently elected to believe the blood test and the State's witnesses, not McWilliams or his witnesses. Additional testimony that McWilliams wanted the blood retested would not have sufficiently influenced the jury. It would be a negligible addition to the wealth of evidence that McWilliams had already presented on his own behalf. Our confidence in the verdict is not undermined.

¶15 McWilliams additionally argues that he may have received ineffective assistance of counsel based on his second trial attorney's failure to make an adequate offer of proof to have evidence of his request admitted. However, the second trial attorney quite adamantly tried to get this evidence admitted. The trial court determined that the attorney "strenuously and colorfully" argued McWilliams' position, a factual finding that we would leave undisturbed on an ineffective assistance review. Moreover, the trial court rejected the evidence on relevancy grounds, not for failure to make an offer of proof.

¶16 Importantly, however, one prong of the ineffective assistance test is whether there is prejudice to the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Because we have concluded that excluding the testimony was harmless, there is no prejudice. With one prong of the ineffective assistance counsel claim unfulfilled, our inquiry would end. ***Id.*** at 697. Counsel was not ineffective.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.